

[The Article 32 investigation was called to order at 1508,  
13 April 2010.]

**IO:** We're back on the record.

**GC:** At this time the government will call Nicole Cusack.

**Miss N. C. Cusack, a civilian, was called as a witness by the  
prosecution, was sworn, and testified as follows:**

**DIRECT EXAMINATION**

**Questions by the prosecution:**

**Q.** Could you please state your full name and spell your last name for the court reporter?

**A.** Nicole Colleen Cusack, C-U-S-A-C-K.

**Q.** And I think you can sit back and relax --

**A.** Okay.

**Q.** -- I think, if you want. I think the microphone actually picks up most of what you're saying and we can hear you.

Where do you currently reside? Are you living here in San Diego?

**A.** Yes.

**Q.** And I want to direct your attention to August of 2006. Did you attend the University of San Diego School of Law?

**A.** Yes.

**Q.** Is that when you started your first year of law school?

**A.** Yes.

**Q.** Were you -- we've heard some testimony from other students with regard to how first year of classes is broken down into sections with particular subsections.

Were you in the same subsection as Jessica Brooder and Elizabeth Easley, now Elizabeth Easley Cook?

**A.** No.

**Q.** You were in a different section?

- A. Yes.
- Q. Were you in the same section as Captain Wacker?
- A. No.
- Q. So, you weren't attending your first year, a lot of the same classes with Captain Wacker, were you?
- A. None of the same classes.
- Q. And same question with regard to Jessica Brooder or Liz Cook. Did you attend a lot of classes with them?
- A. No.
- Q. How would you describe your relationship, first of all, with Jessica Brooder? Do you know her?
- A. I know of her. I've waved at her, but I don't know her.
- Q. So, you're not personal friends with Miss Brooder?
- A. No.
- Q. How about Elizabeth Easley Cook?
- A. Same situation. I may have spoken to her once, but not friends with her.
- Q. Okay. Throughout the three-year period?
- A. Right.
- Q. All right. During your first year -- semester of law school through December 2006, I want to direct your attention to now how you meet Captain Douglas Wacker.
- Could you explain to the investigating officer how did you come to know Captain Wacker?
- A. My -- after my first semester of law school, my good friend Jessie Baxter was -- she needed a ride to the airport, but she was at Captain Wacker's house for a barbecue, following like celebrating the completion of finals. So, I went to the house to pick her up and went in briefly.
- And at that point I think I said, "Oh, I'm going back to Seattle for the summer." And someone said, "Oh, he's from Seattle too" --
- Q. Well, let me ask you, Miss Cusack. You said for the

summer.

A. Oh, I'm sorry. Sorry.

Q. Because what I'm trying to get is --

A. For at Christmas break.

Q. Okay. And so, if I understand correctly, then you go to pick up your friend Miss Baxter at his house. And is it after the finals of your first semester, first year law school?

A. Yes.

Q. Okay. So, where we're at is mid to late December, you finish the finals, and now you're about to commence your first -- actually it's your first holiday, Christmas break during your first year of law school; is that right?

A. Correct.

Q. Now, you mentioned your home area is Seattle.

A. Yes.

Q. In the house, in Captain Wacker's house when you're there to pick up Miss Baxter, is she also from that area?

A. She's not.

Q. Okay. She just needed a ride to the San Diego Airport?

A. Right.

Q. Okay. And so, if I understand correctly then, is this when you first meet Captain Wacker?

A. Yes.

Q. And is it Miss Baxter who -- her first name is Jessie?

A. Yes.

Q. Does she introduce you?

A. I don't -- no, I don't think she did. I think that people were milling around and someone heard "oh, Seattle, Seattle," and introduced us. I don't know who exactly was there.

Q. All right. Is Captain Wacker from the Seattle area?

A. Yes.

- Q. All right. And so, is that how you start discussing Seattle?
- A. Right.
- Q. Well, go ahead and explain -- you know, sometimes I ask convoluted questions, so I'll tell you what. It's a lot easier if you just explain to the investigating officer who's Lieutenant Colonel Sayegh and I apologize for not introducing him earlier. Just explain to him the conversation you have in that house and how you get to know that Captain Wacker's from the Seattle area, your hometown, that type thing.
- A. Okay. It was just a matter of "this guy's from Seattle, you're from Seattle; you're both going to be sitting around over winter break, so he gave me his num -- or I gave him my phone number and we were going to meet up at some point over the break.
- Q. All right. So, you take your friend Miss Baxter to the airport and sometime later during the break, do you actually also yourself fly up to Seattle to spend the holiday?
- A. Yes.
- Q. All right. And how long do you -- do you recall how long you were up in Seattle before you made contact with Captain Wacker?
- A. I don't know how long I had been home, but I do know that he was driving back with a group of friends from San Diego to Seattle, and I do remember that he called me or texted. I'm not sure which one. Made contact through my phone the day he got back, which I thought was pretty eager and the fact that -- I don't know. I just remember him contacting me as soon as he got back.
- Q. You mean back to Seattle?
- A. To Seattle.
- Q. Yeah. And just --
- A. I'm sorry that I'm not clear.
- Q. -- so we understand now, you're no longer in San Diego; you're up in Seattle on your Christmas break?
- A. Right.
- Q. Where were you staying?

A. At my parents' house.

Q. All right. And do you have other family members in Seattle?

A. My little sister. She was --

Q. Was she living at your parents' house or --

A. No. She was attending the University of Washington and she had a house near the campus.

Q. Okay. So, your little sister, she's a college student in Seattle.

A. At that time, yes.

Q. Yeah. And I apologize, but I'm not -- University of Washington is located then in Seattle?

A. Yes.

Q. The City of Seattle?

A. Uh-huh.

Q. All right. And so, at some point do you contact Captain Wacker back? Do you text him back or return his phone call or whatever that is and arrange to meet with him while you're up in Seattle in December of 2006?

A. Yes, and I don't remember exactly how, but it was -- can I --

Q. Absolutely, absolutely.

A. My -- I was having a little happy hour get-together with friends and so I just texted everybody, like "come meet up, we're going to be at Joey's on Lake Union," and he -- actually I was surprised -- showed up with one of his friends, whose name I don't remember now, and he showed up for that, so that was the first time I had met up with him in Seattle.

Q. All right. Now, is that the first time you're -- besides meeting him at his house, is this the next time that you're having any social interaction with him?

A. Yes.

Q. All right. What happens on this particular occasion when he meets you and your friends at, you said it was called Joey's?

A. Uh-huh.

Q. All right. Just --  
A. Yes.

Q. -- anything unusual or just give us the factual data relating to this interaction?  
A. I had invited a lot of different friends because I was back in town trying to see everyone, so I had several different friend groups there and I was having a hard time making sure I had spoke to everyone, so I don't recall really interacting very much with -- do I have to say Captain Wacker or --

Q. Well, how do you refer to him?  
A. Wacker and his friends --

Q. Okay.  
A. -- or friend. And then a few of us, a few good friends of mine and my sister, we decided to go to a bar that was closer to her house. And I remember being surprised that he and his friend tagged along for that, but whatever. The more the merrier, so they came down. And --

Q. He doesn't do anything unusual either? I mean, you're surprised --  
A. No. I'm barely interacting with him.

Q. Yeah. Is this a fair summary: You knew -- you just met him and he's now joined you and your friends, and so you said you were a little surprised, but he's also a part of the group and he's on vacation too? Is that a fair --  
A. It's correct, and I did invite him and I just -- I don't remember much of him for the first -- for the majority of that night because I wasn't really interacting with him.

Q. Okay. A lot of these people that you're seeing, are they high school classmates or college classmates -- where did you go to college at?  
A. University of Washington.

Q. Okay. So, a lot of these people, some of your college and high school classmates also and you're home for the first time in a few months and catching up?  
A. It's high school, college random.

- Q.** Okay. Roger that. Roger that.
- Anything unusual at the conclusion of this evening with regard to interaction with --
- A.** I mean --
- Q.** --Douglas Wacker?
- A.** -- I do remember him buying shots for everybody, wanting everyone to drink, and we just left him and his friend eventually --
- Q.** All right.
- A.** -- at the bar.
- Q.** And no negative interaction?
- A.** Nope.
- Q.** What's the next time that you have the opportunity in December of 2006 while you're up in the Seattle, Washington area to come into contact with, I call him Captain Wacker?
- A.** Okay. I can do that too.
- So, over the course of the break, we had texted back and forth about meeting up because we were both bored at our parents' houses. At that point our friends had -- or my friends had jobs and there weren't a lot of people to hang out with. So, we texted back and forth; finally set up a time to -- he picked an improv place in the university district to go watch, and so I drove out there from my parents' house and met him at -- I don't remember the name, but the improv place.
- Q.** Roger. Okay.
- A.** We go in -- we went into the improv thing, and when you walk in, there's a little entryway with coolers and so we get tickets and whatever. And I do remember I was full and I didn't want a beer and I don't know the guy very well, so the social interaction --
- Q.** Well, let me ask about, first of all, I guess I should have backed up and asked that. What time of day are we talking about? What time do you arrive to meet him at the improv shop?
- A.** It would be later afternoon or early evening. It's not the early morning. It's not the middle of the

day, but it's not late at night.

Q. All right. Had you had an evening meal before you arrived?

A. Yeah, yes.

Q. Do you know where you ate that --

A. My parents' house.

Q. All right. And so, is it after dinner that you go to join him to watch the play at the improv?

A. Yes.

Q. Is it one of these standard places that has a start time somewhere 7:30, 8:00 for first show?

A. Something, maybe even earlier, I'd say.

Q. All right. Might have been even earlier.

So, what's your best -- when do you actually think you met, time wise, met him at the improv?

A. 6:30 or 7:00. It's wasn't late. I do know that.

Q. Okay. All right. Now, you mentioned at this improv, it's not a comedy shop; it's actually -- there is live actors doing a play?

A. Uh-huh, yes.

Q. Now, did they sell alcohol?

A. Yes.

Q. All right. What kind of alcohol did they sell at this institution?

A. I only remember beer, but there may have been --

Q. All right. Did you have alcohol while you were watching the play?

A. I had a beer.

Q. Okay. One beer?

A. I did, and I'm not even sure that I drank the whole thing because I remember not wanting it.

Q. All right. Let me ask you: Is it beer in a bottle or is it --

A. Beer --

Q. -- beer in a pint glass?



A. Beer in a bottle.

Q. All right. Does Captain Wacker have anything to drink with you?

A. He had a beer also. That was what I remember is that he was like "I'm getting a beer, get a beer," and I didn't know him very well and I didn't want to be weird, so even though I didn't want one, I got it and I remember being like, gosh, this guy's being a little bit more intense than my normal friends about being like get a beer, but --

Q. Yeah, but for clarity sake also, you weren't forced either? I mean, you drank a beer?

A. Yeah, no. I know. It's just something I noted --

Q. Okay.

A. -- personality wise.

Q. Did you watch the play?

A. Watch -- yes.

Q. How long does the play last?

A. An hour and a half to two hours.

Q. All right. So, we're now -- at the conclusion of the play, approximately what time is it in the evening? What's your best -- and I know these are approximations.

