

NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

UNITED STATES)	GENERAL COURT-MARTIAL
)	
v.)	GOVERNMENT RESPONSE TO
)	DEFENSE MOTION TO EXCLUDE
Douglas S. Wacker)	EVIDENCE OF DRUGGING
XXX XX 3913)	
Captain)	1 November 2010
U.S. Marine Corps)	

1. Nature of Motion

The defense has moved to exclude any evidence or argument that the accused drugged anyone with any substance.¹ The government opposes the motion.

2. Summary of Facts

a. The charged offenses occurred on the night of 3-4 April 2007 in New Orleans, LA. During that week, approximately 20 law students from the University of San Diego, including the accused and two victims, Jessica Brooder and Elizabeth Easley, were in New Orleans for a volunteer service trip with an organization called the Student Hurricane Network. On the night of 3 April, the entire group met for dinner in the French Quarter, after which a smaller group (including the accused, Ms. Brooder, Ms. Easley, and Rebecca Barker, and 3-4 other students) stayed out to visit a series of bars along Bourbon Street in the French Quarter.

b. At one point in the night, the group visited a club called Razzoo on Bourbon Street. While at Razzoo, the accused offered to buy drinks for both Ms. Brooder and Ms. Easley. Ms. Brooder and Ms. Easley can remember little, if anything, of what happened that night after

¹ The defense motion consolidated several issues into a single motion and was entitled “DEFENSE MOTION TO EXCLUDE EVIDENCE: Nicole Cusack story, Adderall, date rape drug allegations, etc.” The government will respond to the separate issues raised in the defense motion via separate responses.

taking the drinks brought by the accused. Ms. Brooder was unable to recall anything until the next morning, other than a flash of Ms. Barker's face.

c. At some point while the group was at Razzoo, Ms. Barker began to notice that Ms. Brooder was exhibiting signs of severe intoxication. Ms. Barker observed Ms. Brooder swaying on the dance floor with her eyes closed. Prior to 3 April 2007, Ms. Barker had observed Ms. Brooder under the influence of large amounts of alcohol on multiple occasions and had never seen her act in this manner. Ms. Brooder told Ms. Barker that she couldn't see and then vomited on a table at the bar. Ms. Easley then helped Ms. Brooder go to the bathroom to throw up more, physically supporting her as they went into the bathroom. While the two women were in the bathroom, Ms. Barker asked the accused to make sure that they closed out their bar tabs and got home safely. The accused looked Ms. Barker in the eye and repeated her instructions.

d. Ms. Easley's memory of the remainder of the night consists of a series of brief "flashes." One flash includes Ms. Easley holding back Ms. Brooder's hair in the restroom at Razzoo while Ms. Brooder vomited. Another flash involves the accused handing drinks to Ms. Easley and Ms. Brooder in a daiquiri stand, presumably on Bourbon Street. In later flashes of memory, Ms. Easley was on a bed in a hotel room with a shadowy male figure on top of her. In these "flashes," Ms. Easley could recall visual details but no sounds or tactile sensation.

e. Ms. Easley eventually woke up on a hotel bed, looked over, and saw Ms. Brooder lying on an adjacent bed, on her back and not moving, with the accused lowering himself on top of her. Ms. Easley left the room, went back to the room she had been staying in with Ms. Brooder and Ms. Barker, woke Ms. Barker up, and eventually ran back to the room where the accused was with Ms. Brooder.

f. Ms. Easley pounded on the door for a long period of time before the accused answered wearing his boxer shorts. Ms. Easley entered the room and found Ms. Brooder lying unconscious and naked on the same bed where Ms. Easley had last seen her. Ms. Easley attempted to wake Ms. Brooder, who was still sluggish, incoherent, and required Ms. Easley to put her clothes on for her. Ms. Easley assisted Ms. Brooder back to their original room, where Ms. Easley and Ms. Barker helped Ms. Brooder put on a pair of athletic shorts before getting her into bed. Before Ms. Brooder got back into bed, Ms. Barker observed her talking nonsensically, unable to communicate coherently. Ms. Easley also attempted to call her boyfriend, Donald Cook. Mr. Cook described her speech during that conversation as slow, disjointed, fragmented, incoherent, and inconsistent with his prior experience with Ms. Easley on numerous occasions when she was intoxicated.

g. Both Ms. Easley and Ms. Brooder stayed in bed for most of the following day, rather than going to their volunteer job placements. Ms. Brooder felt a lingering sensation of intoxication and physical sluggishness which she testified was similar to “walking through water.” Both Ms. Easley and Ms. Brooder had body-wide muscle soreness when they woke up, for no apparent reason.

