

**DEPARTMENT OF THE AIR FORCE  
TRIAL JUDICIARY**

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UNITED STATES	)	GOVERNMENT RESPONSE
	)	TO DEFENSE MOTION
v.	)	TO CONTINUE
	)	
1ST LT TRAVIS C. BAKER	)	
Delta 4 Detachment 2 (SpOC)	)	
Buckley SFB, Colorado	)	25 April 2023

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**RESPONSE TO MOTION**

The United States, by and through counsel, hereby responds to the Defense Motion to Continue under R.C.M. 906(b)(1).

**SUMMARY**

The Accused is charged with two specifications of violating UCMJ Article 113, Drunken Operation of a Vehicle, two specifications of violating UCMJ Article 107, False Official Statement, and two specifications of violating UCMJ Article 133, Conduct Unbecoming an Officer and a Gentleman. All charged misconduct took place on 14 and 18 October 2022.<sup>1</sup>

Defense Counsel requests this Court to delay this trial because of the accused's rights to expert assistance and to have adequately prepared defense counsel.<sup>2</sup> Defense Counsel's motion to continue is unreasonable, denial of it would not deprive the accused of a substantial right, and an analysis of the motion under the *Miller* factors weighs heavily in favor of denial. The Government respectfully requests denial.

**FACTS**

1. The Government concurs with the facts as set forth in paragraphs 1 and 2 of the Defense Motion to Continue.
2. The Government disagrees with the facts in paragraph 3 of the Defense Motion to Continue.

While we are now being told that Dr. Schneider is unavailable on Friday, 20 May 2023, this conflict has been known by the Defense since January. The Defense still requested [REDACTED] in a by-name request despite her unavailability for the last scheduled trial date.<sup>3</sup> This was a choice made by the Defense in request [REDACTED] by-name. Further, the Government has identified multiple expert forensic toxicologists who are available for the entirety of the scheduled trial week and who can be substituted in for [REDACTED].

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<sup>1</sup> See Attachment 1.

<sup>2</sup> See Attachment 2.

<sup>3</sup> See Attachment 3.

3. On the morning of 25 April 2023, the same date as this response, the Accused was arrested again under the suspicion of being drunk on duty.

### **BURDEN**

4. As the moving party, the Defense bears the burden for this motion. RCM 905(c)(2). The burden of proof on any factual issue the resolution of which is necessary to resolve this motion is a preponderance of the evidence. RCM 905(c)(1).

### **LAW**

5. A military judge “should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just.” Discussion to RCM 906(b)(1), citing Article 40, UCMJ. A military judge has discretion to grant or deny a request for continuance. *Id.*

6. “The standard of review of a military judge’s decision to deny a continuance is abuse of discretion. There is an abuse of discretion where reasons or rulings of the military judge are clearly untenable and . . . deprive a party of a substantial right such as to amount to a denial of justice; it does not imply an improper motive, willful purpose, or intentional wrong.” United States v. Weisbeck, 50 M.J. 461, 464 (C.A.A.F. 1999) (quoting United States v. Miller, 47 M.J. 352, 358 (C.A.A.F. 1997)).

7. Several factors must be considered in deciding whether to grant a continuance. In U.S. v. Miller, the U.S. Court of Appeals for the Armed Forces articulated that the factors a court will examine to determine whether a judge abused his or her discretion in denying a motion for continuance. Those factors include surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, whether the moving party received prior continuances, good faith of moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice. *See Miller*, at 358.

