

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 ACCUSED'S DRUG USE
XXX XX 3913)	AND NICKNAME
Captain)	
U.S. Marine Corps)	1 November 2010
)	

1. Nature of Motion

The defense has moved, pursuant to various rules of evidence, to exclude evidence of illegal prescription drug use by the accused, and of the accused's nickname, "Creepy Doug."¹ The government opposes the motion in part. The government does not intend to introduce evidence of either matter during its case-in-chief; however, the government may either introduce evidence of these matters in rebuttal or ask relevant questions to defense character witnesses in order to test the foundation of their opinions of the accused or his reputation.

2. Summary of Facts

In addition to the summary of facts provided by the government in its response to the portion of the defense motion addressing a prior sexual assault of Ms. Nicole Cusack, the government provides the following:

a. During the spring of 2007, Ms. Cusack had a prescription for Adderall. Adderall is a combination of amphetamines and is a Schedule I controlled substance which is sometimes prescribed for conditions such as attention deficit disorder.

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.

b. On 25 April, 2007, Ms. Cusack went to a Costco, along with the accused, to refill her prescription. After Ms. Cusack picked up more Adderall, the accused took some of her Adderall. Later that day, the accused and Ms. Cusack discussed Adderall via a Google “chat.”

From: Douglas Wacker <douglas.wacker@gmail.com>
Date: Wed, Apr 25, 2007 at 7:52 PM
Subject: Chat with Douglas Wacker
To: nicole.cusack@gmail.com

7:35 PM me: Thanks for going with me to Costco...I meant to give you some adderall. Let me know when you want some...you may want to wait until closer to finals...I don't know what will work best for you. Just let me know.

Doug: It's working great for me...

7:36 PM I could never take it during a class though...

me: Seriously? Are you sure it's not a placebo affect>

7:37 PM ?

Doug: yes.

me: It should have worn off by now. Unless you're more sensitive to it than I am

Doug: I haven't been tired all day.

no, it's basically done now, maybe a little residual, but I'm already in the groove now.

7:38 PM me: good. that's exactly how it supposed to be helpful.

c. The accused did not have a prescription for Adderall.

d. On 21 June 2007, the University of San Diego held a “Critical Issues Board” relating to the offenses that occurred in New Orleans. During that administrative hearing, which was recorded, the accused stated that “I am a Captain in the Marine Corps and I have never used drugs myself” and later “If I were to be found with a drug on me then that would basically ruin my career. And I do not – I don’t take that lightly.”

e. In the fall and spring of 2007, several classmates of the accused referred to him as “creepy” or gave him the nickname “Creepy Doug” due to his inappropriate sexual conduct around women on multiple occasions.

f. In October of 2008, a friend of the accused, Elizabeth McShan, informed him that NCIS was contacting his classmates at USD law school. Shortly afterward, the accused contacted Joseph Gorman and asked him if he had been contacted by NCIS yet. The accused asked Mr. Gorman if he had heard of the nickname “Creepy Doug,” and told him to tell NCIS if asked that he had never heard of it. Mr. Gorman replied that he had not heard of the nickname. The accused went on to tell Mr. Gorman words to the effect of “there was no sexual intercourse between me and Jessica. Remember that.”

3. Discussion

If the defense puts the accused’s character or reputation at issue, the government has a good faith basis to ask character reputation witnesses about the accused’s drug use or reputation for inappropriate sexual conduct.

When character evidence is introduced pursuant to Rule for Courts-Martial 405(a), that rule states that “inquiry is allowable into relevant specific instances of conduct” during cross examination. The cross examiner must have a good faith basis for asking the question. See generally *Michelson v. United States*, 335 U.S. 469, (1948); *United States v. Robertson*, 39 M.J. 211 (C.M.A. 1994). The evidence that is the basis of the cross-examination question need not be admissible. See *United States v. Edwards*, 549 F.2d 362 (5th Cir. 1977), cert. denied, 434 U.S. 828 (1977).² The questions are designed to test the basis for the witness’ testimony concerning opinion or reputation of the accused by asking either “did you know” or “have you heard” questions. *United States v. Brewer*, 43 M.J. 43, 46 (C.A.A.F. 1995). Whether a cross-examination question is relevant depends on the scope of the direct examination and which