A. I'm going to say maybe 8:30 to 9:00.

Q. What did you do at the conclusion of the play?

A. We -- I went to undergrad there. It was kind of my turf, so we decided to walk down University Avenue to kind of see what was still there from when I was there and go to a bar or some -- I don't remember having a plan. We were just walking.

Q. And that's one of those university districts where there's multiple restaurants, multiple pubs --

A. Lots of --

Q. -- music venues, things like that?

A. Yeah, lots of retail and shops just stacked in there.

Q. And correct me if I'm wrong, don't they call it the U District up in Seattle?

A. Yes, they do.

Q. So, did you actually find a place to go into in that district after the play?

A. Yeah. About four to five blocks down, maybe five, six, it was a bar called Fin McCool's. It was a place I used to go in college. And Captain Wacker said he had his Irish bartender, some friend of his that worked there sometimes, so that was why we ended up -- that was our choice.

Q. Okay. Do you go into the bar?

A. Uh-huh, yes.

Q. And do you drink there?

A. Yes.

Q. All right. Tell us -- you know, same type of questions. How long are you in the bar? What is the interaction like? How much do you drink? How much does Captain Wacker drink? Just take us through that portion of the evening where you're at this bar called Fin McCool's.

A. Okay. Now, as far as what Captain Wacker drank, I know we took -- whatever shots I took, he took, but as far as what he was drinking, I don't remember that.

Q. Okay. That's fine.

A. But for me, I always would and I did order just one -- a mixed drink to have --

Q. What did you order?

A. -- and it would have been a vodka/Sprite because that's what I always order.

Q. Okay. And I guess the way I should ask is: Do you have a memory of going into Fin McCool's and actually --

A. Yeah, yes.

Q. -- ordering a vodka/Sprite?

A. I have a memory of going into Fin McCool's and ordering a drink. I can specify vodka/Sprite because that's all I ever order.

Q. All right. And did Captain Wacker join you --

A. Yes.

Q. -- in drinking?  
A. Yes.

Q. Do you know what he drank?  
A. No idea.

Q. Do you have any recollection as it was a beer or was it a mixed drink?  
A. I don't know.

Q. Okay. Roger that.

A. All right. Did you drink your vodka/Sprite?  
I'm sipping it. I am drinking it. We order shots.

Q. Do you know what kind of shots you order?  
A. No.

Q. All right.  
A. I went to the restroom at some point and called or texted a friend and left a voice mail or text, one of the two. I know I didn't get ahold of anybody.

Q. Okay.  
A. I know I didn't have a conversation with a friend. I don't remember who it was. Something saying where I was and that I was hanging out with someone from law school and that it was random.

Q. Okay. Did you actually -- and I apologize if I asked it. Did you drink the shot before you went to the bathroom and did the text messaging?  
A. I'm not sure. Definitely sipped on my drink.

Q. All right. Well, after you hit the bathroom and do the text messaging, do you return to the bar?  
A. Yes.

Q. Captain Wacker was there?  
A. Yes.

Q. All right. What else then? Do you continue to drink? Do you order more shots? Just walk us through the evening a little bit.  
A. We took at least -- another shot. We took a shot. We called our mutual friend. This is how, the way that I felt familiar with him because he was friends with my friends, Anand Upadhye and Alex Lowder, so

we called one of them and they both happened to be in the same place, so we talked to both of them on the phone.

Q. Were they also in the Seattle area?

A. They were in San Diego.

Q. Oh, okay. So, you were just calling them --

A. To say, "oh, I'm hanging out with Wacker" who we all know and --

Q. All right. So, what the individual's first name, your friend?

A. Anand and the other friend was Alex.

Q. Alex Lowder. And Anand's last name is?

A. Upadhye.

Q. Okay. How long does the phone -- is this just a quick phone call where you just say --

A. Yes.

Q. -- "hey, guess what? Here's what we're doing. Hope you're well."

A. Yes.

Q. All right. After that call is made, do you continue to sit at the bar and talk with Captain Wacker and --

A. After the phone --

Q. -- is there further drinking?

A. After the phone call, I don't have a memory of any -- that's when the night drops out for me and I don't remember stuff after that, only in blips.

Q. Let me ask you: When you went to the bathroom --

A. Yes.

Q. -- did you leave your glass of vodka/Sprite, did you leave that at the bar or did you take it with you?

A. I left it at the bar.

Q. Up to this point of the evening then, when your memory drops off, what is the totality of the alcohol that you have ingested?

A. I had been sipping on my vodka/Sprite, may have completed that. I don't even remember. And then

had taken two shots. That's it -- oh, and much earlier at the play, I'd had some of the beer or all. I don't remember.

Q. All right. Now, the shots, you say you had two shots.

A. Yes.

Q. When did you do two shots?

A. When we were sitting at the bar.

Q. All right. We talked about one shot before you went to the bathroom. When you returned from the bathroom, was there a shot waiting for you or did you order another shot?

A. I don't remember.

Q. Do you have any other recollection of interacting with Captain Wacker at Fin McCool's on this evening in Seattle in December of 2006 at the bar that we haven't talked about? Any other facts that you remember of your interaction with him at the bar?

A. No.

Q. Okay. In December of 2006, how old were you?

A. Twenty-six.

Q. How old are you now?

A. I'm 29.

Q. Okay. Did you drink in college?

A. Yes.

Q. You've had experience drinking before?

A. Yes.

Q. Had you ever had this type of reaction before, where after one beer, two shots, and the vodka/Sprite that your memory drops?

A. No.

Q. I want to also ask you whether -- and I should have asked this earlier and I apologize.

Were you on any medication at that time?

A. No.

Q. That evening that we're talking about now where

you're at Fin McCool's. Had you taken any medication earlier in the day?

A. Birth control would be the only thing that I was taking.

Q. Nothing else? Do you have ADD?

A. I was diagnosed with it, but at this point I hadn't been diagnosed with it.

Q. Okay. So, you weren't on any medication for that at this point?

A. No.

Q. All right. Had you had anything at your family's home, any alcohol; did you ingest any alcohol whatsoever before you went to Fin McCool's?

A. No.

Q. So, if I understand your testimony then, it's one beer in a bottle at the play that lasted an hour and a half after you'd had an evening meal with your family, one vodka/Sprite, and two shots?

A. Yes.

Q. Nothing else?

A. No.

Q. Any other substances?

A. No.

Q. I mean a prescription --

A. No.

Q. -- you covered that, just birth control.

All right. Do you have any other memory of interacting with Captain Wacker at all at that bar?

A. No.

Q. Do you know how you left the bar?

A. No. I mean, I can put it together, but I don't remember leaving the bar.

Q. Yeah. You've got to be very careful. I don't want you to speculate.

A. Right.

Q. What I want you to do as you're doing, is just

testify about what you actually remember, an actual recollection that you have; not -- don't assume and don't speculate.

What is the next memory you have of that evening?  
Where are you?

A. Can I explain something really quick?

Q. Yes, absolutely.

A. From here on out, I have like -- like a flash, like a picture, like if you just looked at a photograph, I have flash memories of everything that happened from then on.

So, I have flash memories and kind of can remember like my odd attempt to rationalize what was happening around me.

Q. Well, what's the first flash memory?

A. So, the first thing is I was trying to open my sister's door to her house.

Q. Do you have any memory as to how you got from Fin McCool's to your sister's house?

A. I don't have a memory of it, but I know what happened.

Q. All right. Well, how do you know what happened?

A. Because my car was still up at the improv place.

Q. Okay. All right. Do you have a recollection as to whether Captain Wacker drove you to your sister's house?

A. I don't remember him driving me to my sister's house.

Q. All right. So, then your first memory from Fin McCool's is you're at your sister's door at her house?

A. I have a flash of like consciousness of being frustrated, not being able to unlock the door, like get the key in and unlock the door.

Q. All right. What is the next recollection that you have?

A. And then the next thing is I'm standing in a corner, like a specific area of her room. I just remember being conscious and realizing I was about to throw

up and just puked all down -- I mean, I couldn't move. I couldn't run to the bathroom. I just puked all down the front of myself and into my boots, just all over myself. And then I sat on the side edge of her bed and I just laid down. I felt like I couldn't move. I just didn't -- I just didn't want to move. I didn't care that -- I remember thinking I just have to lay here and even though I realize now that I was covered in puke, I didn't care at all.

- Q. All right. What is the next memory you have? In that memory, is there anyone else there? Is your sister home? I mean, do you recall anybody being present?
- A. Nobody was home. I know that Captain Wacker was there, but he wasn't -- I just remember the puking.
- Q. All right. What's the next memory you have then after that memory?
- A. I remember he had me -- I was in the shower. I knew that I was in the shower and I couldn't -- I was like slipping around and unable to -- I was a mess. I know that I couldn't figure out why I was just such a mess. And I remember like slipping in the shower and grabbing the shower curtain and then it fell on top of me and I was naked in the bottom of the shower and I remember the moment of realizing like I go -- this is humiliating. I go to law school with this guy and he's seeing me naked and this is really embarrassing and thinking at the time like why is this happening, why am I doing this, like what's happening right now. And --
- Q. Well, do you have a memory -- was Captain Wacker in the shower with you?
- A. No.
- Q. Was he in the bathroom with you?
- A. He was in the bathroom. He -- I remember having a tooth -- like he had -- gave me a toothbrush and I don't have a toothbrush there at my sister's house and making me brush my teeth with it and I don't even know where that came from. And just flashes of this stuff, these things happening.
- Q. All right. Well, walk us -- and you're doing fine, Miss Cusack. Walk us through then. What is the



next chronological flash of memory you have?  
A. So --

Q. Do you need to take a break?  
A. No, as long as the court reporter can --

Q. The court reporter will be fine --  
A. -- understand me.

Q. Just take your time now. If you need to take a break, just let us know. Just take your time.  
A. So, the next part is I'm in my sister's bed and I just woke up and -- or like came to consciousness and he was on top of me.

Q. Who was on top of you?  
A. Sorry. Captain Wacker was on top of me and his --

Q. If your memory, can you describe --  
A. Yeah.

Q. -- is he clothed or not clothed?  
A. No, he's not clothed and I'm not clothed. I had a towel. I woke up -- well, I'll get to that.

Q. You know, you can use --  
A. Yeah.

Q. Miss Cusack --  
A. Okay.

Q. Miss Cusack.  
A. Yeah.

Q. All right.  
A. I'm good.

Q. Take your time now. I know that -- we're all adults here and we all understand there's a process in place, so just take your time. If you need a break, you let us know.  
A. Okay.

Q. If you are okay, let me know and I'll try to continue with the questioning.  
A. I'm okay.

Q. All right. Because, I mean, I have to ask you to

describe as well as you can what you were doing, whether you were clothed or not, what actions were taking place, that type of thing. So, could you please do that?

A. I was not clothed and I know -- that was because I -- only -- there was towel in the bed. I was not aware of this at that point though, but I was not clothed.

Captain Wacker was on top of me. He was not clothed and his penis was in my vagina, and I didn't know how any -- how it had got -- any of this had gotten there.