8. In United States v. Moore, 2001 WL 1007714 (A.F.Ct.Crim.App. 2001), the trial judge denied a delay request by the Defense. The Defense requested the delay because, for among other reasons, the Defense had been unable to prepare for trial. On appeal, the trial judge’s decision was upheld. Most significantly, the court in Moore relied on the factors stated in Miller in deciding the trial judge’s decision was not an abuse of discretion. The court noted while the accused’s right to a fair trial is more than compelling, “the public has a strong interest in the prompt, effective, and efficient administration of justice.” Additionally, the court recognized the number of “moving pieces” in scheduling trials, noting the “assembling of witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons.” *Id.*

9. In United States v. Abilar, 14 M.J. 733 (A.F.C.M.R. 1982), the military judge did not abuse his discretion when he denied the defense’s request for a continuance based upon a conflict in civilian defense counsel’s schedule. A trial judge may take into account whether or not the factual issues are simple or complex when considering a request for a continuance. *See also United States v. Thomas*, 22 M.J. 57 (C.M.A. 1986) (noting that the right to counsel is not

absolute and is balanced against society's interest in efficient and expeditious administration of justice).

10. In United States v. Grant, 38 M.J. 684 (A.F.C.M.R. 1993), the military judge did not abuse his discretion by denying a continuance until the civilian defense counsel's state bar suspension expired. The right to "counsel of choice" is not absolute and must be balanced against the need for the expeditious administration of justice.

11. In United States v. Wellington, 58 M.J. 420 (C.A.A.F. 2002), the military judge did not abuse their discretion in denying a motion to continue for reasonable cause based on insufficient opportunity to prepare for trial because there was no actual prejudice because of the denial. The accused was unable to articulate or explain what they would have done differently had they received a continuance.

### **ARGUMENT AND ADDITIONAL FACTS**

12. The substantial rights cited by defense counsel for their motion are (1) expert assistance and (2) adequately prepared counsel. The Government agrees that these are substantial rights and has no interest in depriving the accused of these rights. However, neither right is deprived by a denial of this motion to continue. Further, a continuance would significantly harm the prompt, effective, and efficient administration of justice and should be denied under an analysis of the Miller factors. This Motion will address each right in turn to show that denial of Defense's motion would not deprive the accused of a substantial right.

***The lack of availability of [REDACTED] was waived and the accused does not have the right to a specific expert***

13. In January 2023, defense submitted a request for an expert forensic psychologist and specifically requested [REDACTED] be appointed. At that time, the defense was aware of her limited availability, specifically that she would be traveling on Friday, 19 May 2023, which is the last day of the scheduled trial week. On 20 March 2023, [REDACTED] signed a memorandum of agreement for employment as a civilian expert consultant in the field of forensic toxicology, in which she agreed to testify on behalf of the defense.<sup>4</sup> At the time of [REDACTED] signing the agreement, the trial date had been set for over seven weeks, and the trial has always been estimated as a five-day trial.<sup>5</sup> The decision to request [REDACTED] by-name for this case was a strategic one made by the defense, with the full knowledge of her unavailability on 19 May 2023. Whether made because the defense anticipates her services being completed by that date, which is a reasonable expectation, or for any other reason, it was the defense who opted for this situation in the first place. Any concern of her lack of availability for 19 May 2023 was waived by the defense and should not be a basis for requesting a continuance now.

14. Further, the accused's does not have a right to a specific expert, only to expert assistance. Since Defense's motion, the Government has identified numerous substitute forensic psychologists who have extensive experience consulting in courts-martial. If the defense does not want to proceed because of [REDACTED] unavailability on 19 May 2023, we will simply substitute her for an expert forensic psychologist who is available for the entirety of the week.

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<sup>4</sup> See Attachment 3.

<sup>5</sup> See Attachments 4, 5, and 6.

Because the Accused will have a substitute expert, there is not deprivation of any substantial right of the accused to deny the continuance.

***Defense had and still has ample opportunity to prepare for trial.***

15. Civilian defense counsel cites his busy schedule since being retained on 5 April 2023 and prior to trial as leaving “insufficient time to properly prepare for a contested trial that involves the below complications.”<sup>6</sup> Defense Counsel then cites the Government’s “quite extensive” witness list and the Government’s “exceedingly broad” MRE 304 and 404(b) notices that Defense alleges will require “a request to bifurcate motions or extensive follow up.”<sup>7</sup> Defense Counsel further alleges that discovery is ongoing because “the video surveillance of the gas station is not presently viewable to the defense.”<sup>8</sup> The final cause for continuance cited by defense was that the RCM 706 results are not yet available (the final test was on 20 April 2023).