h. After Ms. Brooder sent the accused a distraught message saying that she didn’t know what had happened, the accused returned to the hotel from his volunteer job and gave a version of the night’s events to Ms. Brooder and Ms. Easley. The accused began by telling both women that “first of all, nothing happened.” He initially insisted that they had gone back to the hotel and rented an additional hotel room with the intention of having a “threesome,” but nothing happened beyond kissing. After Ms. Easley interjected that she recalled seeing Ms. Brooder naked when she returned to the room, the accused responded that “well, yeah, more clothes came

off, but nothing else happened” or words to that effect. The accused continued to insist that no further sexual activity had taken place.

i. Both Ms. Brooder and Ms. Easley booked early flights home from New Orleans on 4 April. During a lay-over in Charlotte, NC, Ms. Brooder went to the bathroom to check her tampon, which she had not replaced since the night before, and discovered that it was displaced so far up inside her vagina that it took 20-30 minutes to retrieve.

k. On the afternoon of 6 April, 2007, approximately 60 hours after the incident, at the suggestion of her boyfriend’s mother, Ms. Brooder submitted a urine sample to a private lab, San Diego Reference Laboratories (SDRL). SDRL performed a standard immunoassay screen for commonly abused drugs such as marijuana, cocaine, amphetamines, and opiates. SDRL did not screen for flunitrazepam (Rohypnol), gamma-hydroxybutyric acid (GHB), ketamine, scopolamine, or diphenhydramine (Benadryl).

j. On 21 June, 2007, the University of San Diego held a “Critical Issues Board” pertaining to the sexual assault complaint against the accused. At that hearing, the accused continued to insist that no sexual intercourse had occurred, either consensual or non-consensual, with Ms. Brooder.

k. Ms. Brooder saved the athletic shorts that her friends had put on her after she returned to her room in the early morning of 4 April 2007. She mailed the shorts to the New Orleans police department, who subsequently released them to NCIS. Forensic testing of the shorts by the U.S. Army Criminal Investigative Lab confirmed the presence of the accused’s semen on the crotch of the shorts.

l. In the spring semester of 2008, the accused held an internship at the U.S. Attorney’s office in San Diego. Joseph Gorman, another second-year law student at USD, held the same

internship. Throughout the semester, the coordinators of the internship program held a series of “brown-bag” lunches with speakers from within the U.S. Attorney’s office. On one such occasion, the accused and Mr. Gorman attended a lunch presentation by an attorney specializing in human trafficking. The speaker began his presentation by asking if anyone in the group knew what ketamine was. The accused immediately held up his hand and responded, “cat tranquilizer.” The speaker followed up by asking the accused a question to the effect of whether he knew what else the drug was used for, to which the accused responded “date rape drug.” After the accused’s second response, he briefly made eye contact with Mr. Gorman and immediately turned bright red and began sweating.

3. Discussion

Circumstantial evidence of drugging and evidence of the accused’s unusual knowledge of date rape drugs are directly relevant to the charged offenses.

The defense first argues that any suggestion of drugging by the accused on the night of 3-4 April, 2007, or at any other time should be excluded under MRE 404(b) because the act of administering an intoxicant *could*, hypothetically, have been charged under a different article of the UCMJ. However, when an act constitutes part of the same transaction or course of events as the charged offenses, it need not be charged in order to be admissible. An act that is part of the same course of events, or the “res gestae,” of the charged offenses, is not an extrinsic act under MRE 404(b). See *United States v. James*, 5 M.J. 382, 383 (C.M.A. 1978). The government does not need to bring every possible charge because, as the standard findings instructions in the Military Judge’s Benchbook indicate, “each particular fact advanced by the prosecution that does not amount to an element need not be established beyond a reasonable doubt. “

By way of illustration of this point, suppose that the government charged an accused with murder using some type of blunt instrument, and the government’s theory was that the accused

used an unloaded weapon as a blunt instrument. The government would not be obligated to charge the accused with possessing the weapon, or to prove beyond a reasonable doubt that the accused did use that specific weapon, in order to argue that the weapon was used in the charged offenses or show that the evidence could be consistent with the use of the weapon.