Q. Do you have any memory of having any consensual interaction with him in that bed --

A. No.

Q. -- before you have this consciousness of him being inside of you --

A. No.

Q. -- his penis inside of your vagina?

A. No.

Q. Do you have any memory whatsoever of ever consenting to him touching you in that manner?

A. No.

Q. What else do you recall?

A. I just -- I remember the same as I tried to describe before is that I wasn't having really rational thoughts. I can remember my rationalization at the time thinking how -- trying to figure out how I was in this moment. And I remember thinking, okay, I have to stop this. How am I going to stop this, and I don't remember exactly what I said, but I somehow communicated like we know or we go to school together. It was something odd that I know that I said, but that's the last thing I remember.

Q. After you said those words, did he say anything to you?

A. I don't know. I don't remember anything.

Q. All right. I understand. Just when I ask a question, it doesn't mean --

A. I know.

Q. -- you remember. I'm just asking your memories, so I appreciate your response.

A. What's the next thing that you remember?  
I woke up in the morning.

Q. Okay. When you wake up, who's there?

A. I think I woke up to no one because no one was there, but --

Q. Okay. Where are you when you wake up?

A. I'm in my sister's bed.

Q. Are you clothed?

A. I'm not clothed.

Q. What else is in the bed?

A. I have a towel that probably used -- was around my body initially and a towel that had been around my hair, I think. There were towels in my bed or in her bed.

Q. What about the floor area or the bed area? You mentioned you vomited earlier. Do you see any evidence of that?

A. I didn't get up for a long time.

Q. So, you remained in the bed?

A. I didn't see it. Right, I wasn't looking around.

Q. Do you know what time it was when you woke up?

A. No, I don't, but I -- I woke up because my sister had to come -- had to meet a plumber and I think she'd been texting me about it.

Q. Okay.

A. And so, she came to the house, to her house to meet a plumber.

Q. So, your sister came into the home?

A. Right, yes.

Q. Do you -- when she came into the home, did that -- were you awake at the time or was that the circumstance that woke you up?

A. I was in and out. I think she -- I had woken up before to a text and then went back to sleep and I woke up when she got there.

- Q.** Okay. So, you don't leave the bed?
- A.** I haven't got -- I'm sick. I am -- I've never been just sick like that.
- Q.** Okay. And that's why I want to ask that question. I want you to describe as well as you possibly can to the investigating officer your physical sense, how are you feeling. Start with your head, your body; you know, just as well as you can explain when you say you've never been that sick, what does that mean for you? What are you actually feeling?
- A.** I just felt crushed. I didn't -- I just couldn't get up. I couldn't walk. And when my sister came in, I attempted to get up because it's pretty absurd for her older sister to be laying in her bed naked in the morning when she comes back. I mean, I have a little bit more pride than that. And I know that I tried to get up and that's when I started puking again, and she dragged a full nasty disgusting garbage bag from the kitchen into the bedroom and I just laid with my head over the edge of the bed with my face in the garbage bag just puking. And eventually she went and got me something better to puke in, but it was -- I don't get sick like that in the morning.
- Q.** Well, have you ever had a hangover before after a night of drinking, you know, multiple alcoholic beverages?
- A.** Yes.
- Q.** All right. This feeling on the morning in December of 2006 that you're describing for us when you woke up, is that like a significant hangover that you had had in the past or is it different; and if it's different, do your best to explain how it was different?
- A.** It was about -- it was a hangover times ten, including someone smashing you over the back of the head with a baseball bat and feeding you rotten food. I mean, it was awful. It was different. And -- it was different.
- Q.** All right. Had you ever felt like that before?
- A.** No.
- Q.** Have you ever had anything like that -- have you felt like that since?

A. No.

Q. Eventually, do you have any conversations with Captain Wacker on that morning about what had occurred?

A. I don't remember.

Q. Because if I understand correctly, he's not there?

A. He's not there.

Q. And you don't see him that morning?

A. No.

Q. Your sister comes home and she helps you.

A. How long does it take for you to kind of recover? I eventually got back to my parents' house still sick and laid around their house for another day. I don't remember exactly when it ended, but it was significant to the point that I kept saying "you know, I didn't drink enough for this. I think I have food poisoning." And I kept telling my parents that. And at first they were like, oh, she's probably just hungover, and then eventually they realized -- they noticed that I was really sick.

Q. Let me ask you about the food poisoning that you just stated.

A. Do you recall what you had at your parents' home before you went out that night?

A. No.

Q. Did you eat with your parents?

A. Yes.

Q. Did they suffer from any food poisoning the next morning?

A. No. It wasn't food poisoning.

Q. Well, I --

A. I know. I know.

Q. But, Miss Cusack, all I'm asking is --

A. I know.

Q. -- did you share the same food?

A. Right, we did.

Q. All right. And how many people shared in that meal?  
A. At least -- my parents and possibly my sister. I don't remember.

Q. And yourself, right?  
A. Yes.

Q. Anybody else have that reaction the next morning that you just described for the investigating officer?  
A. No.

Q. All right. So, no one else in your family that had the meal complaining of food poisoning?  
A. No.

Q. Do you have an opportunity to while you're still on vacation -- first of all, and I know this is the Christmas holidays of December 2006. Do you have -- can you tell us -- do you know which day this occurred; do you know? Was it before Christmas or after?  
A. I don't know.

Q. Do you have an opportunity to talk to Captain Wacker after this occurs about that night?  
A. Yes.

Q. When's the next time you see him and you interact with him?  
A. There were two additional times that I saw him over that winter break and I don't remember which happened first.

Q. Okay. Well, just walk us through -- take one and talk to us about it, describe it.  
A. One of the days, there's this place called Izel's Chicken in Seattle that is really good and I remember grabbing it and texting him, like I've got chicken and we met up at a park and ate chicken.

Q. Okay. Now, when you do that, how many days after the incident with the alcohol is this that we're talking about and your reaction too?  
A. I don't remember.

Q. Do you think it was within a week? Do you think it was within two weeks?

- A. Probably within a week.
- Q. Did it ever -- did you have any questions as to whether anything untoward had occurred that night; in other words, do you have any questions with regard to whether Captain Wacker had done anything to have affected the reaction you had that caused you to vomit? Do you now what I'm asking? Did you have any concerns about Captain Wacker?
- A. I had -- in the back of my mind, I knew that what had happened wasn't right, that something had been off, and when I relayed the story to my friends, they were appalled, but I chose to -- I take responsibility for things. I thought it was my fault and I was embarrassed about it.
- Q. Yeah. And that's what I'm getting to. But at this point you didn't think to yourself that Captain Wacker had facilitated some sort of poisoning or drugged you --
- A. I never would have --
- Q. -- because you do see him everyday.
- A. Yeah, and he's friends with my friends and we go to law school together. There's no way that I would dream that up. I just didn't --
- Q. Right.
- A. -- would never have thought of that.
- Q. Because when you see him with regard to later on winter break and having chicken, this is a consensual interaction, correct?
- A. Yeah, yes.
- Q. And there's absolutely no -- and there was nothing untoward when you had lunch with him that day?
- A. No.
- Q. And then you saw him on a subsequent occasion in Seattle during the winter break before you'd come back to start law school in January of '07, correct?
- A. Correct.
- Q. What was the second interaction that you discussed?
- A. He was at a sports bar, grill near my sister's house and I was at her house. I stopped by and sat down with Captain Wacker and some of his friends and then

I left. It wasn't -- it wasn't a very long --

Q. And --

A. -- time --

Q. I'm sorry. Go ahead.

A. No, no.

Q. And by the time you come back to law school to start your second semester in January of 2007, by the time you get back to San Diego, it's two to three weeks after the night in which you vomited and had this interaction, correct?

A. I believe so.

Q. When you met with him in Seattle with regard to having the chicken, that one interaction --

A. Yes.

Q. -- was it like a daytime lunch or something?

A. Yeah, it was just meeting up.

Q. Okay. Did you talk to him about the night? Did you ask him any questions about, hey, what happened; I mean, that was --

A. I didn't think to ask him what happened --

Q. What --

A. -- so much because I -- well, I didn't know him very well and I was really embarrassed at this point and I was also really concerned about what he was going to go back to law school and tell people. I mean, in law school, you have, to some extent at least, you know, make sure that you don't sound like the slut of the school and I didn't know -- I was concerned that he would --

Q. Well, I guess --

A. -- make fun of me. He wasn't my loyal friend yet. I didn't know what --

Q. All right. So, I guess in response to my question, so you didn't go into detail with him for all the reasons that you just explained to the investigating officer, right? You didn't -- was it one of those kind of things that you didn't kind of like talk about? I mean --

A. I don't remember the conversations. I do know that



we joked about me puking on myself. I mean, that was joked about --

**Q.** Okay.

**A.** -- after the fact and joked about me falling the shower.

**Q.** Okay. The second interaction, is there any discussion during that time frame about what happened the night you were ill, vomiting?

**A.** No. There were people around.

**Q.** Okay. Is there anytime after you get back in January of 2007 and start your second semester where you ever sit down and ask Captain Wacker, hey, I want to know what happened that night or anything like that? Do you do that at all? And you may not have. I don't know. I'm just asking.

**A.** No.

**Q.** All right. Now, beginning in January of 2007 when you get back to law school -- first of all, were you in any sort of significant dating relationship with anybody?

**A.** No.

**Q.** When you did get back in January of 2007, did you start to see Captain Wacker consensually for the coming months romantically?

**A.** Yes.

**Q.** All right. You had consensual sexual interaction with Captain Wacker from January of 2007 through the next three to four months?

**A.** Yes.

**Q.** All right. Nothing untoward happened at all on any of those occasions and we're straightforward about that. That was -- I guess for lack of a better term, were you significant others? Was this a public dating special relationship or was this, you know, you've now gotten to know him a little bit and was it more of consensual sexual interaction --

**CC:** That's a very compound question.

**GC:** Yeah.

**IO:** Hold on. Let me help you.

Was this a mutually exclusive relationship?

**WIT:** I don't know if it was mutually exclusive --

**IO:** In your mind, was --

**WIT:** I wasn't sleeping with other people, but I didn't -- it didn't -- I left it open the possibility that he was at times maybe seeing --

**IO:** Okay.

**WIT:** -- sleeping with other people, but it wasn't discussed, but we were -- it was definitely a friends with benefits situation. It was not a relationship. We were not held out as dating.

**GC:** Absolutely.

And I apologize, Mr. Faraj, for not asking a more articulate.

**Q.** And that's why I wanted to talk about that. Because there's no questions about that. You didn't have any negative interaction with Captain Wacker, but for what you've already talked about in December up in Seattle. You continued to see him in the type of relationship you discussed for three to four months after you get back to law school, and there was never any sort of negative interaction whatsoever, right?

**A.** No.

**Q.** All right. In April of 2007, are you still seeing him at all at this point?

**A.** Yes.

**Q.** When did you stop seeing him?

**A.** It just stopped. I went to work for a judge in Alaska for the summer and it just stopped.

**Q.** All right. And when you stopped, it's not -- I guess, the law school year ends in May of -- first year ended in May of '07 and people left. Most law students go on summer jobs.