16. This is a simple case. There are three charges and six specifications: that the accused drove drunk, acted in a manner unbecoming an officer and a gentleman, and made false official statements on 14 and 18 October 2022. The Government has provided an updated witness list to Defense since their motion with just 25 witnesses.<sup>9</sup> Here is a breakdown of the Government witnesses:

**Table 1: Government Witnesses Expected Testimony, Examination Time, & Availability**

<b>Witness</b>	<b>Summary of Expected Testimony</b>	<b>Expected Direct Examination Time</b>	<b>Date Known to Defense<sup>10</sup></b>	<b>Available 15-19 May</b>	<b>Available 5-9 June</b>
[REDACTED]	Heard accused’s two false official statements	30 minutes	9 December 2022	Yes	Yes
[REDACTED]	Heard accused’s 14 Oct 22 false official statement	30 minutes	9 December 2022	Yes	Yes
[REDACTED]	Heard accused’s 14 Oct 22 false official statement	30 minutes	9 December 2022	Yes	Yes
[REDACTED]	Peterson security forces; initially identified signs of intoxication	10 minutes	9 December 2022	Yes	Yes
[REDACTED]	Peterson security forces; conducted pre-exit tests with	30 minutes	9 December 2022	Yes	No <sup>11</sup>

<sup>6</sup> See Attachment 2.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See Attachment 14.

<sup>10</sup> See Attachments 8, 9, 10, 11, 12, and 13. Capt Sturges was present for the accused’s 18 October 2022 arrest.

<sup>11</sup> The witness will be on leave the week of 5 June.

	accused on 14 Oct 22				
	Peterson security forces; transported accused on 14 Oct 22	20 minutes	9 December 2022	Yes	Yes
	Peterson security forces; will testify to conduct unbecoming on 14 Oct 22	30 minutes	9 December 2022	Yes	No <sup>12</sup>
	Retrieved the gate video of accused on 14 Oct 22	5 minutes	24 April 2023	Yes	Yes
	Peterson lab; drew accused's blood for 14 Oct 22 BAC results	15 minutes	14 April 2023	Yes	Yes
	Peterson lab; placed accused's blood in storage <sup>13</sup>	5 minutes	17 March 2023	Yes	Yes
	Peterson lab; shipped accused's blood <sup>14</sup>	5 minutes	17 March 2023	No <sup>15</sup>	No
	Will likely be the Government's forensic toxicologist <sup>16</sup>	30 minutes	24 April 2023	Yes	Yes
	Served Lyft and Uber subpoenas, took pictures and videos from 7-11, and is the custodian for physical evidence	30 minutes	17 March 2023	Yes	Yes
	Witness to conduct unbecoming on 18 Oct 22	30 minutes	9 December 2022	Yes	Yes <sup>17</sup>

<sup>12</sup> The witness expects to be at a pre-deployment TDY the week of 5 June.

<sup>13</sup> The Government will likely request a stipulation of expected testimony for this witness.

<sup>14</sup> The Government will likely request a stipulation of expected testimony for this witness. If Defense refuses, the Government will call [REDACTED], who has already been noticed.

<sup>15</sup> Witness will be on parental leave as she is expected to give birth in early May. The Government will request a stipulation of expected testimony.

<sup>16</sup> The Government's original forensic toxicologist became unable to testify on 18 Apr 23 and the Government is completed a new Memorandum of Understanding for the new expert witness.

<sup>17</sup> Witness will be on local leave but has agreed to testify anyways.

