

SUMMARY OF WITNESS TESTIMONY:

Jessica Brooder: Jessica Brooder (Jessica) was called as a witness by the Government and testified substantially as follows: She met the accused (Wacker) in August 2006. Wacker and Jessie were both first year law students at USD and in the same section of classes. Jessica described their relationship from August 2006 through May 2007 as friends and buddies. She denies any sexual or intimate conduct by herself or Wacker, and never had any feelings for Wacker. She said their relationship was completely platonic. Wacker was aware that Jessica was in a long time relationship with her then-boyfriend Justin McKlish (Justin), whom she had dated for the last four years and was living with for the past two years when Jessica first met Wacker. Jessica recounted an incident at a Halloween party in 2006 when her and Wacker went on stage as part of the costume contest and he spanked her on the butt. Although Jessica had previously agreed to spin around so Wacker could pretend to smack her butt, she was surprised he took it to the point of actually touching her butt with his hand. Jessica was not offended by this and since Justin and Wacker had previously met, and Justin was present at the Halloween party, no issues were made of the incident.

In April 2007, Jessica went to New Orleans with a group of about twenty other USD law students as part of a pro bono clinic to provide free legal support to victims of Hurricane Katrina. Also on this trip were Elizabeth Easley (Liz) and Rebecca Barker (Becky), as well as Wacker. The three girls were good friends and shared a hotel room in New Orleans. They all arrived on Sunday, April 1, 2007. On Monday, April 2, 2007 Jessica went to work at the clinic. She had no significant contact with Wacker on Monday. During a lunch break on Tuesday, 3 April 2007, Jessica and Wacker had lunch at a cafe. Jessica does not remember what she ate, but Wacker paid for her lunch. Jessica could not remember if Wacker paid for her lunch because she did not have enough cash on her at the time. After work that same day, a group of about six students decided to go for a run in Audubon Park in New Orleans. The group included Jessica, Liz, and Wacker. From the start of the run, the male students set a faster pace and the female students ran slower. Early in the run, Jessica got cramps she immediately associated with the beginning of pre-menstrual cycle. As the result of these cramps, Jessica was unable to run and Liz and another girl stayed with her until Wacker and the other male students returned from their run. They returned to the hotel they were all staying at and decided to clean up and go out for dinner. They left the hotel as a group of about six or eight around 2000. The group included Jessica, Liz, Becky, and Wacker

While walking through the French Quarter they noticed a group of their fellow students and joined them for dinner at the Chartres Restaurant. Jessica remembers it taking a while to get their food and having two glasses of red wine during dinner. Liz had the same and Becky had no alcoholic drinks. During dinner, Jessica had no significant interaction with Wacker and was not aware of what, if anything, he was drinking. Jessica did pay for Wacker's meal to make up for the lunch he had paid for her earlier that day. The group of six or eighth left the restaurant at around 2200 and they all agreed to go to a jazz club. As they walked down Bourbon Street they stopped and purchased a drink named a "Grenade." Wacker paid for the Grenades for himself, Jessica and Liz.

When they arrived at the Jazz club, they were not permitted to enter the club until they had finished their Grenades, so the group hung out in the street and finished their drinks. Jessica does not think she drank more than about 75% of her Grenade. During this time, Wacker took pictures of everyone in their group. Jessica called her Justin and Wacker took a picture of that as well. Jessica recalls Wacker telling her to say hi from him to Justin while she was on the phone. Wacker had met Justin about five to ten times previously. They entered the jazz club the "Funky Pirate" at about 2300. While in the jazz club, Jessica had one drink of vodka and gin and one shot from a vial or test tube, possibly called a "kamikaze." Liz purchased the shot for Jessica. There was no significant contact with Jessica and Wacker in the Funky Pirate and the group left after about forty-five minutes in the club. Jessica remembers feeling fine with regard to her intoxication when they left the Funky Pirate.