**A.** Right.

- Q. When you came back in late August of '07 to start your second year of law school, do you re-initiate any relationship with Captain Wacker?
- A. Just friends.
- Q. Okay. But no sex --
- A. Absolutely not.
- Q. -- potential sexual interaction or anything like that?
- A. Absolutely none.
- Q. Up to this point, let me ask you: Before you go in May of '07, your first year ends, had you become aware of any allegations of misconduct against Captain Wacker from a trip in New Orleans?
- A. No.
- Q. So, you -- when you leave for your summer of '07, you have absolutely no knowledge that there's been any complaint that USD levied against Captain Wacker, any allegations of any sort of improper conduct between himself and other students; is that right?
- A. That's right.
- Q. In May of '07, did you have any particular special relationship with Jessica Brooder?
- A. No.
- Q. Same thing with Elizabeth Easley, now Elizabeth Easley Cook; did you even know them in May of '07?
- A. I knew of them.
- Q. Did you have any knowledge that they may have been involved at least allegations of negative interaction with Captain Wacker at that time?
- A. No. I knew something had happened among people. I just knew something had happened on that trip. I knew nothing about it and I did not know that it involved Captain Wacker.
- Q. Okay. When did you first become aware of at least allegations involving Captain Wacker, maybe inappropriate conduct with fellow female students?
- A. I had gotten wind of it in the fall of '07, the fall of my second year. Probably late fall of my second year, I had gotten wind of something was going on

with him, but I -- with Captain Wacker, but I did not know -- I don't think I was aware of any rape allegation. I just knew something was -- he was dealing with something legally stemming from the New Orleans trip.

**Q.** Okay. When did you become aware of -- that the allegations may have involved potential sexual contact with either incapacitated or inebriated females?

**A.** That was through -- that was in January of 2008.

**Q.** Okay. So, that would be the January starting your second semester of your second year of law school?

**A.** Yes.

**Q.** How did you become aware of that allegation?

**A.** I know this is irritating. Possibly February. Sorry.

**Q.** Fine.

**A.** But --

**Q.** My point is this: How did you become aware of it? What information was communicated to you? And then once you heard that information, what did you do?

**A.** I -- we were -- a few of my friends and I were going to a Garth Brooks concert in LA, and I was in the car on the ride up with my friend Jessie Baxter, April Tatton, who at that time I wasn't really friends with. Jessie was friends with April. And Jessie and April had spoken previously -- basically Jessie said, "Hey, April, I think this is the time to talk to Nicole about what's going with Wacker." April had told Jessie the story of what happened with the other two girls and Jessie, knowing my story from winter of first year, said --

**Q.** And then I neglected to ask that. Your friend -- let me back up --

**CC:** There was an answer there by the witness and we'd like the answer to be complete.

**IO:** To be honest, I -- what I'd like to know is when is this conversation taking place? You're going to a Garth Brooks concern when?

**WIT:** It's January, February of 20 -- let's see -- 6, 7 -- of 8, 2008.

**Q.** And you're traveling in the same car with April Tatton and Jessie Baxter?

**A.** Yes.

**Q.** Jessie Baxter's the same friend that you told us earlier had been at the Wacker residence in December of 2006 when you came to pick her up and drive her to the airport.

**A.** Correct.

**Q.** I had forgotten to ask you this: After that interaction in December of '06 with Captain Wacker at your home when you vomited and things like that, did you tell anybody about that?

**A.** Yes.

**Q.** Who did you tell?

**A.** I definitely told Jessie Baxter, my roommate Talbot Theunissen, and my friend Alex Lowder, possibly others, but I know those three specifically because they're my closest.

**Q.** Okay. I'm going to have to ask you a couple chronological questions.

When did you tell them and what did you tell them with regard to what happened?

**A.** I told Jessie while still on vacation over the phone, I would say.

**Q.** December of 2006?

**A.** December, January.

**Q.** So, you're telling her within a few weeks of the incident what had occurred?

**A.** Within a week, I'd say.

**Q.** Okay.

**A.** And then I told -- I know I told Talbot probably when I returned to San Diego after the break.

**Q.** In January of 2007?

**A.** Yes. I told them -- I mean, I turned it into a story of like self-deprecating because it was so, to me, humiliating and unexplainable that I just

decided I'd make fun of myself before anyone else did. And I -- so, Jessie and Talbot both upon -- I remember and my friend Alex. Anyone I spoke to about it, their reaction was "ugh, that's screwed up."

Q. Did you tell them about the vomiting?

A. Oh, yes.

Q. Did you tell them -- when you relayed the story, did you tell them about the fact that you didn't understand how it occurred based upon the amount of alcohol you ingested?

A. Yes, I believe so.

Q. So, some of the -- the facts you've related to the investigating officer here today, were those some of the facts that you related to your friends in December of '06 and January of '07?

A. They were the same facts.

Q. Okay. All right. Now, and I apologize for not asking that earlier, but that gets us to this car ride where you're going up in either late January of '0 --

A. 8.

Q. '08, February of '08 with your friend Jessie Baxter and is it Miss Tal -- April Tatton?

A. April Tatton.

Q. Going up to see Garth Brooks.

A. Yes.

Q. Can you explain how in this ride up to Los Angeles, you know, just walk us through how the topic comes up and what is discussed amongst you -- and it's just your three; is that correct?

A. Jessie's roommate, Leah Air, was driving, but she doesn't know anybody in law school and she doesn't know what's going on.

Q. All right. So, just relate the subject matter of the conversation, what you discussed.

A. So, those two had had a conversation before, which based on, Jessie had always felt that something was wrong about that night the year before. And so, based on what April had told Jessie about the two

other girls, Jessie, knowing my story exactly, said, "You need to talk to Nicole because this is what happened to her." So, we're in the car and Jessie said, "Hey, April, I think you should talk to Nicole about this now." And Jessie was like "Nichol, will you tell April what happened?" Because I wasn't friends with April and she didn't know my story of my interaction with Captain Wacker.

So, between -- I told my story. She told her -- what had happened with those two girls, and between the two of us, it was just like, oh, my God. This is the exact same thing. This is --

Q. Okay. Well, let's back up one. When you say you told your story, did you relate to April Tatton kind of the facts that you've related here today in a similar manner, some --

A. Exactly the same.

Q. Okay.

A. And the same as what I told my friends when I got back to San Diego.

Q. What does April Tatton say in response -- were you the first one who relates the facts?

A. Jessie had me tell -- from what I remember, Jessie had me tell April because it was my story and I needed -- she wanted me -- she didn't want to share it for me. And so, I -- in telling April and April, as I'm telling it, starts -- I would say, you know -- out of nowhere, I threw up on myself, and April would be like "oh, my God. This is the same thing." And then the next -- I mean, I told her the whole story. And as I told it, she was just freaking out because she was like "this is what happened," and then she told me their story and it was not -- I always knew that something had been off, like you're not supposed to throw up on yourself and then have an encounter like that, but, I mean, I just wouldn't think that would happen.

Q. Okay.

A. So, I was shocked.

Q. What does April -- do you remember what April communicated to you with regard to -- was it about New Orleans?

A. Yeah.

Q. All right. Did she tell you who was involved there?

A. Yes.

Q. What did she -- who did she say was involved?

A. She said it was Captain Wacker and Jessica Brooder and Elizabeth, I'm going to say Cook. I mean, it was Easley. I know her as Easley. And, I mean, do you want me to tell you what she told me?

Q. Yeah. Why don't -- just do a brief summary because what I really want to ask is: When she gives you this brief summary of at least what she believes -- the information she's getting about New Orleans, I'm going to ask you: What did that cause you to do? Did you go to law enforcement? So, just give us a brief summary as to what April says back to you after you're done explaining what happened to you in Seattle in December of 2006.

A. April said that they all -- they were in New Orleans. They'd all gone out. That Captain Wacker had bought drinks for Jessica and Elizabeth and that one of them puked at the bar and that both of them were really out of control and out of character, and then he was the guy -- Captain Wacker was the guy who stepped up to take them home, offered to take them back to their hotel, and that he got a separate room and then at different points the girls -- like one girl saw the other one unconscious being raped and then the other one came to and left. That's about -- I mean, it was basically the thing that got me was that they were out of control, puking, both of them, and that then he had taken them somewhere alone.

Q. All right. And this is just April Tatton's version?

A. Right.

Q. What does that cause you to do? After you hear this, did you seek out any law enforcement? Did you go to the USD campus police? You know, what steps did you take after you received that information?

A. Nothing.

Q. Did you contact Liz Cook?

A. No.



- Q. Did you contact Jessica Brooder?  
A. No.
- Q. Did you ever have any conversations with them where you tried to see what their version of the events were, what their facts were?  
A. No, and I begged April not to tell anybody because I didn't want these two girls to know that I had relevant information, and they were fighting and I wasn't bothering to help because I knew.
- Q. That's what I want to ask you about. Let's talk about that.  
  
How long -- did you ask April not to say anything about your story?  
A. Yes.
- Q. Okay. Why did you ask her not to say anything at this point? This is now approximately February of 2008. Why did you ask her not to say anything?  
A. I had slept with him consensually after the fact. I had been friends with him for a long period of time after the fact. And I didn't say anything right away in Seattle. So, who's going to believe me? They're just going to drag me through the mud. Like what's -- why would I bother? No one was -- I mean, I just didn't think that it was likely that after consensually sleeping with him, I was -- anyone was going to care.
- Q. How long -- how long did you keep this information to yourself before you took another step forward?  
A. Well, during that little weekend when we went to the Garth Brooks' concert, it was sinking in and I was getting really angry that I had -- that I had let myself blame myself, but -- so, I started getting really angry that I'd been taken advantage of and that I'd been -- that I was -- had fallen -- like allowed myself to fall victim to this, so I started -- I told friends. I told friends like "he did this" and "this is what he's in trouble for and he did this to me," and I told a few of my friends that and they basically deterred -- I mean, I was basically told it probably wouldn't be a good idea to talk about it anymore for my sake and for Captain Wacker's sake.

Q. Okay. And, I mean, when do you actually formally come forward to some level of authority to let them know?

A. In the fall of 2008.

Q. In the fall of 2008.

A. Yes.

Q. Do you know when?

A. Probably October. I'm not sure.

Q. All right. And to whom was -- who did you come forward to? Besides, you know, I know you've talked about your friends and things like that.

A. Right.

Q. Who in the fall of 2008 did you --

A. J. R. Burge.

Q. Special Agent Burge from NCIS?

A. Yes.

Q. Did he contact you or did you contact him?

A. I told April -- I thought about it and waited, and I finally -- because April was calling, saying they -- you have information and they're going to want it if you know something, and so I was telling her I didn't want to get involved because I knew what was -- that I was going to be dealing with this. So, eventually I told her, "You can give him my phone number," and then he called me.

Q. All right. So, did April tell you in the fall of 2008 that it looked like now that the military authorities may be investigating?