[REDACTED]	Buckley security forces; conducted Standardized Field Sobriety Tests	30 minutes	18 October 2022	Yes <sup>18</sup>	Yes
[REDACTED]	Buckley security forces; searched accused's car and observed SFSTs	30 minutes	18 October 2022	Yes	Yes
[REDACTED]	Retrieved the gate video of accused on 18 Oct 22	5 minutes	9 December 2022	Yes	Yes
[REDACTED]	Buckley lab; drew accused's blood and placed into storage for 18 Oct 22 BAC results	15 minutes	15 December 2022	Yes	No <sup>19</sup>
[REDACTED]	Buckley lab; shipped accused's blood for 18 Oct 22 results <sup>20</sup>	5 minutes	15 December 2022	Yes	Yes
[REDACTED]	Forensic psychologist; will testify to state of mind of accused with regard to alcoholism	30 minutes	17 March 2023	Yes	Yes
[REDACTED]	Sentencing and rebuttal (character/reputation for truthfulness)	15 minutes	14 April 2023	Yes	Yes
[REDACTED]	Sentencing and rebuttal (character/reputation for truthfulness)	15 minutes	14 April 2023	Yes	No <sup>21</sup>
[REDACTED]	Sentencing	15 minutes	14 April 2023	Yes	No <sup>22</sup>
[REDACTED]	Sentencing	15 minutes	14 April 2023	Yes	Yes
[REDACTED]	Sentencing	15 minutes	14 April 2023	Yes	Yes

While there are 25 witnesses, their cumulative direct examination testimony is expected to be less than nine hours (including sentencing), and the Government expects a two-day findings case. The findings witnesses could be further reduced from 20 to 17 if Defense were to stipulate

<sup>18</sup> Witness will be on parental leave but has agreed to testify anyways.

<sup>19</sup> The witness will be TDY the week of 5 June.

<sup>20</sup> The Government will likely request a stipulation of expected testimony for this witness.

<sup>21</sup> The witness is set to PCS on or about 1 June 2023.

<sup>22</sup> The witness is set to be on vacation the week of 5 June 2023.

to blood collection chain-of-custody witnesses. Since Defense has noticed no witnesses, they apparently have no case aside from calling their forensic psychologist. Their entire preparation appears to be interviewing Government witnesses and putting on their sentencing case.

17. Further, most of these witnesses have been known to the detailed area defense counsel since at least 9 December 2022 (if not earlier). Many of them provided written statements. And the accused has had two military defense attorneys detailed to this case for months, one of whom remains on the case. Defense has had ample opportunity and notice to adequately prepare for trial. While the civilian defense counsel has a busy schedule, he has had and will have sufficient time to prepare for this straightforward trial, especially with the assistance of a military defense attorney. Considering this context, the defense has made an insufficient showing of how defense counsel cannot be adequately prepared for the scheduled trial date and, as such, denial of this motion would not deprive the accused of a substantial right.

18. Defense next cited the Government's "exceedingly broad" notice as reason to delay. This is not an accurate characterization of the notice.<sup>23</sup> The notice provides the written materials containing statements by the accused as well as specific and complete quoted statements he made to witnesses that are not otherwise reduced to writing. To the extent the Defense may be complaining that the Government did not highlight statements by the accused that are found in written materials disclosed to the Defense, that is not required. Defense counsel can read those materials for themselves.

19. Defense counsel's claim that discovery is ongoing is accurate only in that discovery is an ongoing obligation. The Government has in fact made disclosures and discovery responses as scheduled or earlier in this case. The only thing not provided to the defense has been a copy of the 7-11 video files. As has been explained to the defense counsel previously, the Government is likewise unable to play the video files downloaded directly from 7-11, but a Security Forces investigator has taken a video of the relevant footage, and that footage has been disclosed to the defense already. Furthermore, the Government noticed this issue to Your Honor and the Area Defense Counsel at the docketing conference in January, so if this were an issue Defense believed would cause a continuance, it is unreasonable for this non-issue to be cause for continuance.