The group then decided to go dancing and ended up at dance club called Razoo's. Jessica remembers opening up a tab and immediately buying her and Liz a drink and then heading to the dance floor with Becky. Jessica remembers dancing with Becky for about 15 minutes. From this point on, Jessica claims her memory is a blur with only "flashes" of memory. She has no real memory of anything from the time she was dancing with Becky late on April 3, 2007 until she wakes up in her hotel room on April 4, 2007. Everything she knows about the intervening time she was told by Liz. When she woke up, Jessica indicated she felt like she had "been run over by a car." She has drunk to excess before and this did not feel like a hangover. She said she felt like she "was walking through water." She admitted that she had no pain in her vaginal area and no chaffing on her inner thighs, and no physical marks on her body that would indicate force was used against her that night.

On the morning of 4 April 2007, Liz told Jessica that she too had limited memory of what happened the night before. Liz remembered helping Jessica vomit in the restroom and Razoo's. Liz' next memory is waking up in a hotel room and Wacker was straddling Liz. Liz' next memory is waking up and looking over and seeing a naked Wacker lowering himself onto Jessica who had nothing but a bra on. Liz told Jessica about her flashes of memory and how she [Liz] woke up and saw Wacker on top of Jessica and then left the room. Liz told Jessica how it was Becky who told Liz to go back to the room and get Jessica and when Liz when back to the room, Jessica was naked and passed out on the bed and Wacker was in his boxer shorts. Liz told Jessica about how she struggled to get her dressed and back up to their room. Liz told Jessica she thought Jessica had sexual intercourse with Wacker.

When Jessica heard all this she became extremely upset because she did not remember any of it. She immediately began crying and called Justin. She told Justin, "I think I had sexual intercourse with Doug." Later that morning, Wacker comes to their room and Jessica tells Wacker she can not remember what happened. Wacker is wearing a business suit for work that day. Wacker. Wacker then tells Jessica and Liz that they were dancing at the club and Jessica lost her balance. He indicates that Jessica threw up at the bar itself and that Becky asked him to get her and Liz home safely. Wacker indicated that Liz was having trouble walking when Jessica and Liz came back from the bathroom.

Wacker then told them about them all stopping at a daiquiri bar on the way back to the hotel in which they all had a daiquiri. Wacker told them a discussion about a 3-some came up. Jessica and Liz were shocked when Wacker told them this since neither had ever had any interest in a 3-some. Wacker told them that when they got back to the hotel, he purchased a new room for the three of them and they all went to it. Once in the room, Wacker said they all began making out with each other. Wacker said nothing more happened, and definitely no sex occurred. When Wacker said this, Liz interjected that she saw Wacker naked and on top of Jessica and that later when she went back to the room she saw Jessica completely naked on the bed. Wacker responded that more cloths came off but nothing sexual happened. Wacker then offered to call their boyfriends.

Jessica and Liz decided that day to leave New Orleans and go home. Both girls had to rush to get dressed and to the air port on time. Jessica had to take a connecting flight through North Carolina. While in the airport in North Carolina, Jessica remembered she had not changed her tampon in a while. When she went into the bathroom she discovered her tampon was pushed way up insides her, to the point she could barely reach it. It took her about twenty minutes to retrieve it, and when she did it was covered in blood and another substance she could not readily identify, but she admitted it could have been normal fluid from her cycle. Upon realizing her tampon had been pushed far insides her, Jessica determined that Wacker had lied to her about not having sex with her and this made her even more distraught than she already was. She would later find out that the gym shorts Liz put on her after getting her from Wacker's room on the morning of 4 April 2007 had been tested and it was determined that Wacker's DNA was on the crotch area of the shorts presumable from sperm contained in any of Jessica's vaginal discharge that had occurred while she was wearing those shorts.

