

**DEPARTMENT OF THE AIR FORCE
TRIAL JUDICIARY**

UNITED STATES)	
)	
v.)	DEFENSE MOTION TO
)	CONTINUE
)	
)	
1Lt Baker)	
Delta 4 Detachment 2 (SpOC))	
Buckley Space Force Base, Colorado)	19 April 2023

RELIEF SOUGHT

The Accused, by and through Counsel, IAW Rules for Courts-Martial 906(b)(1) respectfully moves this Court continue the trial date currently scheduled for 15 May through 19 May 2023. This is the first continuance of a court-ordered milestone requested in this case.

HEARING

The Defense does not request oral argument.

BURDEN OF PROOF AND PERSUASION

As the moving party, the Defense bears the burden of proof and the burden of persuasion is upon a showing of reasonable cause. See RCM 905(c) and 906(b)(1) discussion.

FACTS

1. 1Lt Baker has been accused of one charge and two specifications of violating U.C.M.J. Article 107, False Official Statement (14 October 2022 and 18 October 2022), one charge and two specifications of violating U.C.M.J. Article 113, Drunken Operation of a Vehicle (14 October 2022 and 18 October 2022), and one charge and two specifications of violating U.C.M.J. Article 133, Conduct Unbecoming an Officer and Gentleman (14 October 2022 and 18 October 2022).

2. An Article 32 hearing was held in this matter on 20 December 2022. All charges and specifications were referred on 18 January 2023. The Accused was served with the referred charges on 20 January 2023. Currently, the trial is scheduled for 15-19 May 2023.

3. On 18 April 2023, undersigned counsel was notified that [REDACTED], Defense Expert and witness who will testify in the merits phase of the case is no longer available to prepare, travel, and attend the court martial.

LAW

R.C.M. 906(b)(1), Manual for Courts-Martial, United States 2019 Edition
Article 40, UCMJ, 2019

United States v. Andrews, 36 M.J. 922 (A.F.C.M.R. 1993)

United States v. Perry, 14 M.J. 856 (A.C.M.R. 1982)

United States v. Furgason, 6 M.J. 844 (N.C.M.R. 1979)

United States v. Andrews, 36 M.J. 922 (A.F.C.M.R. 1993)

United States v. Miller, 47 M.J. 352 (C.A.A.F. 1997)

United States v. McGinnis, 2010 WL 3931494 (A.C.C.A 2010)

United States v. Short, 50 M.J. 370 (1999)

United States v. Ndanyi, 45 M.J. 315 (1996)

United States v. Robinson, 39 M.J. 88 (C.M.A. 1994)

ARGUMENT

4. “The military judge or a summary court-martial may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.” Article 40, UCMJ; *see also* United States v. Miller, 47 M.J. 352 (C.A.A.F. 1997), and R.C.M. 906(b)(1)(discussion). “Whether a request for continuance should be granted is a matter within the discretion of the military judge. Reasons for a continuance may include: insufficient opportunity to prepare for trial; unavailability of an essential witness; the interest of the Government in the order of trial of related cases; and illness of an accused, counsel, military judge, or member.” Miller, 47 M.J. at 358. In U.S. v. Perry, the Army Court of Military Review (A.C.M.R.) held that “the test for abuse involves a balancing of the parties’ interests.”

5. Where the accused is the moving party, the military judge must weigh the underlying basis for the continuance against the adverse consequences to the prosecution from delaying the trial. If the accused’s request for a continuance is grounded on a substantial right and where the prosecution’s only basis for opposition is administrative inconvenience, its denial may constitute an abuse of discretion.” U.S. v. Perry, 14 M.J. 856, 858 (A.C.M.R. 1982) (*citing* U.S. v. Furgason, 6 M.J. 844, 848 (N.C.M.R. 1979)); *see also* U.S. v. Andrews, 36 M.J. 922, 925-26 (A.F.C.M.R. 1993). Further, “the judge should err on the side of liberalism in taking action on delay requests when good cause for delay exists.” Andrews, 36 M.J. at 926.

