

UNITED STATES MARINE CORPS
WESTERN JUDICIAL CIRCUIT

UNITED STATES)	
)	GENERAL COURT-MARTIAL
v.)	
)	DEFENSE RESPONSE IN OPPOSITION
Douglas Wacker)	TO GOVERNMENT MOTION TO
Captain)	EXCLUDE EXPERT TESTIMONY
U.S. MARINE CORPS)	
)	(OB-GYN)
)	
)	19 October 2010
)	

1. **Nature of Motion.**

This is a defense response brief in opposition to the Government’s motion as referenced in the caption. The defense asks that the Government motion be denied.

2. **Summary of Facts.**

- a. The Government retained CAPT Leininger, USN for the defense to potentially testify at trial as an expert witness in this case.
- b. Accuser Jessica Brooder alleged that she believes Capt Wacker had intercourse with her in a hotel room off of Bourbon Street in New Orleans because a tampon was found inserted into her vaginal canal a short time thereafter.
- c. CAPT Leininger opined that such a device could navigate up the vaginal canal absent sexual intercourse; implying of course that Capt Wacker did not have sexual intercourse with Jessica Brooder as she claims.
- d. On 24 March 2010, Dr. Leininger opined to the defense counsel via email after being sent the sworn statement of Jessica Brooder to NCIS. Emphasis added:

In follow-up to our conversation on 22 Mar 2010, a tampon may end up deeply placed (or high up) in the vaginal canal for several reasons. Sexual intercourse can displace (sic.) the tampon deeper inside, as can other kinds of sexual

activity (digital manipulation, use of foreign objects). In other cases, some individuals will insert a second tampon, forgetting they already had a tampon in place, thus forcing the first tampon higher up the canal. Another potential reason might include anatomic distortion (due to tumors or rectal distension) of the vaginal canal that pushes the tampon up the canal. And, some patients report being unable to retrieve tampons in the absence of any identifiable cause (so they see their doctors for assistance), suggesting migration up the canal due normal physical activity.

Of note, I was unable to find any research literature on this topic, so the opinion here is based on clinical and anecdotal experience. **I reviewed this reply with 5 of my colleagues, all Board Certified ObGyns (I did not share any details of the case), and they concur with this opinion.**

3. **Discussion.**

A. THE GOVERNMENT RETAINED THE OBGYN EXPERT FOR THE DEFENSE AND THEY CANNOT NOW EXCLUDE US FROM USING THAT SAME EXPERT.

“(A)n accused servicemember has a limited right to expert assistance at government expense to prepare his defense.” United States v. Ndanyi, 45 M.J. 315, 319 (CAAF 1996).

“(T)his Court articulated a three step test for determining whether such government-funded expert assistance was necessary, as follows: There are three aspects to showing necessity. First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop.” United States v. Ndanyi, 45 M.J. 315, 319 (CAAF 1996).

Case law from CAAF indicates that “Where the Government has found it necessary to grant itself an expert and present expert forensic analysis often involving novel or complex scientific disciplines, fundamental fairness compels the military judge to be vigilant to ensure that an accused is not disadvantaged by a lack of resources and denied necessary expert assistance in the preparation or presentation of his defense.” See United States v. Lee, 64 M.J. 213 (CAAF

2007) and United States v. McAllister, 64 M.J. 248 (CAAF 2007) for the same analysis regarding defense experts. See also United States v. Warner, 62 M.J. 114 (CAAF 2005), which held that the

US v. Lee, supra means that the defense must get comparable experts because the Government has enjoyed its own experts. Since the Government is going to put on testimony that the fact that a tampon was found is indicative of intercourse, then in all fairness the defense should have an equal opportunity to rebut that inference. For example, See RCM 913(c), explaining the presentation of evidence in rebuttal and surrebuttal of an opponent's case during trial.

The case of United States v. Sanchez, 65 M.J. 145 (CAAF 2007) articulated the so called Daubert test for admitting an expert witness to testify. Sanchez explained that MRE 702 dictates the admissibility of expert testimony. Sanchez said that the rule permits expert testimony in the form of an opinion or otherwise only if the testimony: (1) is based upon sufficient facts or data, (2) is the product of reliable principles and methods, and (3) the principles and methods have been applied reliably to the facts of the case. Sanchez said that the requirement that a scientific theory be generally accepted in the scientific community has been rejected, and the trial court has a gatekeeping role.

Here the Government is attacking the admissibility of testimony from the VERY SAME expert it obtained for the Defense upon request. This seems unfair. With one hand, the Government provides the defense with a witness under RCM 703(d), and then the Government seeks to deny the same witness with the other hand.

Applying the Daubert factors as articulated in Sanchez, Dr. Leininger's testimony is still admissible. First, his testimony is based upon sufficient facts or data: Leininger reviewed the statement of Jessica Brooder in this case and her depiction of the tampon located in her vaginal canal. Dr. Leininger then reviewed the medical literature for any reference if such a case (he

couldn't find it), he then consulted with 5 medical doctor OBGYNs and his own extensive clinical experience before opining. Second, his testimony is the product of reliable principles and methods: Dr. Leininger's opinion was peer reviewed by 5 of his OBGYN (all licensed and board certified medical doctors) peers. There was nothing more Dr. Leininger could have done to substantiate his opinion. Finally, the principles and methods have been applied reliably to the facts of the case because Dr. Leininger is a trained OBGYN with extensive experience and he has used his own training and experience to opine as to Ms. Brooder's condition in this case. Applying the Daubert factors, Dr. Leininger's opinion is admissible as expert testimony.

Regarding trial counsel's point that Dr. Leininger's opinion is based more on his clinical experience and peer review than medical literature; the defense points out the case of United States v. Elmore, 55 M.J. 533 (NMCCA 2001). In Elmore, the military judge did not abuse his discretion in admitting the testimony of a handwriting examiner—even where there was no literature or scientific test to support it. Elmore found that although the military judge did not employ the flexible Daubert analysis, but instead relied upon a more traditional analysis under MRE 702, we find that the field of handwriting analysis is generally valid and reliable and may properly be admitted in trials by court-martial. Elmore points out that the military judge has wide discretion as the gate keeper to allow this expert testimony. The testimony here should be allowed because of Dr. Leininger's credentials, his significant experience in this field and the fact that this will help the members better understand a fact at issue in the case.

4. Relief Requested. The defense respectfully requests that the Government's motion, which is the subject of this response brief, be denied in full and that the defense be allowed to direct examine Dr. Leininger on his opinion concerning the alleged tampon allegedly found on Jessica Brooder.

5. **Burden of Proof.** The burden of proof is on the Government, as the moving party of its own motion. The burden is preponderance of the evidence.

6. **Argument.** The defense desires oral argument.

7. **Evidence.** The defense requests the following witnesses and evidence. All witnesses' full names and contact information are believed to be in the possession of the trial counsel.

- ENCLOSURE A: CV OF DEFENSE OBGYN EXPERT
- ENCLOSURE B: OPINION OF DEFENSE OBGYN EXPERT
- ENCLOSURE C: GOVERNMENT APPROVAL OF OBGYN EXPERT
- ENCLOSURE D: JESSICA BROODER STATEMENT

The foregoing pleading was served via electronic means on the opposing counsel and court on this date: 19 October 2010

/s/

Capt C. P. HUR
Defense Counsel