A. Yes, something like that. I didn't really understand what was happening.

IO: Can I briefly establish --

GC: Yes, sir. Yes, sir.

IO: -- a time line here real quick? And I'm sorry for interrupting.

You go to the concert in, is it February, March?

WIT: January, February.

**IO:** I'm sorry. January, February. Initially during the car ride, you ask Nicole not to report it for the reasons you state --

**WIT:** Not Nicole.

**IO:** I'm sorry.

**WIT:** It's okay.

**IO:** You asked April not to report it. However, during that same -- I guess you went away for a weekend.

**WIT:** Yep.

**IO:** You're getting angry and then you say you go out one night and you start telling people at a bar? Is that -- you start talking about it?

**WIT:** No, I didn't say that, but that did happen.

**IO:** Is that that weekend?

**WIT:** It was not that weekend.

**IO:** Okay. So, then the next time you start talking about it is in the fall of 2008.

Any discussion of it between the concert weekend and when April finally convinces you --

**WIT:** Yep, yes.

**IO:** Okay. So, how much discussion is going on?

**WIT:** In the spring, maybe within a few weeks after that concert --

**IO:** Right.

**WIT:** -- I was realizing what was happening, and so I told a few people, a few friends. There was a time when we were at a bar in Pacific Beach and it was -- they were people who I was close friends with, but we were standing in a group, and I said, "Hey, did you guys know that he's in trouble for this" and "did you know that this happened to me?" And so, I completely believed these girls because the exact

same thing -- he did the exact same thing to me.  
And --

**IO:** When you said you realized what was happening, what do you mean by that? You said as time went by, you realized what was happening.

**WIT:** It was sinking in that I had ignored something that was glaringly wrong.

**IO:** Okay. So, the happening had to do with you, not with anything that was -- charges that --

**WIT:** Happening at that time, no.

**IO:** -- were going on with him? Okay.

Would it be better to say you realized what had happened as opposed to what was happening? Is that what you're saying?

**WIT:** Yes.

**IO:** Okay.

**WIT:** It was just -- the happening was the fact that it was sinking in and that I was going to have to deal with, I guess --

**IO:** All right.

**WIT:** -- the emotional repercussions.

**IO:** So, just to catch up. In the spring of 2008, you were at a bar and you were discussing it openly that you had heard about this and this is what he did to you; you were telling friends at a bar?

**WIT:** I had discussed it with probably three or four friends.

**IO:** And then after a period of time, April's calling you, telling you you need to talk about this and --

**WIT:** About six to eight months later.

**IO:** Right. In the fall. Okay. I'm sorry. There we go.

**Questions by the prosecution continued:**

Q. So, it's April Tatton --

A. Yes.

Q. -- that contacts you and she's aware now that there's still an ongoing investigation in some form?

A. Yes. And they had started calling people from school and we were aware of this and I was aware of this and --

Q. "They" being who? I mean, who's communicating --

A. At the time I didn't know who --

Q. Who's telling you -- let me back up, Nicole, so I'm clear.

A. Right.

Q. You know, we use a lot of they, them, him.

A. Sorry.

Q. All right. Who relates to you that they, being investigators, are starting to interview people at the school with regard to Captain Wacker's conduct?

A. I actually don't know who informed me of that, but I do know that Joe Gorman, my boyfriend, was getting calls.

Q. Okay. Do you know who he was getting calls from?

A. The investigator.

Q. Okay. Special Agent Burge?

A. Yes.

Q. All right. So, this is in the fall of 2008?

A. Yes.

Q. So, in the fall of 2008, you're now being made aware either through Joseph Gorman or April Tatton that there's still an ongoing investigation into Captain Wacker's conduct.

Let me ask you this: Did anybody tell you that it was now a military investigation, a Marine Corps investigation?

A. I don't remember.

Q. All right. And when did you come to the conclusion

or decision that you should be coming forward and meeting with the investigator to share the information that you had?

A. I talked about it with my boyfriend Joe a lot because -- and he was -- I mean, it was a hard decision. I would go back and forth because I knew that all of the consensual activity and the fact that I didn't come forward in the first place or figure it out in the first place, that this was going to be a hard process for me, and --

Q. And what do you mean by "hard process?" You mean the formal -- this right here, the formal questioning process?

A. The whole thing. I mean, if I -- the whole thing. People knowing, sitting in a courtroom, going and having to talk about this at end. It's all miserable, but the problem is that if -- for the safety of women out there and for the fact that the other two girls knew what had happened was wrong and I knew what was wrong, that what had happened to me was wrong, so for me to just sit on it, sit on information that was relevant and crucial to the right thing being done, I just couldn't -- I just sucked it up and --

Q. All right.

A. -- agreed to talk.

Q. All right. And I don't know if I'd asked this, but I'm -- and I apologize for jumping back, but my co-counsel indicated to me that I had failed to ask you whether you have any knowledge as to whether Captain Wacker cleaned up the vomit in your house in December 2006?

A. He did.

Q. How do you know that?

A. Because it was gone in the morning, and my sister, later in the day, she and her friend -- the garbage had blown over in front of their house and they were picking up all these paper towels all over the street and they realized like these stink and that he had -- basically he had cleaned it up with the paper towels and put it in the kitchen garbage and that there was -- that was -- I mean, she was like, "oh, God, there was puke everywhere. What is this?" And so, he had cleaned it. She didn't clean it.

I know I jumped around in that, but --

Q. Yeah, no. That was my fault and I apologize.

A. Let me ask you this: Since --  
Oh, and he washed my clothes.

Q. How do you know that?

A. Because they were clean and dry and folded on my bed, on my sister's bed in the morning.

Q. All right. And your sister didn't do that, to your knowledge?

A. She did not.

Q. Special Agent Burge interviews you in the late fall of 2008. Did you give a sworn statement --

A. Yes.

Q. -- in writing?

A. Yes.

Q. Is that the first formal statement you've given?

A. Yes.

Q. Is that the only statement you've ever given, written statement?

A. Yes.

Q. At anytime have you ever personally sat down with Jessica Brooder and talked to her about, hey, what happened to you and let me tell you what happened to me?

A. No.

Q. Have you ever done that with Elizabeth Easley Cook?

A. No.

Q. To this day?

A. Never.

Q. Have you ever seen their statements?

A. No.

GC: Sir, can I just have a moment?

Nothing further, sir. I'll tender --

**IO:** Hold on. I've got a question for you there, government.

Investigative Exhibit -- her statement to NCIS, is that a different statement than what you just asked her about?

**GC:** Let me see it.

**IO:** Yeah, the date's way off. That's why I --

**GC:** Yeah, yeah. I'll show it to her.

**IO:** You just asked her if she gave a statement in the fall of --

**GC:** Fall of 2008, yeah, and I'll just -- what is her statement?

**AGC:** It's IE-7.

**Q.** All right. Investigative Exhibit 7. Take a look at that.

**A.** Yeah.

**Q.** See if you recognize that statement.

**A.** I do.

**Q.** All right. And what's the date on the statement?

**A.** January 6th, 2009.

**Q.** And is that the statement you gave to Special Agent Burge?

**A.** Yes.

**Q.** When you say late fall of 2008, you're obviously inaccurate.

**A.** I'm sorry.

**Q.** January 2009?

**A.** Correct.

**Q.** Any other statements besides the document I just handed you?

**A.** No.

**Q.** Your first interview with him though was in December of 2008, right? Didn't you meet with him in a



**A.** question and answer session?  
I did.

**Q.** All right. And there was the January of '09 session where you actually put it in writing, it was typed out and you signed it?

**A.** Correct.

**GC:** All right. Thank you.

**IO:** If at anytime you need a break, just let us know.

**WIT:** Okay.

**IO:** Do you need a break?

**WIT:** Maybe.

**IO:** Do you want a break?

**WIT:** Yes.

**IO:** We're in recess for five minutes.

[The Article 32 investigation recessed at 1612, 13 April 2010.]

[The Article 32 investigation was called to order at 1619, 13 April 2010.]

**IO:** We're back on the record. All parties present when the investigation adjourned are again present.

The witness has resumed her place on the witness stand.

I'll remind you, ma'am, you're still under oath.

And for the record, I will note that it appears Captain Hur is going to conduct the cross for the defense.

**DC:** Yes, sir.

**CROSS-EXAMINATION**

**Questions by the defense:**

**Q.** Miss Cusack, are you still regularly using cocaine?  
**A.** No.

**GC:** Again, I object, Your Honor. May I excuse the witness?

**DC:** There's a good basis for that, sir.

**GC:** You know, let's excuse the witness.

**IO:** Is the government aware of the basis?

**DC:** Yeah, I don't see a need --

**GC:** Well, I'm glad you don't.

**IO:** Well, let's --

**GC:** It's like a 39(a) session.

**IO:** Is that your last question on that point?

**DC:** No. There's --

**IO:** Then let's excuse the witness temporarily.

The witness withdrew from the hearing room.

All parties held a discussion on the objection.

The witness entered the hearing room.

**Questions by the defense continued:**

**Q.** Miss Cusack, how much preparation have you had for your testimony today?

**A.** None, other than going back over a time line on my own to make sure that I'm not stumbling around up here.

**Q.** You created a time line of your own?

**A.** In my head.

- Q. Okay. Do you have anything written down like a time line?
- A. No, no.
- Q. And Lieutenant Colonel Sullivan, one of the other trial counsels didn't have practice questions with you?
- A. No, no.
- Q. You've never met with him to go over what you're going to say today?
- A. I've met with him, but not to go over what I'm going to say. Just to tell me where I need to be, what I need to do, and just where I need to be basically.
- Q. How many interviews with the prosecution have you had to discuss your testimony, if any?
- A. I just met with them several times, but not to discuss my testimony; only to tell them what happened in the first place.
- Q. And you've met with Special Agent Burge two times or more?
- A. I don't remember. I remember I met with him once in the fall of '08 and then I know I had to go out and do my statement. I don't believe I went out to the base any other time.
- Q. And when you met with Special Agent Burge, your interview was videotaped?
- A. I believe so. I don't remember.
- Q. And when you met with Special Agent Burge, he didn't tell you about any of the allegations of what had happened in April 2007 between these other girls, did he?
- A. No. I had to -- I knew only what people at school or April had told me.
- Q. So, Special Agent Burge, he never went over with you, you know, what had happened back in April 2007?
- A. No.
- Q. Okay. And it's your testimony today that you first had sex with Captain Wacker in late December 2006.
- A. Late December, early January, over winter break of that year, yes, but --

Q. Over the weekend --  
A. -- I would like to not characterize --

Q. I'm sorry.  
A. I don't -- it's hard for me because I know that the definition of sex is a penis in a vagina, but I have never -- if we're characterizing that as sex, that's fine.

Q. Okay.  
A. But not as consensual sex.

Q. You characterize it as rape.  
A. I do.

Q. And you first reported that you were raped by Captain Wacker in, I guess, early 2009?  
A. No. It was fall of 2008.

Q. Fall of 2008?  
A. Yes.

Q. To your friends?  
A. Oh, I see what you're saying. I thought you meant officially, like gave a statement to the investigator. The first time I ever said --

Q. You gave a statement to the investigator, law enforcement for the first time that you were raped in early 2009.  
A. Fall of 2008.