20. Defense counsel also stated that there will be an alleged two-week turnaround for the results of the RCM 706 board. What defense counsel did not mention is that the delay was caused by the accused when he failed to go to his scheduled neuropsychological test on 27 March 2023. The Government has never been told why the accused did not appear for his ordered sanity board appointment, especially when all parties were aware of how hard it is to get neuropsychological appointments and that it takes weeks to re-schedule them (the accused's original RCM 706 board was held on 28 Feb 23). Fortunately, the accused did show up for his 20 April appointment, and even if defense counsel is correct on the timing, they will receive the results on 4 May, plenty of time before trial to prepare defense's forensic psychologist. It is unreasonable for this non-issue to be cause for continuance. Denial of this motion would not deprive the accused of a substantial right.

21. In summary, none of the reasons provided by Defense would deprive the accused of a substantial right, namely, adequately prepared counsel.

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<sup>23</sup> See Attachment 15.



***The Miller Factors Support a Denial of the Motion to Continue as a Delay Will Prejudice the Government's Case and Deny the Prompt, Effective, and Efficient Administration of Justice***

22. Nature of the Evidence Involved: The evidence involved in this case is straightforward, and weighs in favor of denial of the motion. The facts are contained to two days on which the accused drove drunk onto two Space Force bases in Colorado, lied about it to his supervisor and commander, and acted in a manner unbecoming an officer and a gentleman. As table 1 shows, each witnesses testimony is relatively short and simple and the defense should be prepared for trial on 15 May, as scheduled. While expert psychological testimony may be included, those experts were appointed months before the scheduled trial date with more than sufficient time to prepare. The nature of the evidence involved weighs in favor of denial of the motion to continue.

23. Timeliness of the Request: This request is not timely. Defense has had two detailed military defense counsel on this case with five months to prepare for a trial on what is essentially charges of drunk behavior on two days. One ADC has been detailed since the accused's arrests in October of 2022. The Government has been pro-active and gone above and beyond in providing discovery well in advance of Your Honor's scheduling order. Aside from a change in the forensic toxicologist (outside of Government's control), the addition of the witness who pulled the video from Peterson SFB, and the name of the airman who pulled the accused's blood at Peterson (hardly dramatic last-minute witnesses), there has been no new evidence or discovery since March in this case. Even then, the facts and evidence are largely the same as they were in October when the charged misconduct occurred and December when the bulk of all evidence was provided. The Government hasn't received nor denied a Defense request or motion to compel production of evidence. Since the addition of a civilian defense counsel on 5 April (5 weeks before trial) there has been no new evidence that should gives reasonable grounds to continue. Two ADCs were given five months to prepare this case for trial, and the civilian defense counsel had a month and a half. That is easily enough time, even with a busy schedule, for three attorneys to be adequately prepared for such a straightforward case. A continuance at this point in the trial process, especially given that defense has noticed no witnesses aside from their forensic psychologist (via a motion), is not timely and unreasonable. The lack of timeliness of the request weighs in favor of denial of the motion to continue.

24. Availability of Witnesses: Six of the Government's witnesses are unavailable for defense's proposed trial date of 5 June 2023, including several indispensable witnesses such as [REDACTED] (the Peterson SFS member who conducted pre-exit tests with the accused), [REDACTED] (a named witness in one of the conduct unbecoming specifications), and [REDACTED] (who drew the accused's blood at Buckley). The unavailability of Government witnesses on the proposed trial date compared to the availability of all witnesses on the current trial date weighs heavily in favor of denial of the motion to continue.

25. Length of Continuance: The Defense has proposed 5 June 2023 as the new date of trial. However, the Government is not available that week due to witness unavailability (the Government also currently lacks a certified trial counsel for this date). Civilian defense counsel stated that their next availability after 5 June would not be until December, approximately 224 days from the scheduled trial date. This extremely long continuance weighs heavily in favor of denial of the motion to continue.



