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Via email: michael.savegh@usmc.mil

Re: U.S. v. Wacker Article 32 Defense Summation

Capt Wacker, by and through undersigned counsel, submits the following summation of the Article 32 hearing that took place from 12-14 April 2010. The defense has not shared its summation with the Government. The IO is requested to provide the government a copy upon receipt of the Government's own submission.

Sexual Assault or Rape Allegations

The essence of this case is regret. The activities in New Orleans between Captain Douglas Wacker ("Wacker"), Ms. Jessica Brooder ("Brooder") and Mrs. Elizabeth (Easley) Cook ("Easley") were consensual acts between willing and able adults. The accusations made by Easley and Brooder stem from regret that they had cheated on their boyfriends and done something that they felt was out of their moral character. The accusation by Ms. Nicole Cusack ("Cusack") arise only after finding out that Wacker had intimate relations with two other women during their five month consensual sexual relationship. Although Ms. Cusack noted that there was no agreed upon exclusivity in their relationship, she did agree that it was a relationship founded upon both physical and emotional ties. Only once she believed that she had been betrayed by Wacker did she allege that he had drugged her, similar to the allegations by Easley and Brooder. Moreover, Ms. Cusack did not make these allegations until almost 2 years after they allegedly occurred and then the allegations were spurred on only when prompted by an investigator and even though she continued a physical relationship for 5 months after the night in question.

There was no evidence presented by the Government that drugs were involved, only the lay opinions of Easley, Brooder, Cusack, friends, and family, which lack any scientific evidence. Indeed, the only scientific evidence presented in this case indicates that there is no evidence that any date-rape drugs were used. Any intimation by the Government that Wacker used date rape drugs is being used solely for the purpose of creating salacious allegations made from innuendo and speculation.

The testimony is clear that Easley and Brooder do not remember many of the activities on the evening of 3 April 2007 and morning of 4 April 2007. However, the statements of Ms. Rebecca (Barker) Abdullah ("Barker") and Mr. Daniel Cook ("Cook"), show that Brooder and Easley were out with friends for a night of drinking on Bourbon Street and drank several drinks, including hand grenades and shots, over the period of at least 5-6 hours. The exact amount is

unknown by any witness. It is clear, however, that there was excessive drinking, but not to the point that anyone in the group expressed sincere concern. Even when Barker was about to leave Razoo and asked Wacker to ensure Easley and Brooder made it back to the hotel safe, Brooder and Easley stated they wanted to stay out.

Although not presented at this hearing, the defense proffers that evidence exists to show that Brooder's purchased the three daiquiris with either her debit or credit card after they all left Razoo. Such evidence would tend to show that Brooder and Easley were not unconscious and a server, accountable for ensuring that patrons are not overly intoxicated to the State of Louisiana for his liquor license, served the three of them at that time through a purchase made by Brooder herself.

At this daiquiri bar, there were discussions of a threesome and a three-way kiss occurred. All three agreed to rent a new hotel room. All three walked to the St. Charles. Both girls waited in the lobby for Wacker to get the room. All three went to the hotel room on the 10th floor. All three walked in together. All three went to the bed and engaged in consensual touching fondling and kissing. And this continued until Easley changed her mind and said "I can't do this" and left the room to wallow in her guilt. But not before remembering seeing Brooder come out of the bathroom and goes back to the bed. Why did Brooder do that?

Easley's journal provides poignant facts and informs the reader as to her state of mind. It betrays the regrets of a guilty conscience of a woman who acted willingly and suffered remorse. To cleanse her guilty soul she fabricates the drug theory. It absolves of her guilt, wins the sympathies of boyfriend and putative mother-in-law, rescues her equally guilty friend and reverses the betrayal. The price: Wacker's liberty.

Belief is a powerful thing, but it is not evidence of guilt of any crime. To allow beliefs and feelings to take over in the absence of credible evidence and testimony is to upend the system of justice and law. Regardless of Brooder and Easley's feelings and beliefs, Wacker committed no crime on 3-4 April 2007, and should not continue to be punished by a continuation of this process.

Obstruction of Justice

In the matter of Cusack, Lowder, and Gorman, there is no evidence that Wacker ever intended to impede or actually did interfere with anyone's testimony. Gorman and Lowder testified to that under oath to questions posed by the Investigating Officer himself. This is an element of the offense of obstruction of justice and therefore the Government fails to meet the evidentiary burden of such charges whether under Article 134 or under Article 133. Moreover, the government could have, but failed to, called to the stand NCIS Special Agent John Burge, the investigator in this case, to inquire as to how his investigation was impeded or obstructed. Burge was available as a witness over a period of two days. Yet the Government chose not to elicit any testimony regarding the obstruction charge. Instead, relying on testimony from witnesses who simply confirmed that Capt Wacker is innocent because he asked Cusack to stop spreading rumors that might affect his case.

Multiplicious Charging

The Government is charging the same acts under Articles 80 and 120, as under Articles 133 demonstrates clear multiplicity and the Investigating Officer should recommend dismissal of all of those specifications for which the Government has not met its evidentiary burden.

Uncontroverted Facts to Consider

To summarize, the defense requests the IO consider the following evidence in particular to making a final determination as to the disposition of charges:

1. Easley remembers Brooder walking out of the bathroom and returning to the same bed that the accused lay in as she –Easley- stated “I can’t do this” and left.
2. What was Easley referring to when she said “I can’t do this?”
3. Brooder denied to Easley having sex with Wacker when asked “why were you having sex with Doug?”
4. Brooder’s warning to Wacker in the voicemail is informative of her state of mind at the time closest to her interaction with Wacker.
5. Both Brooder and Easley walked 10-15 minutes from Razoo to the St. Charles Hotel.
6. Both Brooder and Easley knew where their room was on the 7th floor and were able to get back there after they consensually went to room 1008 with Wacker.
7. Both girls suffered guilt at betraying their boyfriends before they decided they were drugged.
8. Cusack was seen walking out of the bar on her own without the need for any assistance and she did not appear to be inebriated.
9. Cusack gave Wacker directions on how to get her home on the night she claims she was assaulted.
10. Cusack decided to go on a picnic in a park that she says was not a date.

The burden at an Article 32 hearing is not high. But evidence, to go forward on a charge, must be competent and probative even on the low burden. The testimonial evidence in this case has gone through several iterations over the last three years of what it needs to be to secure a conviction and has been fashioned in such a way as to imply an offense. The truth can only be gleaned from considering those statements that were captured before witnesses colluded and before memories began to change to support beliefs as to what happened.

Based on the forgoing the defense requests you recommend all charges and specifications be dismissed for lack of competent evidence to support a referral of charges.

Very respectfully submitted,

_____/S/
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_____/S/
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