Q. Fall of 2008.  
A. Yes.

Q. You told your friends that you believed you were raped in late 2008?  
A. Early 2008.

Q. Early 2008.  
A. Yes.

Q. And before the first time that you and Captain -- well, you were raped by Captain Wacker, you'd actually gone out on two dates with him; is that correct?  
A. No, that's not correct.

- Q. You did not invite him to come over to a friend's house of yours?  
A. No.
- Q. I believe you call it Joey's; you didn't invite to come over to Joey's?  
A. Sorry. Joey's was a -- is a restaurant/bar on Lake Union in Seattle, and it wasn't a date because I invited probably 20 people and it wasn't a date of me and 20 people. It was just my friends and I knew that I told him I would meet up with him over winter break at some point, so I included him in the mass text that I sent out to everyone, but it certainly was not a date.
- Q. And then you met up with Captain Wacker on one other night before you ended up going to Fin McCool's with him the night of --  
A. No, that's not --
- Q. It was just the one night?  
A. Yes.
- Q. Okay. And the night, I'll just say, that you had sex with Captain Wacker, the night that you had sex with him for the first time, you went to the Jet City Improv?  
A. Yeah, if --
- Q. To see a play?  
A. -- that's the name of it, yes.
- Q. And then you went to Fin McCool's?  
A. Yes.
- Q. And then you went to an Irish pub afterwards?  
A. No. Fin McCool's was the Irish pub.
- Q. Fin McCool's was the Irish pub.  
A. Yes.
- Q. You didn't go anywhere else that evening?  
A. No.
- Q. Just the play and Fin McCool's?  
A. Yes.
- Q. And then afterwards, you went to your sister's

house?  
A. Yes.

Q. In your car?  
A. No.

Q. Captain Wacker had been to your -- Captain Wacker, before that evening, had never been to your sister's house?  
A. No.

Q. So, you told Captain Wacker how to get there?  
A. I assume so, yes, but I don't remember.

Q. Because there's no other way he could have gotten there, correct?  
A. That makes sense, yes.

Q. And at your sister's house, you said that you ended up naked in the shower?  
A. Yes.

Q. And that that was pretty embarrassing to you?  
A. That was embarrassing.

Q. Because you would never be naked in public or anything like that?  
A. No.

Q. Or ever tell anybody that you would like to be naked in public?  
A. Well, not that I can think of. I can joke about it.

Q. Sure.  
A. But not actually intend to be naked in public.

Q. And you said that you ended up vomiting in your house?  
A. I vomited on myself and on the ground --

Q. And Captain Wacker --  
A. -- in my sister's house.

Q. I'm sorry. What were you saying?  
A. It was my sister's house, but --

Q. It was your sister's house.  
A. Yes.

Q. And Captain Wacker ended up cleaning up the vomit?  
A. Yes.

Q. And he ended up washing your clothes and folding them for you?  
A. Yes.

Q. And you gave a written statement to NCIS as well, correct?  
A. Yes.

Q. And in your NCIS statement, as well as in the video, do you remember telling Agent Burge that you thought Captain Wacker was being a nice guy by folding up your clothes?  
A. Yes -- oh, sorry. Not necessarily about folding up my clothes, but for later --

Q. Cleaning up the house?  
A. Can I --

Q. Absolutely.  
A. Okay. For later -- I remember thinking that he seemed like what a nice guy, that I puked and he cleaned it and then he cleaned my clothes; how exceptionally -- most guys would probably think that it was gross.

Q. And then after that night, about a week later, you ended up going to a park with Captain Wacker where you guys had a picnic?  
A. Yeah, yes.

Q. And then a couple days after that, you went out to another restaurant with Captain Wacker?  
A. I met him. He was already there with people, and I walked in and sat down and then I left.

Q. You sat down with him and ate there?  
A. I didn't. I just sat with people while they hung out with his friends.

Q. Okay. But the picnic in the park, that was just between you and him?  
A. Yes.

Q. And the night that you first had sex with Captain Wacker, you did not wake up the next day and go "oh,

A. my God, I was raped?"  
No, I didn't.

Q. And you never called the police?  
A. No.

Q. And you did not immediately call or tell anybody in the world that you had just been raped?  
A. No.

Q. Not until a year and a half plus later did you tell somebody "I was raped?"  
A. That's true.

Q. And in between that time, you dated Captain Wacker for five months when you got back to law school at San Diego?  
A. I wouldn't characterize it as dating, but I was in a consensual sexual relationship with him, and I actually considered him a good friend.

Q. And he slept over at your house quite often?  
A. Yes.

Q. And you slept over at his place?  
A. Yes.

Q. And you went out on dinner dates with him during that time period?  
A. Sometimes, yes.

Q. And you did fondue with him in the evenings at your place sometimes?  
A. Yes.

Q. Sometimes at his place?  
A. Right.

Q. And while you were in this intimate relationship with him, that included the month of April 2007?  
A. Yes.

Q. In fact, it almost slipped my mind, but during your entire relationship with Captain Wacker, you engaged in a lot of G-mail chats with him, correct?  
A. That's true.

IO: For the record, the defense held up a package of what



appears to be about two inches thick.

DC: About an inch.

IO: About an inch thick. Okay.

GC: Yeah. And I think for the record, that was the documentation that was reviewed ex parte as part of the prior evidentiary ruling.

Is that correct, Captain Hur?

DC: Yes, sir.

GC: Roger. Well, at this time then I think we've --

DC: Well --

GC: -- well, I just want to address the investigating officer.

If we're going to go into any specifics with regard to the document that you just cited to the record, I'd like to be heard under 412 and excuse the witness one more time.

DC: Well, I don't think I'm going to cover anything that touches on 412 yet, sir.

IO: Let's hear the question. I can't cut him down without -- I can't object on a question --

GC: But you could request a proffer on a particular question. He's now going into the exhibits that we argued.

IO: I'm going to give him one chance.

GC: Roger.

**Questions by the defense continued:**

Q. Were you on any medication on the night that you first had sex with Captain Wacker?

A. No.

Q. Just prior to that incident, had you been in some sort of car crash where you needed to be in the

hospital for a month?  
A. No.

Q. Were you ever in the hospital for about a month at anytime in your life?  
A. No.

Q. Following a car crash?  
A. No.

Q. You were never hit by a drunk driver before --  
A. I was run over -- do you want me to explain it to you?

Q. Absolutely.  
A. Okay. I was run over by a drunk driver about -- when I was 21. It was about five years prior to any of this -- to the age of 26 where -- 2006. Do you understand? I was hospitalized the night of. I was in the emergency room and released early morning of the next day. I was injured.

Q. But you never spent a long period of time in the hospital ever?  
A. No.

Q. Did this incident happen in Florida or in Idaho?  
A. It happened in Idaho.

Q. Was there ever an incident where you were hit in Florida?  
A. No.

Q. Now, if I were to mention the terms "passed out" and "black out," do you know what I'm talking about?  
A. Yes, I do.

Q. And in your own words, what's the different between a pass out and a black out?  
A. Pass out is when you are laying unconscious.

Q. Right.  
A. Black out is where you don't remember.

Q. Right. And both can happen after you drink too much, right?  
A. That's true.

- Q. I mean, obviously, you've probably had many evenings, you know, since you're in college, where you've drunk alcohol before.
- A. Yep, that's true.
- Q. And would you agree that what happened that December 2006 night was a classic black out where you can't remember what happened?
- A. Absolutely not. It was completely different, otherwise I would not be here.
- Q. Well, it was completely different in that you found out about what Captain Wacker was accused of doing in April 2007, correct?
- A. No.
- Q. I'm going to ask then: How is you not being able to recall everything that happened -- well, let me back up.
- You cannot recall most of what happened that evening in December 2006, correct?
- A. Correct.
- Q. And have you ever had a black out before?
- A. Yes.
- Q. And when you had a black out before, you also couldn't recall what happened during an evening that you drank alcohol until you came to the next morning; is that correct?
- A. No, that's not exactly how I would characterize blacking out for me.
- Q. What happened in your other black outs?
- A. Well, I can't explain specific instances, but the difference was that this night, it was a memory drop off. With a black out, people can say, oh, this happened, and you're like I know I was there, but I don't exactly remember what was happening or you just forget a specific part of a conversation with someone, but I don't have a complete memory drop off where when I come -- flashes of coming to and I'm out of control of myself. With a black out, you can kind of remember things and know what happened, but not have just a physically out of control, physically ill, not knowing, being able to like take control of your body back and take control of the

situation at all.

I can -- I know the difference. I will admit that I drink, I drank in college, I drank in law school. I know how alcohol affects my body, and I know how much I can drink and how I will react, and I did not drink enough that night for this drop off or this experience. I've never had anything like that before and I've never had anything like that since, and it was just completely different from a black out.

Q. That evening you remember having at least an Irish car bomb.

A. I didn't -- I didn't testify that I don't remember that.

Q. You don't remember having an Irish car bomb?

A. No.

Q. Okay. Did you have a flaming Dr. Pepper?

A. I don't know. If it was a shot --

Q. Did you --

A. -- that I had, I don't remember.

Q. Do you remember having a vodka/tonic?

A. A vodka/soda, vodka/Sprite, vodka/tonic possible, but I'm -- I told you that -- I had testified earlier that I don't remember exactly what the drinks were.

Q. And when you were at Fin McCool's, Captain Wacker introduced you to a friend of his; do you remember that?

A. No. I believe his Irish bartender friend that he had discussed wasn't there.

Q. You weren't introduced to a woman by the name of Amber Davis?

A. I don't believe so.

Q. Do you remember sitting in a public place where there was lots of people around you?

A. I remember that that night there were not a lot of people around us. We were at the bar. There were people sitting over by -- over in booths in Fin McCool's, but I don't remember a lot of people being

around us at all.

Q. Has somebody told you that with regards to the other women in April 2007, that one of them tested positive for a date rape drug?

A. No.

Q. Okay. Would it surprise you to learn that nobody ever tested positive for date rape drugs?

A. I wouldn't know either way.

Q. Sitting here today, you are not saying that you were drugged, correct?

A. I believe I was drugged.

Q. You have no other -- you have no evidence other than just how your memory dropped off that evening, correct?

A. I have my physical experience of vomiting and not being able to control and wanting -- like not being able -- feeling like I couldn't move and feeling so ill the next day. I've never been that ill from drinking or I've never been that ill the next day, but I have no scientific evidence, sure, but I know from my experience that I'm positive that I was drugged.

Q. Now, during your relationship with Captain Wacker, did you ever -- did you ever get angry at him for flirting with other girls?

A. Sure, probably.

Q. Did you ever talk to Captain Wacker about getting so drunk that you couldn't remember what happened the next day?

A. Maybe.

Q. When I asked you "do you remember telling Captain Wacker that you got so drunk that you couldn't remember what happened," you said, "Probably," is that a yes or a no?