Upon returning home, Jessica spoke with Justin and his mother about what happened. Justin's mother was able to arrange for a drug test for Jessica to see if she was drugged. The test came back negative. Jessica is aware that Becky says Jessica and Wacker were dancing sexually at Razoo's and Jessica believes Becky would not lie. Jessica still believes she was drugged by Wacker. Jessica still has no recollection of what happened that night. She does not believe a consensual incident with Wacker would have resulted in a break up with Justin at the time, however her and Justin are no longer dating. Jessica reported the incident to USD first and then the police a few weeks later. Her first concern was with the consequences of missing so much class because after returning from New Orleans she could not go back to school right away.

Elizabeth Marie Easley-Cook: Elizabeth Easley-Cook (Liz) was called as a witness by the Government and testified substantially as follows: She met the accused (Wacker) in August 2006. Wacker and Liz were both first year law students at USD and in the same section of classes. Liz described their relationship from August 2006 through May 2007 as class-mates but not really friends outside of school. She denies any sexual or intimate conduct by herself or Wacker, and never had any feelings for Wacker. She said their relationship was completely platonic and that she would never be interested in Wacker because she is only attracted to taller men. Wacker was aware that Liz was in a long

time relationship with her then-boyfriend and now husband Donald Cook (Donald). Liz believes that Jessica was closer with Wacker than she was.

In April 2007, Liz went to New Orleans with a group of about twenty other USD law students as part of a pro bono clinic to provide free legal support to victims of Hurricane Katrina. Also on this trip were Jessica and Rebecca Barker (Becky), as well as Wacker. The three girls were good friends and shared a hotel room in New Orleans. They all arrived on Sunday, April 1, 2007. She had no significant contact with Wacker on Monday. After work on Tuesday, 3 April 2007, a group of about six students decided to go for a run in Audubon Park in New Orleans. The group included Jessica, Liz, and Wacker. From the start of the run, the male students set a faster pace and the female students ran slower. Early in the run, Jessica got cramps she immediately associated with the beginning of pre-menstrual cycle. As the result of these cramps, Jessica was unable to run and Liz and another girl stayed with her until Wacker and the other male students returned from their run. They returned to the hotel they were all staying at and decided to clean up and go out for dinner. They left the hotel as a group of about six or eight around 2000. The group included Jessica, Liz, Becky, and Wacker.

While walking through the French Quarter they noticed a group of their fellow students and joined them for dinner at the Chartres Restaurant. Liz remembers having two glasses of red wine during dinner. During dinner, Liz had no significant interaction with Wacker and was not aware of what, if anything, he was drinking. When they left the restaurant, Liz did not feel anything from the wine. The group of six or eighth left the restaurant and they all agreed to go to a jazz club. As they walked down Bourbon Street they stopped and purchased a drink named a "Grenade" which Liz believes contained strong liquor called "Ever Clear." Liz has worked as both a bartender and cocktail waitress in the past. Wacker paid for the Grenades for himself and Jessica, but Liz purchased her own. Liz described the Grenade as "medium to strong" but not real strong based on her experience. When they arrived at the Jazz club, they were not permitted to enter the club until they had finished their Grenades, so the group hung out in the street and finished their drinks. Liz does not think she drank more than about 75% of her Grenade. During the approximately 15 minutes they walked outside the jazz club and finished their Grenades, Liz said Wacker was taking pictures of her and Jessica with Becky's camera. They entered the jazz club the "Funky Pirate" at about 2400 and her and Jessica immediately went to the bar and opened tabs. Liz ordered vodka with cranberry for herself and a vodka tonic for Jessica. Liz then went to the bathroom. While in the jazz club, Jessica had one drink of vodka and gin and one shot from a vial or test tube, possible called a "kamikaze." Liz purchased a shot for Jessica as well. There was no significant contact with Liz and Wacker in the Funky Pirate and the group left after about forty-five minutes in the jazz club. Liz observed Jessica to be "buzzed" based on the fact she was starting to talk louder when they left the Funky Pirate, but Liz described herself as starting to feel happier and getting more talkative.