6. The Accused is entitled to the assistance of an expert in preparing for a court-martial. *See United States v. McGinnis*, 2010 WL 3931494 (A.C.C.A 2010); *United States v. Short*, 50 M.J. 370 (1999); *United States v. Ndanyi*, 45 M.J. 315 (1996). A military Accused has, as a matter of Equal Protection and Due Process, a right to expert assistance when necessary to present an adequate defense. *See United States v. Robinson*, 39 M.J. 88 (C.M.A. 1994); *Ake v. Oklahoma*, 470 U.S. 68 (1985).

7. In the case, the request for a delay in the trial is grounded in a substantial right: the right to adequately prepared defense counsel and the right to expert assistance. The accused's right as a matter of Equal Protection and Due Process to meaningful, adequate expert assistance to [REDACTED], who is a forensic psychologist, is essential to the charged offenses and essential to the preparation of the defense's case.

8. Undersigned counsel was only retained on 5 April 2023 and has not had adequate time to review the evidence in question and prepare for trial for the following reasons. Undersigned counsel had an Article 32 hearing in US v. Anderson out of Tinker AFB on 7 April, traveled to Joint Base Maguire Dix Lakehurst for a guilty plea on 9 April to 10 April, traveled to Dallas, TX on 12-14 April for a CLE presentation to the Dallas Bar Association, and preparing to travel to Germany on 20 April for a GCM in Kaiserslautern, Germany from 24 April to 28 April 2023. In the next three weeks, undersigned counsel will also be traveling to FT Bragg, NC from 3-5 May for an administrative separation board and then to FT Benning, GA on 6 May to prepare a client for providency for a guilty plea taking place on 9 May, flying to Washington D.C. on 7 May to attend a sentencing for a January 6 riot case on 8 May and flying back to FT Benning on 8 May to attend the guilty plea on 9 May. This will leave insufficient time to properly prepare for a contested trial that involves the below complications.

9. The government has provided notice it intends to call 33 witnesses for sentencing, yet not indicated any at present for sentencing. Clearly, 33 witnesses is quite extensive and will require time to interview and time to prepare for cross examination for trial. In addition, the MRE 304 and 404b notices are exceedingly broad and will necessitate either a request to bifurcate motions or extensive follow up. The discovery in this case is also ongoing because the video surveillance of the gas station is not presently viewable to the defense.

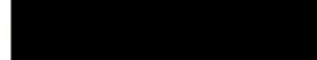
10. Perhaps most importantly, the accused is still awaiting the RCM 706 results and is pending additional testing – about 5 hours of testing – scheduled for 20 April 2023. The results of the testing and the 706 board are not expected for at least another two (2) weeks at which time the defense will need to get the results to the appointed expert, [REDACTED]

11. [REDACTED] is also unable to attend the entire trial during the currently scheduled trial dates. In speaking with her, she would be able to attend the trial from 0900 to 1425 Monday through Thursday and then would fly to Germany for a GCM at Ramstein, Germany. Proceeding in this trial absent her assistance would only serve to prejudice the Accused by not allowing him the opportunity to provide an expert witness to combat the allegations in question and present a cogent sentencing case, especially in light of the fact the government is calling 33 sentencing witnesses.


12. It is respectfully submitted the interests of the accused in having a fully prepared defense counsel, an expert able to attend the entire trial proceedings and complete discovery and settled motions outweighs the government's interest in an expeditious trial.¹

13. Currently, Defense counsel does not have dates for all parties involved to secure availability for trial in the future. Once available, the Defense will submit such dates to the Court for scheduling purposes, if the continuance request is granted.

14. Accordingly, the Defense respectfully requests this Honorable Court continue the trial currently scheduled for 15 May through 19 May 2023 and issue a new EDN and a new PTO.


Jonathan W. Crisp, Esquire
Civilian Defense Counsel

I hereby certify that a copy of the attached motion was sent to Trial Counsel and Military Judge on this 19th day of April 2023.


Jonathan W. Crisp, Esquire
Civilian Defense Counsel

¹ Defense counsel consulted with Trial counsel who indicated the government objects to a continuance.