A. I don't specifically remember talking about that.

Q. So, you'll say you don't recall?

A. Okay. I don't recall.

Q. Do you remember telling Captain Wacker all sorts of intimate details about your personal life in the

course of your relationship?

A. I considered him a good friend, so I know that I did.

Q. Do you remember talking about very intimate and personal details from your own personal life that no one would know about except for yourself?

A. I think that anything I shared with Captain Wacker was something that my friends probably also knew.

Q. And that you had asked Captain Wacker on many occasions to come over and be with you?

A. That's true.

Q. You would beg him to come over and be with you?

A. Sure.

Q. And that you would converse with Captain Wacker at all hours of the day and night?

A. Well --

Q. Late hours of the morning -- or early hours of the morning?

A. Well, the thing about law school is that everyone lives on G-chat, so --

Q. I'm sorry. I mean, I'll allow you to explain more, but is that a yes?

A. It's poss -- I don't remember specifically --

Q. Okay.

A. -- but if I were doing homework, working on a paper, and he happened to be working on something up late, any other friend as well, we'd be G-chatting.

IO: Is that what you meant, government -- defense, by converse? Did you mean talk or did you mean communi -- could you be more specific --

Q. Right. Converse anyway: Talk, e-mail, chat?

A. Sure, but no different than any other friend.

IO: But I think the question was: Would you be --

WIT: Sorry.

IO: -- I mean --

Q. With Captain Wacker, do you remember?  
A. I'm sorry.

Q. Do you remember conversing with Captain Wacker in any means at late hours of the late or early hours of the morning?  
A. I don't specifically, but I wouldn't be surprised if I did.

Q. Did you tell Captain Wacker "I miss the smell of you on my bed?"  
A. I don't remember saying that.

Q. Would that surprise you if you did?  
A. No.

IO: Defense.

GC: Well, I'm just going to renew the 412, and I know Captain Hur's been very artful and I'm just --

IO: You've already established, she's already admitted --

GC: I mean --

IO: You used the word "bed," for him to come over and she agreed. It was not uncommon for her to beg for him to cover over. She's admitted she's given him personal private intimate details of her life --

DC: I'll move on to some other matters, sir.

IO: Okay. Thank you.

Q. And you asked Captain Wacker to explain his relationship with other females during this course of time that you were seeing him?  
A. I don't remember that, but if I --

Q. Would that surprise you --  
A. -- I don't remember that.

Q. -- if you did? If you confronted Captain Wacker --  
A. No.

Q. -- about being --  
A. No.

- Q. -- with other women?
- A. No, but we -- I recall specifically having a conversation about both of our freedom to do what we wanted with other people, but I would have -- I wouldn't be surprised.
- Q. And you're saying here today that it did not upset you when you learned that during the course of the time period that you and Captain Wacker were seeing each other from December all the way until late May '07, that's when you were seeing each other intimately, correct?
- A. Yes.
- Q. You're saying here today that it did not make you angry that during that time period you were intimate with Captain Wacker that you learned in April 2007 he had an intimate interaction with two other women?
- GC: I'm going to object to that and that's a mischaracterization of testimony. She admitted that she got jealous at times in one of the previous conversations and I think she just said that she may have --
- IO: I think what happened -- you can sit down. I think what happened was is you jumped ahead and inserted a fact that she hasn't admitted she was even aware of yet, so -- something about a relationship --
- Q. You admitted on direct that you were aware -- you found out later on when, I believe, it was Talbot told you; found out later -- or not Talbot, but April -- you found out later on from April that Captain Wacker had been in some form of intimate interaction, whether consensual or not, with Jessica Brooder and Elizabeth Easley, correct?
- A. Correct.
- Q. And you found out about that in about the fall of 2008, correct?
- A. Correct -- oh, spring of that year.
- Q. When you found out about that, that made you angry, correct?
- A. It made me angry for myself.
- Q. It made you angry for yourself. And that happened,



that incident that you learned of, you learned that it happened in April 2007, correct?

A. Correct.

Q. And between December 2006 and late May of 2007, that's when you were in this relationship with Captain Wacker?

A. Correct.

Q. Friend with benefits, as you called it.

A. Thanks, I appreciate that.

Q. So, that means that if Captain Wacker, in fact, were intimate with Jessica Brooder and Elizabeth Easley, he was seeing different women on the side while he was seeing you?

A. Again, I -- that would have been true, but as I said before, I at no point would have been surprised if he were sleeping with other girls, maybe not regularly, but randomly. We were not -- we were not exclusive.

Q. Okay. And so, if you were not exclusive with Captain Wacker, why did you challenge him about what he was doing with this other girl?

A. I don't know what you're talking about though.

Q. Okay. What I'm talking about is: Did you not communicate to Captain Wacker in April 2007, hey, what are these other pictures that I saw of you on Face Book with this other girl? Do you remember saying that to Captain Wacker?

A. I don't remember saying it, but I wouldn't be -- I wouldn't mind -- I wouldn't mind if you randomly without -- not people that were in my face. I wouldn't have cared if you were sleeping with other people, but sometimes, yeah, I was concerned about -- I was concerned because he was my friend and I wanted to know what was going on --

Q. So that I understand what you're saying --

A. -- however --

Q. Please continue.

A. However, when I found out about this over a year later, he was so far -- I didn't care about him at all. I didn't care what had happened while I was with him. It was so over that the last thing I

wanted to do was bring it back up or bring it to people's attention that I had been consensually involved with him. So, I mean, I didn't care what he did in the past. It was over. I didn't care about him, so.

Q. Except as you said -- help me if I'm mischaracterizing your testimony --

A. Yeah.

Q. -- you said if he saw somebody on the side, that wouldn't necessarily bother you, correct?

A. Not necessarily.

Q. But if he did it blatantly, like rub it in your face, that would bother you?

A. It would depend on the girl, honestly.

Q. And this was pretty blatant when you found out he did this New Orleans thing?

A. No, because no one even knew about it.

Q. Nobody knew about it? The whole law school wasn't talking about it?

A. No. I was such good friends with the guy and I didn't find out about it until a year later.

Q. You weren't hearing fourth and fifth gossip from the one L's, two L's, and three L's?

A. Nobody knew about it.

Q. What does "friends with benefits" mean?

A. It means that you consider someone a friend. You are able to interact with them as you would a male or female friend, regardless of -- so it's regardless of gender, but that you have kind of an unemotional sexual interaction with them, so you're not in a committed relationship.

Q. Okay. So, in an unemotional sexual interaction with somebody, would you agree that you had an emotional sexual -- would you agree that you had an emotional relationship with Captain Wacker --

A. Maybe --

Q. -- between December and May?

A. -- at times, maybe like sometimes, but not -- not a relationship, not my boyfriend, not -- you care

about your friend and you do care about -- yeah.

Q. He gave you -- when you asked for study materials, he got you study materials?

A. Yes.

Q. When you were sick, he came over and took care of you?

A. Yes.

Q. You talked to him about -- via G-mail chat and other communications and e-mails, you talked to him about, you know, things that have happened in your family?

A. Probably. He was my friend.

Q. You testified on direct that you didn't know how you ended up at your sister's house, correct?

A. Correct.

Q. You don't even know why Captain Wacker came inside, correct?

A. Correct. I mean, I -- specifically I don't remember why, but I do know that my sister had a really cool house and that I would often show people what a great set up it was for a college student, but I don't remember that. I don't remember at that time.

Q. And the way I was asking that jogged your memory that you had signed a NCIS statement where you talked about wanting to invite Captain Wacker in to go show your sister's house?

A. It didn't jar my memory. It's hard because when I'm answering questions, I can put together what happened and I can put together why things happened a certain way, but it's not neces -- I don't remember it happening specifically.

Q. You're just assuming?

A. An informed assumption.

Q. Assumptions. If we don't know something for sure, we assume, right? If you see a puddle of water on the ground here, the assumption is -- and there's no leak in the ceiling, the assumption is somebody must have spilled some liquid on the floor. Do you agree with that in the hypothetical?

A. Yes.

- Q. So, the assumption is that night you have blotches of memory, large chunks of your memory missing that night, correct?
- A. Yes.
- Q. So, you assume that, hey, because I've never drunken alcohol like this before, I assume that it must be drugs?
- A. But I had been drinking alcohol like that before, so --
- Q. In those quantities?
- A. -- I didn't -- I've had far more quantity of alcohol than what I had that night.
- Q. Yet you don't remember what you drank after Fin McCool's?
- A. I didn't go anywhere that I recall after Fin McCool's.
- Q. That you recall. For all you know, you could have gone to some other bar because you don't remember?
- A. I guess that's true.
- Q. It's possible. And it's also possible that for all you know, you and Captain Wacker at your sister's house could have began making out, correct, but you don't remember that?
- A. That's interesting that you say that -- or, fine, correct.
- Q. It's interesting that I say that because you threw up and then you made out; is that what you were about to say?
- A. No, no.
- Q. Okay. Fair enough.
- The point of the matter is: For all you know, because you have your memory missing is, you could have been kissing with him and you could have agreed to go have a relationship with Captain Wacker, a sexual relationship that began that night, but you forget yourself consenting to it because your memory is missing?
- A. That -- I don't believe that to be the case at all.
- Q. You don't believe it's the case because you don't

remember it?

A. I don't remember anything except those splotches, but in my rational -- like my rationalization in those moments, there was no -- there was no plan. There was no intent. There was no interest. When I went out in the first place to hang out with him, there was no interest in him like that.

Q. There was no interest in him like that, but then what happened that night you ended up having an emotionally invested and intimate relationship with Captain Wacker that extended all the way up until late May?

A. Not beginning that night by any -- no.

Q. At -- well, following that night, you didn't go to the police?

A. That's true.

Q. And the next interaction you had with Captain Wacker wasn't "I can't believe you did that to me;" you never said that to him, did you?

A. No. I was really confused about what had happened.

Q. The next interaction you have with him is a lunch date and a picnic -- a lunch date where you're having a picnic in the park.

A. I met up -- I considered it meeting up with a friend with food, yes.

Q. At a park by yourself?

A. In a public park, yes.

Q. Okay. A lot of time has past since December 2006, over three years, correct?

A. Yes.

Q. And would you agree with me that your memory was a heck of a lot fresher closer to the time period than it is over three years into the future?

A. Sure.

Q. And your memory was probably better in January 2009 when you gave a signed statement to the NCIS agent, correct, than it is today?

A. Sure, yes.

Q. So, if you wrote in your statement that "I decided I

could not drive and I was able to give him directions and he drove me there," but you can no longer remember that, would you just go with what your statement says?

**A.** I'll defer to my statement, but, again, I do have to say that what -- the way you had said to me earlier about informed assumption and the whole leaky and the informed assumption, when I was writing that statement, I don't know that I was really clear on exactly on what I know to be happened because I put it together and what I really specifically can and cannot remember.

**Q.** But you believe everything in your signed statement to be the truth?

**A.** I do.

**DC:** Sir, may we have a five-minute recess?

**IO:** Yeah. We're in recess.

[The Article 32 investigation recessed at 1742, 13 April 2010.]

[The Article 32 investigation was called to order at 1755, 13 April 2010.]