The group then decided to go dancing and ended up at dance club called Razoo's. When they got to the bar, Liz remembered she forgot to close her tab at the Funky Pirate and immediately went back to the jazz club. She ended up having to close her tab and the one

Jessica had opened because Jessica forgot to close her tab as well. When Liz returned to Razoo's she saw Jessica dancing with Becky. At some point Liz observed some unknown males intentionally dancing behind Jessica, so Liz stepped-in and turned them away. Around this time, Wacker approaches Liz and Jessica and offers to buy them each a drink. Liz tells Wacker to get her a vodka cranberry and a vodka tonic for Jessica. Liz then begins dancing with Jessica and Becky. Wacker returns with the drinks about three minutes later and Liz takes one big sip from her drink. She then felt sick in her stomach which she presumed to be from drinking too much. Liz did not finish her drink and switched to water. She described herself as being buzzed at that point and did not see Jessica do anything unusual but believed Jessica was buzzed as well. A short time later, Jessica asks Liz to take a sip of the drink Wacker had purchased for her to ensure it was a vodka tonic. Liz took a sip and confirmed it was. Liz did not understand Jessica to be intimating there was anything wrong with the drink Wacker bought for her; merely that Jessica was not familiar with how a vodka tonic might taste. From this point on, Liz claims her memory is a blur with only distinct "flashes" of memory.

-First Flash: Holding Jessica's hair back as she vomits in the bathroom and then leaving the bathroom and seeing the dance club almost empty

-Second Flash: Sitting at a white table with "Slurpee" machines she believed to contain daiquiri's based on seeing them previously around New Orleans. Remembers it was Wacker who brought her a daiquiri.

-Third Flash: Remembers a man in a yellow shirt on his phone hiding behind a pillar at the daiquiri stand staring at her.

-Fourth Flash: Being in the hotel lobby with Jessica and Wacker is talking to people behind the lobby desk.

-Fifth Flash: In a dark hotel room near the window side of the room and a man she believed to be Wacker is kneeling between her and Jessica on the same bed. Liz was not sure what was going on and could not tell if Jessica was clothed or not.

-Sixth Flash: Liz is now in the bed closer to the door, the light by the door is on and a figure she thinks was Wacker is straddling her. Liz has no recollection of feeling anything touching her at all but Wacker's face is very close to hers and she can't tell what Wacker is wearing.

-Seventh Flash: Still in same bed, looks over to her left and sees Jessica on the other bed and Wacker is lowering himself onto her similar to a push-up. She can not see Jessica's eyes because her head is facing away from Liz she sees no movement from Jessica. She can tell Wacker is naked and that Jessica has only her bra on, but there is a sheet covering Jessica and Wacker is outside the sheet. Jessica's hands are folded up at the elbows, and neither her arms nor hands are moving. Jessica's legs are straight out from her body.

Upon seeing this, Liz regains her situational awareness and says something to the effect of "I can't do this." She then gets up and realizes her pants are off, but her underwear is still on. She puts on her pants, grabs her pocketbook and leaves the room. She leaves her shoes behind. As she is leaving the room, she notices the room number is 10008 which reminded her of a police code she was familiar with from her time doing work with victims. Liz estimates it took her about 10 seconds to get her pants on and leave, and did

not hear any noise or response from either Wacker or Jessica as she was leaving the room.

The next thing Liz remembers is Becky telling her to “go get her” and she is back in front of room 1008 banging on the door. Liz said it took some time for the door to answer, but when it does Wacker is standing there in his boxer shorts and Jessica is completely naked and passed out on the same bed. She is lying on her back face up. There is no sheet on her, she is not moving, and she makes not attempt to cover herself up when Liz enters the room. Liz then starts to get Jessica dressed but Jessica is not responding or helping her at all. Liz says that Jessica was mumbling the whole time she was trying to dress her and her eyes were either closed or half-open. Liz indicated it was very hard to get her dressed, that Jessica did nothing to help her and Wacker just stood and watched Liz dress Jessica. Liz put Jessica’s pants on backwards and Wacker made a comment and laughed about it. Liz admits was probable very hysterical about the situation and that may have contributed to Wacker not wanted to assist. Liz left the room with Jessica but had to walk her back to their room with an arm around Jessica’s waste. Jessica did not acknowledge Liz and merely kept mumbling as they walked back to their room. Once back at the room, Becky was awake and Jessica kept mumbling and crying that she had to call Justin. Becky was asking them both what happened but neither Liz nor Jessica could really explain because Liz was not sure. Liz eventually got frustrated and decided that Jessica had a right to know what happened so she went back to room 1008.

