WESTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY

UNITED STATES v. FRANK D. WUTERICH XXX XX 3312 Staff Sergeant U.S. Marine Corps	)))))))))	GENERAL COURT MARTIAL **DEFENSE RESPONSE TO GOVERNMENT MOTION IN LIMINE FOR RECONSIDERATION OF MOTION TO PREADMIT PHOTOS** 17 June 2010

1. Motion. This is a defense response to the Government's motion for reconsideration of the military judge's preliminary ruling on the admissibility of photographs taken in what is called "House 2". The Government's motion should be denied in its entirety because it raises no new facts or evidence, is frivolous, and fails to put forth any exceptional circumstances that would merit this court reverse the law f the case. The defense does not dispute the state of the cited law. But we do dispute the Government's representations as to the facts and the former judge's findings, conclusions, and order.
2. Facts .
    a. Government counsel filed a timely motion April 26, 2010, requesting reconsideration of a decision by a military judge formerly detailed to this case but who has sense retired. On May 5, 2010, Civilian defense counsel –Haytham Faraj- and Trial Counsel –Capt Nicholas Gannon- conferred. Defense counsel explained to the Trial Counsel that defense responses would be late because civilian counsel was involved in back to back trials and several preliminary hearings. Defense counsel further requested that the motions be heard at the

second hearing because they involved issues of law. These discussions were communicated to the military judge.

b. In late May Trial Counsel requested an 802 conference to complain about the lack of response to the motions. On May 27, 2010, a telephonic 802 conference was held. Trial Counsel described to the judge the challenges he faced with preparing for trial and communicated an urgent need to have responses to his motions. The judge ordered that defense file responses by June 15, 2010.

c. Civilian defense counsel began to adjust his schedule to abide with the Judge's order.

d. A review of the Government's motion and evidence definitively establishes the frivolity of the Motion. The Government has no new facts and the law has not changed. The motion to reconsider appears to be nothing more than a desire to use the new judge to reverse the former judge's ruling and to place further strain on the defense' limited resources, especially in light of the fact that the accused has no detailed counsel.

e. The Government in its motion provides numerous citations of cases that provide theories of admissibility of evidence based on relevancy and probativeness . Judge Meek's –the former military judge detailed to the case- however did not find that the photos <u>are not</u> relevant or probative. *See Transcript of 20 February 2008 Article 39a at 122*. [hereinafter "Transcript"]. Judge Meeks simply required the Government to establish a foundation with the predicate facts necessary to make the photos relevant to SSgt Wuterich: "I am not going to exclude the photographs on a 403 ground or basis. *I find them to have relevance*

to the issues of the testimony of the forensic experts that you are calling to testify. However, I am going to require you to have a witness to come in and lay the connection between these photographs and the conduct of the accused in front of the trier of fact, before I allow you to publish then to the trier of fact. Id. (Emphasis added).

3. Discussion.

a. The Government in its motion challenges the former judge's ruling and the law of the case; yet it offers nothing new. Capt Gannon continues to represent that he has access to witnesses and evidence but fails to produce his witnesses in court. This is specifically what Judge Meeks focused on during the previous hearing.

MJ: I'm not sure if we're communicating right now. Okay? Right now, there is no evidence in front of the trier of fact. Okay?

TC (Capt Gannon): Yes, Your Honor.

MJ: All right. So, the defense is saying that before you can put this evidence here in front of the trier of fact; for example, in your opening statement.

TC (Capt Gannon): Yes, sir. Which we would like to do, Your Honor. Yes, sir.

MJ: I understand that. That's why I'm asking this right now. Okay?

TC (Capt Gannon): Yes, sir.

MJ: That you be required to put on some evidence to the members establishing the link between this and Staff Sergeant Wuterich. They're saying -- what they are saying is they believe that your evidence will fail on that particular point.

Transcript at 113

Trial counsel's conduct in filing this motion is vexing. He maintains that the photos are not being admitted for the purpose of enflaming the prejudices of the jurors. Yet, his conduct reveals a contrary purpose. The former military judge did not suppress the photographs. He merely required the Government to

produce admissible evidence to lay a foundation for the photographs. If the Government can lay the foundation for logical and legal relevance to SSgt Wuterich, then the photos come in after a 403 balancing test.