In the present case, there is ample circumstantial evidence supporting the theory that a drug could have been used on the night of 3-4 April 2007. Both Ms. Easley and Ms. Brooder experienced significant “lost time” beginning at exactly the same point in the evening, shortly after being brought drinks by the accused. Ms. Brooder told Ms. Barker that she “couldn’t see” shortly before throwing up. People who knew both victims well and had seen them intoxicated before, Ms. Barker and Mr. Cook, described both of them as acting incoherent and inconsistent with their normal intoxicated behavior in the morning of 4 April 2007. Both Ms. Brooder and Ms. Easley woke up on the morning of 4 April with severe symptoms, including muscle soreness, beyond a normal hangover. The accused’s willingness to lie to Ms. Brooder about whether any sexual intercourse took place suggests knowledge that something was affecting her memory. Ms. Cusack’s experience with the accused is eerily similar, describing “lost time,” uncontrollable vomiting, and losing muscle coordination in the shower (with the accused watching and laughing), before passing out and waking up with the accused on top of her, and then feeling sick for an entire day afterward.

Although Ms. Brooder did take a drug test approximately 60 hours after the charged offenses, the results of that drug test are of little value, both due to the amount of time passed since the likely time of ingestion of the drug and due to the fact that the lab did not test in any way for several of the most common “date-rape drugs,” including flunitrazepam (Rohypnol), GHB, and ketamine. It is the latter, ketamine, which is used legitimately in veterinary medicine

as an anesthetic (i.e., an animal tranquilizer), in addition to its illicit uses.² The accused's statements regarding the dual uses of this particular drug are more than mere "innuendo" as alleged by the defense- they are direct admissions that the accused had an unusually detailed knowledge regarding date-rape drugs, particularly for a law student with no medical or life science background.

In short, the circumstantial evidence that the accused had knowledge of particular types of intoxicating drugs, and that the symptoms of the alleged victims were consistent with having been drugged, provides a sufficient foundation that the fact-finder could conclude that a drug may have been used. Such evidence is relevant as part and parcel of the charged offenses, as the means by which the sexual assaults could have been accomplished.

The defense next argues that any evidence or argument pertaining to drugging should be excluded under MRE 403 as unfairly prejudicial. Although MRE 403 involves a balancing test, the balance is not carried out on an evenly weighted scale- MRE 403 is a rule of inclusion, and relevant evidence will be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice. Unlike extrinsic acts of bad conduct, introduction of evidence or argument regarding drugging carries little danger of unfair prejudice because the fact-finder will not find such evidence "inflammatory" if they are not reasonably persuaded that it happened.

The government could not locate any directly controlling case law dictating a particular outcome in a factual scenario such as this, where circumstantial evidence strongly suggests the administration of a drug but direct forensic evidence is absent. From unpublished cases, it appears that appellate courts consider the question of whether drugging evidence is admissible to be highly fact-specific, and will not disturb a reasoned decision by the trial judge in either

² <http://www.drugabuse.gov/infofacts/clubdrugs.html>

direction. See *United States v. Taylor*, 2009 WL 689877 (A.F.Ct.Crim.App.) (military judge properly allowed evidence and argument that multiple victims may have been drugged with GHB); *United States v. Moreno*, 2007 WL 2225991 (N.M.Ct.Crim.App.) (in Article 62, UCMJ appeal, military judge’s decision to exclude argument that victim was drugged was “not beyond the range of reasonable conclusions”).

Although neither *Taylor* nor *Moreno* is controlling, the fact that three women all experienced similar symptoms after being given drinks by the accused, and similar withdrawal effects the following morning, makes this case much more factually similar to *Taylor*. As in *Taylor*, evidence or argument relating to drugging, particularly in light of the accused’s own unusual knowledge of the uses of common date-rape drugs, could be helpful to the fact-finder in order to evaluate the testimony of the victims. Because the defense has not met its burden to show why any mention of drugging by the accused should be excluded, the defense motion should be denied.

4. Relief Requested

The government requests that the court deny the motion.

5. Evidence and burden of proof

The defense bears the burden of proof as the moving party. The government offers as evidence a letter from San Diego Reference Laboratories pertaining to the absence of testing for date rape drugs.

6. Oral Argument

The government respectfully requests oral argument on this motion.

E. S. DAY
Captain, U.S. Marine Corps
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served on the court and defense counsel on 1 November 2010.

E. S. DAY

San Diego Reference Laboratory

6122 Nancy Ridge Drive • San Diego • California • 92121 • (800) 677-7995

The Best in Price, Quality & Service

April 8, 2010

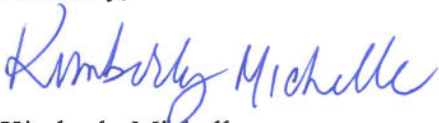
To: Captain E.S. Day, Trial Counsel
From: Kimberly Michelle, San Diego Reference Laboratory
Re: SDRL Accession: C656982

Mr. Day,

In response to your questions sent via email letter April 7, 2010;

1. It is our understanding that our client (through whom Ms. Brooder tested) is an outpatient substance abuse and counseling facility.
2. Immunoassay only: none of the tested substances were at a level that would cause the initial immunoassay to screen positive and then reflex to a GC/MS.
3. No tests were requested or performed for
 - a. Flunitrazepam (Rohypnol)
 - b. Y-Hydroxybutyric Acid (GHB)
 - c. Ketamine
 - d. Diphenhydramine (Benadryl)
 - e. Zolpidem (Ambien)
 - f. Scopolamine
4. None of the items in question 3 were requested or would trigger a positive result for the panel of tests requested or performed.