**IO:** We're back on the record.

The government is retrieving the witness one more time.

We had another discussion, this time regarding evidence that could require the witness to have to invoke her Fifth Amendment rights. We believe we've resolved the issue.

**GC:** Please resume your seat, Miss Cusack, on the witness stand, and I'll remind you that you continue to remain under oath and under cross-examination by Captain Hur.

**WIT:** Yes.

**DC:** Thank you, sir.

**Questions by the defense continued:**

**Q.** Have you graduated law school now?

A. Yes.

Q. From which law school?

A. University of San Diego.

Q. And have you taken and passed the bar?

A. I've taken the bar twice.

Q. Okay. California?

A. Yes.

Q. Any other states?

A. No.

Q. And however unlikely you may believe it to be, would you at least agree that sitting here today because of your blocks of memory missing, would you admit that it is possible, however unlikely it may be, that you did, in fact, consent through language or body to having sex with Captain Wacker that December night?

A. I cannot -- I cannot admit that.

Q. Can you agree that it's possible, but you can no longer remember?

A. Well, no.

Q. But you also -- you also say that you don't actually remember telling him no, correct?

A. I remember telling him no in some form. There was a form of stop or no or we can't do -- something along those lines. I verbalized something --

Q. You don't remember what you said?

A. -- but I don't remember exactly what I said.

Q. You don't remember what you said?

A. But --

Q. You don't remember pushing him off you or trying to push him off you?

A. No.

Q. And given that you don't remember exactly what you said, is it possible you didn't say it loud enough so that he didn't hear it?

A. No, and I woke up. I mean, I came to not moving. I mean, I was out. It wasn't like, oh, I'm coming

back to consciousness. It was -- I mean, I'm immobile.

Q. And your reaction to that happening was to go out on a picnic date with him instead of call 911?

A. I didn't understand what had happened.

Q. You knew what rape was when that happened --

GC: All right. We --

Q. -- the definition?

IO: Was that a question?

DC: It is a question.

IO: The question --

Q. Did you know what the definition of rape was that night?

A. Yes.

Q. And at that time you did not think that was rape, correct?

A. At the time I chose to -- at the time I chose not to acknowledge what had happened.

Q. Okay. So, the answer is: Yes, you did not think it was rape; is that correct?

GC: The answer is what she responded to the question.

IO: Hold on. The answer -- she gave her answer. What was your follow-up?

Q. My question was: You did not -- the day after that happened, you did not believe that you had been raped; yes or no?

A. I had not asked myself the question, so I did not not believe I had been raped.

Q. Not until the fall of 2008, correct?

A. I always knew that something had felt wrong about that, but I just chose to not acknowledge it, and when I found out -- when I realized how similar it was, I realized that I had to face it and deal with it.



DC: All right. I don't have -- I do have some additional questions, but I know everybody else wants to ask you some different types of questions before I ask my other questions.

IO: Government, any recross?

GC: No. I'm going to --

IO: Defer to me?

GC: Defer to you, yes, sir.

IO: I'm sorry. I've just got --

WIT: No, it's okay.

IO: -- a few follow-up questions and I apologize. My questions are going to jump all over because I try and let them ask their questions and then --

WIT: Okay.

IO: -- I'm just going to piecemeal this a little bit.

#### **EXAMINATION BY THE COURT**

##### **Questions by the investigating officer:**

Q. Unfortunately, I'm going to go right to the heart of the matter.

A. Okay.

Q. The incident itself in which you wake up and you find Captain Wacker on top of you, do you remember -- you said you were able to realize that his penis was in your vagina.

Do you associate any pain?

A. No.

Q. There's no pain?

A. No.

Q. Do you recall any issues with dryness or anything like that?

A. No.

Q. And I guess the next morning when you wake up, are you -- what is the position of your body in terms of did you move at all or were you still just laying on your back?

A. I don't remember.

Q. You don't remember. Do you remember if you were under the covers or above the covers?

A. I believe I was under the covers.

Q. So, that would have meant that -- when you woke up with him on top of you, do you believe you were under the covers at that point?

A. I do believe I was under the covers -- I was under the covers at that point.

Q. Okay. So, you were under the covers the whole -- so that when you woke up, you were basically at least under the covers, the same way you were when you woke up?

A. Well, it's a hard -- I -- during the course of the whole night --

Q. Right.

A. -- I would have -- I moved around --

Q. Sure.

A. -- in my sleep.

Q. Okay.

A. So, I wouldn't say that the position or situation I was in at the time of the sexual interaction with Captain Wacker would have been the same as --

Q. So, it's possible that -- it's possible that when you woke up and found him on top of you, you were outside the covers, and then after he left, you somehow ended up under the covers?

A. Yeah, sure.

Q. Okay. And the next morning when you wake up, you had talked about how you felt, but with regard to your body in terms of anything from forced sexual contact, did you have any pain from that?

A. I don't remember having any --

Q. Do you remember --

A. -- I don't remember having any.

- Q. Okay. A couple days later though, do you remember seeing any marks on your thighs or anything or any type of pain in that area of your body that would suggest that someone had forced themselves on you?
- A. No, and that's the different is that why I wouldn't -- if I had seen or felt something really violent, it would have -- it would have triggered more for me, but I was -- from what I can remember, is I was just laying. There was no like (inaudible) or anything.
- Q. So, then the answer's, no, you found no physical -- physical --
- A. No.
- Q. -- you neither felt nor found any signs of physical force on your body or felt any physical force on your body?
- A. Correct.
- Q. Now, on the day after, the day after --
- A. Okay.
- Q. -- not subsequent to that, did you feel at all that Captain Wacker had taken advantage of you?
- A. Yes, a little bit.
- Q. Now, those are my words, but is that how you felt?
- A. Yes. Like I said, I spoke to friends. I felt like something had been wrong, but you don't --
- Q. Okay.
- A. -- you don't have a girl who vomits on herself and then is not awake and then you engage --
- Q. I understand that. But my question is how you felt. Before you even talked to anybody --
- A. Right.
- Q. -- before, when you woke up that next morning -- well, let me ask you this: When you wake -- because when you make up the next morning, you recalled the incident. Did you at that point realize that Captain Wacker had taken advantage of you?
- A. At that point I wasn't clear on what had happened the night before. I was very confused.
- Q. Now, the -- when you and him would joke about you

throwing up and then falling in the shower, did you ever joke in front of other people about it?

A. Yes.

Q. What other people was those?

A. I don't know specifically. Fellow law students. There was a specific night at -- it's called Kwava Beach in Mission Beach where I remember relating the story to a table of people, leaving out the sexual aspect of it, and at that point I still didn't know him very well.

Q. Do you know the time frame of this Kwava Beach?

A. I would say within a month after.

Q. So, this would have been about February. So, in -- and this is my characterization. In February of '06, is this, or '07?

A. '07.

Q. '07, you're openly joking about the incident in the shower --

A. On my own, and I actually remember him seeming a bit uncomfortable about it, but I was saying, hey, I'm going to get this out here before he makes fun of me behind my back, really is what I was thinking. It's humiliating, so I approached it self-deprecatingly.

Q. It was an attempt at levity at the situation, right?

A. Correct.

Q. It wasn't a downer; hey, you weren't sharing --

A. No.

Q. -- sob stories? This was a --

A. No. I was saying, "oh, God, this happened." I mean, I chose to approach this --

Q. Okay.

A. -- with levity.

Q. Now, when you go to Alaska, do you have any contact with Captain Wacker while you're in Alaska?

A. E-mails sometimes. I think he wrote on my Face Book wall.

Q. Now, were these e-mails just hello/good-bye or were they the same type of interaction you had while you

were --

A. They were far less sexual. It was more like, "okay, hey, buddy" --

Q. Okay.

A. -- "how's it going up there?"

Q. By intimate, I mean personal. Were you still conveying personal thoughts and feelings in these e-mails or --

A. No, no, no feelings, and I wouldn't say really ever conveying, you know, feelings about -- like that I felt towards him?

Q. No, I didn't mean that. I'm sorry. When --

A. About my personal feelings?

Q. Right. When the defense was asking you questions, you admitted that you conveyed intimate details of your life, just in general, it may be inner thoughts, I guess is what I'm getting at.

A. Yeah.

Q. You know -- the word I'm looking for. You know, you were friends --

A. I can answer, yeah.

Q. Okay.

A. I think that even though I had no interest in being sexually involved with him anymore, I still thought he was my friend.

Q. Okay. So, the benefits part was stopped, but the friends part continued?

A. It was fine, yeah.

Q. Okay. Who was -- was April -- is her name Tatoon?

A. Tatton.

Q. Tatton. Was she friends with one of the two girls with the incident in New Orleans?

A. I know her to be friends with, I thought those girls, but I -- probably Jessica maybe.

Q. With Jessica?

A. I wasn't in that section, so I don't really know who was tight friends.

- Q. Now, when you're telling this story to numerous people, I guess, the first time in the car so to speak, are you as emotional as you are -- as you were today in the courtroom when you told them about this?
- A. No, because I had always just taken it as that weird night and it was -- there was a twinge of embarrassment and a twinge of shame because something felt wrong about it, but when I -- it was pretty neutral when I told April, and it was -- the emotions started setting in when I was realizing, really realizing that I had been --
- Q. On that particular -- that particular time in your life, who would say was your best friend?
- A. Probably Jessie Baxter.
- Q. Okay. And you did tell her?
- A. She knew from day one -- from within a week.
- Q. And when you told her, did you get emotional with her?
- A. No. It was more like "this happened," and she -- you know, when you tell your friend and you can tell that, as you're saying it, that it's something that wasn't quite right, and she always felt -- she always said that was not okay, this is not okay, that's not cool that you did that, and I just tried to -- I didn't want to deal with it.
- Q. Now, you referred -- unless I misunderstood you -- you referred to Joe Gorman as your boyfriend.
- A. Currently.
- Q. Current. When did he, would you say --
- A. Fall of 2000 --
- Q. 8?
- A. 8, yes.
- Q. And did that rela -- I mean, not only the relationship, but your communications with Mr. Gorman, did he discuss the incident in New Orleans?
- A. No. He didn't seem to really know much about it that I know of. The only -- he was good friends with Captain Wacker, so he knew of it, but --
- Q. Do you have any idea why he was getting called by

A. NCIS about the incident in New Orleans?  
At that point, yes.

Q. Why?

A. Because he had been such good friends with Captain Wacker.

Q. Okay. So, as far as you know, he was a character witness, not a fact witness?

A. I'm not sure why.

Q. Okay.

A. Like everyone was being called in at that point, just lots of people who weren't there basically.

Q. And on cross-examination, you admitted that you did get angry at Captan Wacker flirting with other girls.

A. A little bit.

Q. Okay.

A. My friend. I remember once he was hitting on my friend in a bar. I mean, I wasn't really happy about that. If only out of loyalty as a friend --

Q. I see.

A. -- to not hit on your friend. That's what I -- I remember being upset about that one. But, yeah.

IO: I have no further questions.

[The witness was warned, excused subject to recall, and withdrew from the courtroom.]