The Government is aware of these foundational requirements. And Trial Counsel – the half dozen or so working this case- know that they cannot lay a foundation for all the photos they propound with competent and admissible evidence except in a motions hearing where otherwise inadmissible evidence may be considered. They, therefore, seek to preadmit the photos for use in their opening statements and, presumably, beg forgiveness of the court when they then fail to connect them to SSgt Wuterich before the members, relying on the prejudicial impact of the photos to inflame the jurors and obtain a conviction in a case lacking evidence against this accused.

b. The Government seeks to admit the photos by offering the accused's statement to Col Watt. Specifically, the Government seeks to admit the photos based on the accused's alleged statement "shoot first and ask questions later." The government, however, cannot corroborate that statement as they are required to do under MRE 304(g). There is no independent evidence to corroborate that the statement was actually made or that anyone heard it. Accordingly, that statement cannot be used as the foundation for admission of the propounded photos.

c. In its motions the Government discussed new evidence that was not available to it during the last motion hearing on this issue. That statement is untrue. Although the Government had not admitted SSgt Wuterich's statement yet, they were always aware of the corroboration requirement for the "shoot first, and ask

questions later" statement. Trial Counsel further argues that they now have access to the '60 minutes" statements which they did not have previously. That tells a partial truth but relies on a misrepresentation to persuade this court to reconsider. The Government always had the actual "60 Minutes" program. And they now also have the outtakes. But nothing in either the outtakes or the program reveals that SSgt Wuterich was in the back bedroom of House #2 or that he assaulted anyone in House #1. In House #1 the Government only charged SSgt Wuterich with an assault. The assault refers to the survivors. He is not charged with any deaths. The "new evidence" the Government refers to contains nothing that indicates that SSgt Wuterich committed an assault. It is all old evidence and argument recycled and repackaged for presentation to a new judge in the hope of getting a different outcome.

d. When Judge Meeks asked Trial Counsel what evidence they had as to SSgt Wuterich's location in House #1, the Trial Counsel answered 1) "LCpl Tatum's statement, he places SSgt Wuterich in the room where the Gentleman and the little boy were shot" Transcript at 96; 2) SSgt Wuterich was on notice and had a duty to intervene because he saw Salinas shoot someone. *Id*. 3) LCpl Tatum will testify that he went to the aid of his squad leader. Transcript at 99. Tatum has not testified yet. No one knows what Tatum will say except Tatum. Tatum's written and oral statements to investigators are inadmissible hearsay. Moreover, even if this court were to consider Tatum's written statement, the squad leader on the mission on November 19, 2005 is Sgt Salinas not SSgt Wuterich. *Sgt Salinas oral statement to Defense Counsel*. Wuterich had turned the squad over and was

merely along to assist Salinas in his new duties. Accordingly even if Tatum's statement "I went to help my squad leader" is admitted, it remains ambiguous as to whom it refers. Trial Counsel now has an opportunity to deliver on his representations that he can establish a foundation to admit the photos.

Judge Meeks asked Capt Gannon to establish a foundation by explaining to him that he had not heard from any witnesses. Transcript at 113. Specifically, Judge Meeks told Capt Gannon that he had not heard from Salinas Tatum, Mendoza or Wuterich. *Id.* The former military judge laid out a road map for admissibility of the propounded evidence. Instead of presenting the necessary foundation to admit the evidence, Trial counsel has decided to try and take advantage of a change in judges to have the decision reversed and thereby violate the law of the case doctrine.

Law of The Case Doctrine.

e. Barring exceptional circumstances, this court should not disturb the decision by the previous judge in this case because his decision is the law of the case. Under the doctrine of the law of the case courts generally refuse to reopen what has been decided absent a showing of exceptional circumstances. *Gindes v. United States*, 740 F.2d 947, 949 (Fed. Cir. 1984). (*citing Messenger v. Anderson*, 225 U.S. 436, 444 32 S. Ct. 739, 740, 56 L. Ed. 1152 (1912). "The doctrine rests upon the important public policy that "no litigant deserves an opportunity to go over the same ground twice, hoping that the passage of time or *changes in the composition of the court* will provide a more favorable result the second time. The purpose of the law-of-the-case principle is to provide finality of judicial decisions." *Gindes*,

at 949. (Emphasis added.) The prosecution has provided nothing new or persuasive to merit reversal of the former judge's decision. They seek to admit photos of dubious relevance to this accused, pretrial, so that they may use them in their opening statements. They believe that they can lay a proper foundation during the trial to connect them to this accused. The question screaming to be answered is what if they cannot lay a foundation because the evidence is not there, a witness testifies differently than what they believe, or a witness simply refuses to testify? A limiting instruction would be grossly inadequate given the graphic and prejudicial nature of these photographs.

4. Evidence and Burden and Proof.

   a. The defense relies on the transcript attached to the Government's motion as evidence.

   b. The burden of proof is on the moving party to demonstrate exceptional circumstances -s*ee Gindes v. United States*, 740 F.2d 947, 949 (Fed. Cir. 1984) and *Messenger v. Anderson*, 225 U.S. 436, 444 32 S. Ct. 739, 740, 56 L. Ed. 1152 (1912)- by a preponderance of the evidence.

5. Relief Requested.

   Wherefore the defense respectfully requests that the Government's motion be denied in its entirety. Furthermore, if this Court finds that indeed the Government has failed to adhere to the previous judge's instruction on admissibility of propounded evidence and that no new basis exists to challenge the old ruling, monetary sanctions should be imposed to compensate the accused for attorney's time and expenses.

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CERTIFICATE OF SERVICE

I certify that a copy of this document was served upon government counsel by email on June 17, 2010.

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