² The government brings to the court’s attention dicta in *U.S. v. Saul*, which states that such inquiries may be made “presuming there is a good faith basis for asking the question and it is otherwise admissible under our rules of evidence.” *U.S. v. Saul*, 26 M.J. 568, 572 (A.F.C.M.R. 1988). The service court’s dicta regarding “admissibility” is not supported by other case law, and cites only an evidence manual; furthermore, the government believes that the point of this dicta is to point out that an M.R.E. 403 balancing test is required, which the government concedes is true.

character trait the defense elicits; thereafter, it is “relevant on cross-examination to ask the witness his awareness of any specific instances of conduct that logically would bear upon that character trait.” *Id.* at 47. As the Supreme Court noted, “[t]he price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.” *Michelson v. United States*, *supra* at 479.

In this case, the defense has requested a very large number of witnesses who will supposedly testify to the accused’s character or reputation for good military character, law-abidingness, peacefulness, or honesty. Should the defense present such evidence, the government has a good faith basis to test these witnesses’ knowledge of the accused’s character by asking questions about the fact that the accused illegally used a Schedule I prescription amphetamine and then lied about it during an official academic administrative board less than two months later. Similarly, if the defense puts on evidence tending to show that the accused had a good reputation for peacefulness in the USD Law School community, evidence of the accused’s reputation for inappropriate sexual conduct would be a relevant basis for government cross-examination of character witnesses.

Evidence of the accused’s drug use or inappropriate sexual conduct may also be admissible as substantive evidence in rebuttal. See *United States v. Tyndal*, 50 M.J. 616 (N.M.Ct.Crim.App. 1999) (evidence of prior drug use admissible to rebut innocent ingestion defense); *United States v. Gaeta*, 14 M.J. 383, 389-90 (C.M.A. 1983) (evidence of uncharged misconduct admissible to rebut claim that accused was “mere innocent bystander”). The government can only speculate as to how the defense will choose to present its case, and therefore how such evidence would become relevant. However, if the defense introduces any

evidence tending to open the door to appropriate rebuttal, the government will proffer its basis for introducing evidence of the accused's drug use or reputation for inappropriate sexual conduct in an Article 39(a) session prior to presenting such evidence to the members.

Finally, the government notes that although the government does not intend to introduce evidence of the portion of the accused's 30 October, 2008 conversation with Mr. Gorman dealing with the "Creepy Doug" nickname during its case-in-chief, the government does intend to introduce testimony from Mr. Gorman regarding the remainder of this conversation. The fact that the accused contacted a prospective witness in a criminal investigation and gave him a false story regarding the charged offenses is strong evidence of the accused's consciousness of guilt.

4. Relief Requested

The government requests that the court deny the motion.

5. Evidence and Burden of Proof

a. Burden of Proof

As the moving party, the defense bears the burden of proof by a preponderance of the evidence. The defense claims that "Given the Government has cited MRE 304, the burden falls on the Government for that issue to prove by clear and convincing evidence that the confession of the Accused was not taken involuntarily." This statement is legally wrong in at least three respects. First, the government's citation of MRE 304 refers to the government's duty to disclose known statements of the accused pursuant to MRE 304, and such citation by itself does not create any obligation to demonstrate the voluntariness of a statement. Second, prior to shifting the burden of proof on the admissibility of a statement to the government, the defense must make an appropriate motion or objection and may be required to specify the grounds of the objection. The defense has not stated any specific grounds upon which a statement to the

accused to another civilian law student should be suppressed as involuntary. Third, even if the defense were to shift the burden, the government's burden of proof is only a preponderance of the evidence under MRE 304(e)(1).

b. Evidence

In addition to the evidence offered on its other motions and responses, the government offers the following evidence on this motion:

- a. Google "chat" between accused and Ms. Cusack dated 25 April 2007 (Encl 1).
- b. Sworn statement of Rebecca Barker dated 14 August 2008 (Encl 2).
- c. Sworn statement of Joseph Gorman dated 6 January 2009 (Encl 3).
- d. Transcript of University of San Diego "Critical Issues Board" on 21 June 2007.³
- e. National Institutes of Health information- Adderall

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 by electronic mail on 1 November 2010.

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

³ Previously provided as Enclosure (2) to the government's response to the defense motion to quash a subpoena for the accused's emails.