Sincerely,



Kimberly Michelle
San Diego Reference Laboratory

Club Drugs (GHB, Ketamine, and Rohypnol)

Club drugs are a pharmacologically heterogeneous group of psychoactive drugs that tend to be abused by teens and young adults at bars, nightclubs, concerts, and parties. Gamma hydroxybutyrate (GHB), Rohypnol, ketamine, as well as MDMA (ecstasy) and methamphetamine (which are featured in separate *InfoFacts*) are some of the drugs included in this group.

GHB (Xyrem) is a central nervous system (CNS) depressant that was approved by the Food and Drug Administration (FDA) in 2002 for use in the treatment of narcolepsy (a sleep disorder). This approval came with severe restrictions, including its use *only* for the treatment of narcolepsy, and the requirement for a patient registry monitored by the FDA. GHB is also a metabolite of the inhibitory neurotransmitter gamma-aminobutyric acid (GABA). It exists naturally in the brain, but at much lower concentrations than those found when GHB is abused.

- Rohypnol (flunitrazepam) use began gaining popularity in the United States in the early 1990s. It is a benzodiazepine (chemically similar to sedative-hypnotic drugs such as Valium or Xanax), but it is not approved for medical use in this country, and its importation is banned.

- Ketamine is a dissociative anesthetic, mostly used in veterinary practice.

How Are Club Drugs Abused?

- GHB and Rohypnol are available in odorless, colorless, and tasteless forms that are frequently combined with alcohol and other beverages. Both drugs have been used to commit sexual assaults (also known as "date rape," "drug rape," "acquaintance rape," or "drug-assisted" assault) due to their ability to sedate and incapacitate unsuspecting victims, preventing them from resisting sexual assault.
- GHB is usually ingested orally, either in liquid or powder form, while Rohypnol is typically taken orally in pill form. Recent reports, however, have shown that Rohypnol is being ground up and snorted.
- Both GHB and Rohypnol are also abused for their intoxicating effects, similar to other CNS depressants.
- GHB also has anabolic effects (it stimulates protein synthesis) and has been used by bodybuilders to aid in fat reduction and muscle building.
- Ketamine is usually snorted or injected intramuscularly.

How Do Club Drugs Affect the Brain?

- GHB acts on at least two sites in the brain: the GABA_B receptor and a specific GHB binding site. At high doses, GHB's sedative effects may result in sleep, coma, or death.
- Rohypnol, like other benzodiazepines, acts at the GABAA receptor. It can produce anterograde amnesia, in which individuals may not remember events they experienced while under the influence of the drug.
- Ketamine is a dissociative anesthetic, so called because it distorts perceptions of sight and sound and produces feelings of detachment from the environment and self. Ketamine acts on a type of glutamate receptor (NMDA receptor) to produce its effects, which are similar to those of the drug PCP.^{1,2} Low-dose intoxication results in impaired attention, learning ability, and memory. At higher doses, ketamine can cause dreamlike states and hallucinations; and at higher doses still, ketamine can cause delirium and amnesia.

Addictive Potential

- Repeated use of GHB may lead to withdrawal effects, including insomnia, anxiety, tremors, and sweating. Severe

withdrawal reactions have been reported among patients presenting from an overdose of GHB or related compounds, especially if other drugs or alcohol are involved.³

- Like other benzodiazepines, chronic use of Rohypnol can produce tolerance, physical dependence, and addiction.
- There have been reports of people binging on ketamine, a behavior that is similar to that seen in some cocaine- or amphetamine-dependent individuals. Ketamine users can develop signs of tolerance and cravings for the drug.⁴

What Other Adverse Effects Do Club Drugs Have on Health?

Uncertainties about the sources, chemicals, and possible contaminants used to manufacture many club drugs make it extremely difficult to determine toxicity and associated medical consequences. Nonetheless, we do know that:

- Coma and seizures can occur following use of GHB. Combined use with other drugs such as alcohol can result in nausea and breathing difficulties. GHB and two of its precursors, gamma butyrolactone (GBL) and 1,4 butanediol (BD), have been involved in poisonings, overdoses, date rapes, and deaths.

