

UNITED STATES MARINE CORPS
WESTERN JUDICIAL CIRCUIT

UNITED STATES)	SPECIAL COURT-MARTIAL
)	
v.)	DEFENSE RESPONSE TO
)	GOVERNMENT MOTION IN LIMINE
Douglas Wacker)	(Cusack Drug Use)
Captain)	
U.S. MARINE CORPS)	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.

2. **Summary of Facts.**

- a. Capt Wacker is not facing any charges related to Ms. Nicole Cusack, even though her claims were investigated at an Article 32 and consciously withdrawn and dismissed as charges by the convening authority after the 32 officer said that Ms. Cusack’s testimony was incredible.
- b. The Government has given Capt Wacker notice that it intends to introduce Ms. Cusack’s allegations in this case that she was sexually assaulted by Capt Wacker on the first night the two begin an intimate relationship that lasted for several months from December 2006 until almost mid 2007.
- c. The Government now seeks to prevent Capt Wacker from cross examining Ms. Cusack about her criminal drug use during their months long dating relationship.
- d. Ms. Cusack regularly used cocaine and other illegal drugs during law school, which she attended with Capt Wacker.

- e. Ms. Cusack regularly used cocaine when the incident with Capt Wacker occurred.
- f. Cocaine affects the ability of a person to accurately remember events.
- g. Cocaine use results in paranoia and hallucinations where a user falsely believes events that did not occur, actually occurred.
- h. As a prerequisite for being admitted to law school or becoming a member of the bar, many states require an applicant to disclose their criminal history and abuse of illicit and controlled drugs.

3. **Discussion.**

A. IF NICOLE CUSACK IS ALLOWED TO TESTIFY ABOUT CHARGES THAT HAVE BEEN DISMISSED, THEN CAPT WACKER DESERVES THE OPPORTUNITY TO IMPEACH HER.

Drug use that affects a witness's ability to recall events is impeachable at trial in the military courts. If a military judge does not allow an accused to impeach a witness about drug use that affects memory and recall, then it is error. U.S. v. Williams, 40 M.J. 216, 218 (CMA 1994), emphasis added, held:

Evidence of Brown's drug use on the night in question was certainly relevant to and probative of Brown's ability to accurately remember the events of November 11, 1989. Mil.R.Evid. 401 and 402. Nevertheless, the military judge excluded the evidence as being substantially more prejudicial than probative under Mil.R.Evid. 403, with no explanation as to why. If the military judge's ruling was based on potential prejudice to the Government's witness, he erred. By definition, effective impeachment evidence should be prejudicial to a witness. If the judge's ruling was based on potential prejudice to the accused, he erred again. While evidence Brown used drugs on the night of the robbery might have implied he used them with appellant or otherwise reflected negatively upon appellant, appellant was the proponent of the evidence and waived objection to any adverse inferences from such evidence. The military judge incorrectly applied Mil.R.Evid 403 to exclude evidence of Brown's drug use.

The Defense believes that the cases cited by the Government don't appear to be relevant to

this issue or are distinguishable. The Government's cited U.S. v. Holmes, 39 M.J. 176 (CMA 1994) stands for the proposition that the Government may not use an accused's use of marijuana 18 years prior to convict the accused for contemporary marijuana allegations. Here, the Defense seeks to use Ms. Cusack's cocaine use that occurred during the 6 month time period she had an intimate relationship with Capt Wacker. This cocaine use affects Ms. Cusack's ability to accurately recall events.

Also, the Government's cited U.S. v. Pierce, 14 M.J. 738 (AFCMR, 1982) held that while asking an accused about his marijuana use years prior exceeded the scope of the direct examination, the error was not so harmful that it required the conviction to be overturned. The Defense read was that Pierce was a case that concerned the sale of marijuana, but not necessarily the use. Spillover isn't at issue with Ms. Cusack (who shouldn't be allowed to testify about uncharged misconduct against Capt Wacker that was dropped post Article 32 anyway). Ms. Cusack is the accused, who is at risk of suffering from any spillover like Capt Wacker might be as an accused. What's at issue with Ms. Cusack's testimony is that she used cocaine (a drug that causes memory loss and hallucinations) during the period she is going to testify about. There also exists a strong likelihood that Ms. Cusack has lied previously to others about her drug use.

Finally, the Government's cited "United States v. Kizer, 569 F.2d 504 (9th Cir. 1978) (defense not allowed to question witness on drug addiction and treatment unless it went to accuracy and reliability of recall)"; actually supports the Defense's proposition that Ms. Cusack be impeached because cocaine use degrades the ability of the mind to remember. Again, cocaine use also causes paranoia and hallucinations. The defense deserves the right to ask Ms. Cusack if she was using cocaine during the event of December 2006, the several months thereafter that she and Capt Wacker dated and had regular consensual sex, and also if she is (or has recently) still using

cocaine. Ms. Cusack invoked her 5th amendment right regarding her current or recent cocaine use during the Article 32 hearing.

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 impeach Ms. Cusack about her prior drug use if she is to testify.

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.

- NICOLE CUSACK
- EXHIBIT A: SCHOLARLY ARTICLES

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