When Liz knocked on the door, Wacker answered in boxer shorts and a white t-shirt. Liz tells Wacker that Jessica has a right to know what happens. Wacker sits down on his bed, crosses his legs and says that Jessica should talk to him because he is not going to discuss what happened with Liz. Wacker did not appear drunk to Liz. Liz responded with, “I can’t believe I stood up for you.” Wacker did not show Liz any concern for her or Jessica and he never said anything about an agreement to have a 3-some. Liz leaves Wacker’s room and returns to her room. When she returns Jessica is still crying so Liz comforts her until they both fall asleep in the same bed.

Liz wakes up early the morning of 4 April 2007 felling achy, nauseous, and like she “had been hit by a truck.” Liz never felt like this before, she can not stand up and her head is hurting. Liz is 23-years old and has drunk to excess before, but never ended up feeling like this. Becky asks her if she is going to work, but she falls back asleep. When she wakes up again, it is later in the morning and Becky is gone. Jessica is awake and the two start talking about what they remember about the night before, neither has any recollection of how they ended up in a room with Wacker. Liz tells Jessica that Liz believes Jessica had sexual intercourse with Wacker. Liz told Jessica to check her tampon. Jessica gets upset and calls Justin and tells him she may have had sex with Wacker and offers to move out of their apartment if that is what Justin wants. Shortly thereafter, Wacker comes to their room. Liz lets him in and he is wearing a suit for work. Wacker immediately states that, “First off, nothing happened.” Jessica responds with, “Are you sure?” Liz admits to Wacker they only have flashes of memory. Wacker tells them that Jessica threw up at the bar and that when Liz and Jessica came out of the bar bathroom they both wanted to drink more. Wacker said they went to the daiquiri stand

and mutually agreed to a 3-some. Wacker said he needed to help Liz walk. Wacker said he got them a room, they all went up and starting kissing each other and that he rubbed their stomachs as they kissed. Liz became upset at hearing this because she could not understand doing this and put her head under the sheets as Wacker kept talking to them. At some point Wacker says, “Nothing else happened” and Liz responds to that by telling Wacker she saw Wacker lowering himself onto Jessica, to which Wacker started to stutter his speech a bit and responds, “More cloths came off, but nothing else happened.” Jessica appeared to be relieved by this. Wacker said “I really respect you guys, I will talk to your boyfriends.” Wacker did ask if they were Ok. Liz and Jessica decided to leave that day, but Liz felt bad for leaving Becky and felt that Jessica had gotten it worse than she had. Liz never considered she had sexual intercourse with Wacker because when she left the room her underwear was still on.

Liz has no memory of Jessica dancing with Wacker at the bar. She does not remember her vomiting in the bar, only in the bathroom. Liz admits that if Jessica had vomited on the bar, she would have been kicked out of the bar. Liz has no idea why Jessica would not check her tampon before they left, but they were in an extreme rush to not miss their planes when they left. She admits she discussed the case with District Attorneys in California who told her about “cameos” that occurred from being drugged. Although she was not completely convinced a crime occurred against her initially, as time goes by, she is more firm about what happened. Liz had never had any desire for a 3-some. She is not sure exactly what she said before she left room 1008 but feels it was consistent with her feelings on having a 3-some or being in a room while two other people are having sex. She was told something about her [Liz] telling Becky soon after she left room 1008 that she offered to give Wacker a back rub to get him off her. Liz does not have personal recollection of this happening, but does not deny she would have handled a situation like that if Wacker was on top of her and she wanted to get him off without making him mad. She had attended classes where they teach women how to avoid being victims of sexual crimes.