- Rohypnol may be lethal when mixed with alcohol and/or other CNS depressants.
- Ketamine, in high doses, can cause impaired motor function, high blood pressure, and potentially fatal respiratory problems.

What Treatment Options Exist?

There is very little information available in the scientific literature about treatment for persons who abuse or are dependent upon club drugs.

- There are no GHB detection tests for use in emergency rooms, and as many clinicians are unfamiliar with the drug, many GHB incidents likely go undetected. According to case reports, however, patients who abuse GHB appear to present both a mixed picture of severe problems upon admission and a good response to treatment, which often involves residential services.³
- Treatment for Rohypnol follows accepted protocols for any benzodiazepine, which may consist of a 3- to 5-day inpatient detoxification program with 24-hour intensive medical monitoring and management of withdrawal symptoms, since withdrawal from benzodiazepines can be life-threatening.³

- Patients with a ketamine overdose are managed through supportive care for acute symptoms, with special attention to cardiac and respiratory functions.⁵

How Widespread Is Club Drug Abuse?

Monitoring the Future Survey[†]

MTF has reported consistently low levels of abuse of these club drugs since they were added to the survey. For GHB and ketamine, this occurred in 2000; for Rohypnol, 1996. According to results of the 2009 MTF survey, 0.7 percent of 8th-grade and 1.1 percent of 12th-grade students reported past-year^{††} use of GHB, a statistically significant decrease from peak-year use of 1.2 percent in 2000 for 8th-graders and 2.0 percent for 12th-graders in 2004. GHB use among 10th-grade students was reported at 1.0 percent, an increase from 2008 (0.5 percent), and statistically unchanged from peak use of 1.4 percent in 2002 and 2003.

Past-year use of ketamine was reported by 1.0 percent of 8th-graders, 1.3 percent of 10th-graders, and 1.7 percent of 12th-graders in 2009. These percentages also represent significant decreases from peak years: 2000 for 8th-graders (at 1.6 percent) and 2002 for 10th- and 12th-graders (at 2.2 and 2.6 percent, respectively).

For Rohypnol, 0.4 percent of 8th- and 10th-graders, and 1.0 percent of 12th-graders reported past-year use, also down from peak use in 1996 for 8th-graders (1.0 percent), 1997 for 10th-graders (1.3 percent), and 2002 and 2004 for 12th-graders (1.6 percent).

Other Information Sources

For more information about club drugs, visit www.clubdrugs.gov, www.teens.drugabuse.gov, and www.backtoschool.drugabuse.gov; or call NIDA at 877-643-2644. For street terms searchable by drug name, street term, cost and quantities, drug trade, and drug use, visit <http://www.whitehousedrugpolicy.gov/streetterms/default.asp>.

Data Sources

[†] These data are from the 2009 Monitoring the Future survey, funded by the National Institute on Drug Abuse, National Institutes of Health, Department of Health and Human Services, and conducted annually by the University of Michigan's Institute for Social Research. The survey has tracked 12th-graders' illicit drug use and related attitudes since 1975; in 1991, 8th- and 10th-graders were added to the study.

^{††} "Lifetime" refers to use at least once during a respondent's lifetime. "Past year" refers to use at least once during the year preceding an individual's response to the survey. "Past month" refers to use at least once during the 30 days preceding an individual's response to the survey.

Resources

¹ Anis NA, Berry SC, Burton NR, Lodge D. The dissociative anaesthetics, datamine and phencyclidine, selectively reduce excitation of central mammalian neurons by N-methyl-aspartate. *Br J Pharmacol* 79(2): 565–575, 1983.

² Kapur S, Seeman P. NMDA receptor antagonists ketamine and PCP have direct effects on dopamine D2 and serotonin 5-HT2 receptors – Implications for models of schizophrenia. *Molecular Psychiatry* 7: 837–844, 2002.

³ Maxwell JC, Spence RT. Profiles of club drug users in treatment. *Subst Use Misuse* 40(9–10):1409–1426, 2005.

⁴ Jansen KL, Darracot-Cankovic R. The nonmedical use of ketamine, part two: A review of problem use and dependence. *J Psychoactive Drugs* 33(2):151–158, 2001.

⁵ Smith KM, Larive LL, Romanelli F. Club Drugs: Methylenedioxymethamphetamine, flunitrazepam, ketamine hydrochloride, and γ -hydroxybutyrate. *Am J Health-Syst Pharm* 59(11):1067–1076, 2002.