26. Prejudice to Opponent: The Government and the public have a strong interest in the prompt, effective, and efficient administration of justice. This interest will be severely prejudiced by a 224-day delay in this case. During the 224-day delay created by a continuance to December, the accused's unit will continue to have the burden of an officer who stands accused of serious crimes who will effectively be in "limbo" until this case is resolved. This delay would come after a nearly three-month gap between the Government and Defense Ready dates. Should Your Honor grant the continuance to 5 June, the Government's findings and sentencing cases would be extremely prejudiced by the unavailability of indispensable witnesses. This severe prejudice to the Government by a continuance (compared to little to no prejudice to the defense by a denial) weighs in favor of denial of the motion to continue.

27. Good Faith of the Moving Party: The Government does not doubt that civilian defense counsel has a busy schedule, as all attorneys do. Nor does the Government doubt that civilian defense counsel would like to have more time to prepare for a trial, as all attorneys do. However, while the Government does not question the Defense's good faith in wanting and seeking a delay, nor believe the Defense is seeking a delay for improper purposes, the Government does challenge the difference between what the Defense would like and find convenient versus what is actually needed to adequately prepare for this trial.

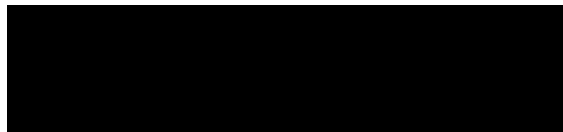
28. Use of Reasonable Diligence by the Moving Party: Civilian defense counsel took this case on 5 April knowing the case was set for 15 May but took two weeks to decide to move for a continuance (while having two detailed ADCs on the case). Defense then made a motion for a continuance without even attempting to secure a new expert witness, speaking with the Government about possible trial dates, or speaking with the Government about facts alleged in his motion (i.e., Dr. Schneider's availability, the 7-11 video non-issue, the Government's witness list). Civilian defense counsel did not use reasonable diligence in even attempting to avoid a continuance. The lack of reasonable diligence by the moving party weighs in favor of denial of the motion to continue.

## CONCLUSION

29. Thus, the United States asks the Court to DENY the defense motion.

30. The Government does not request an Article 39(a), UCMJ, hearing to present argument and evidence.

Respectfully submitted,



GLENN L. HOLMES, Capt, USAF  
Trial Counsel

15 Attachments:

1. Charge Sheet, dated 20 January 2023 (3 pages)
2. Defense Motion to Continue, dated 19 April 2023 (4 pages)

3. Email, dated 24 January 2023 (2 pages)
4. Memorandum of Agreement from [REDACTED], dated 20 March 2023 (3 pages)
5. Docketing Memorandum, dated 25 January 2023 (1 page)
6. Confirmation Memorandum, dated 26 January 2023 (1 page)
7. Scheduling Order, dated 27 January 2023 (4 pages)
8. ADC Preferral Receipt, dated 13 December 2022 (1 page)
9. ACC Preferral Receipt, dated 25 January 2022 (1 page)
10. ADC Discovery Receipt 1, dated 15 December 2023 (3 pages)
11. ADC Discovery Receipt 2, dated 17 March 2023 (4 pages)
12. ADC Discovery Receipt 3, dated 28 March 2023 (1 page)
13. ADC Discovery Receipt 4, dated 3 April 2023 (1 page)
14. Government Witness List #2 - *United States v. First Lieutenant Travis C. Baker*, dated 25 April 2023 (4 pages)
15. Notice Under MRE 304(d) and 404(b), dated 14 April 2023 (5 pages)

### CERTIFICATE OF SERVICE

I certify that a copy of this Government Response to Defense Motion for Continuance was served upon the Military Judge and Defense Counsel via electronic mail on 25 April 2023.

[REDACTED]

GLENN L. HOLMES, Capt, USAF  
Trial Counsel