Rebecca Barker: Rebecca Junay Barker –Abdullah (Becky) was called as a witness by the Government and testified substantially as follows. She met the accused (Wacker) in August 2006. Wacker and Becky were both first year law students at USD and in the same section of classes. Becky feels like she knew Wacker well by April 2007.

In April 2007, Becky went to New Orleans with a group of about twenty other USD law students as part of a pro bono clinic to provide free legal support to victims of Hurricane Katrina. Also on this trip were Jessica and Liz, as well as Wacker. Jessica and Liz were Becky’s best friends in school and the three girls shared a hotel room in New Orleans. They all arrived on Sunday, April 1, 2007. After work on Tuesday, April 3, 2007 the girls decided to go out for dinner. They left the hotel as a group of about six or eight around 2000. The group included Jessica, Liz, Becky, and Wacker.

While walking through the French Quarter they noticed a group of their fellow students and joined them for dinner at the Chartres Restaurant. Becky remembers both Liz Jessica having two glasses of red wine from the same bottle during dinner. Becky was not

drinking any alcohol that night due to getting sick the day prior from something she ate. The group of six or eighth left the restaurant and they all agreed to go to a jazz club. As they walked down Bourbon Street they stopped and purchased a drink named a "Grenade." Becky did not get a Grenade. When they arrived at the Jazz club, they were not permitted to enter the club until they had finished their Grenades, so the group hung out in the street and finished their drinks. Becky is not sure how much of their Grenades Liz and Jessica finished. While everyone else finished their Grenades, Becky said Wacker was taking pictures of Liz and Jessica with Becky's camera. Becky said she deleted some of the pictures because she thought they were "offensive" to her. By "offensive" Becky meant she did not think it was right for Wacker to be taking pictures of her friends when they were drunk. She did not think the pictures were inappropriate for any other reason, it just did not seem right to her personally. During this period of finishing their Grenades, Becky remembers Liz declaring she was drunk. The group then entered the jazz club the "Funky Pirate." Becky remembers seeing Jessica order a gin and tonic and that everyone else in the group did at least one shot, but not her. When they left the Funky Pirate Becky observed Jessica and Liz to be getting buzzed. It was Becky who suggested they find a club to go dancing.

The group ended up at dance club called Razoo's. When they got to the bar, Jessica immediately opened a tab and bought drinks for herself, Liz, and Becky. Becky did not want the drink so she just put it down. At some point Jessica insisted that Becky do a shot, so Becky did the one shot but never felt any effects from it. Becky remembers dancing with Jessica and Liz for about forty-five minutes. She remembered starting to see Jessica act very intoxicated by the way she was dancing. She also started to see Liz dancing with another friend from their group (Forest). She observed Jessica to be swaying back and forth and not in rhythm with the music and she was moving her head very slowly. There was a stage separate from the dance floor and at some point Jessica ended up on the stage dancing, and again her dancing was just this swaying back and forth. After this, Becky then sees Jessica back on the dance floor and Wacker is dancing behind her, almost up against her back. Becky believes Jessica knew Wacker was there, but Becky found it odd that she would dance with Wacker like that. Becky also was seeing Liz flirt with Forest and dancing with him as well. Becky found Jessica and Liz to be acting completely inconsistent with what she knew of them, to include her knowledge of the serious relationships they had with their respective boyfriends, and what Becky knew of the girls' interest in either Forest or Wacker.

At about 0200 on the morning of 4 April 2007, Becky told the group she wanted to go back to the hotel for the night. She asked Forest to walk her home and he agreed. The group was standing by the bar area when Becky asked Liz if she wants to stay and Liz says she does. At this point, Jessica comes over to the bar area and says, "I can barely see" and then begins to vomit. Forrest reacts by grabbing a filled drink out of the way so Jessica does not vomit in someone's drink. Liz immediately escorts Jessica towards the bathroom, but Becky is not sure where they went exactly. After this, Becky turns to Wacker – who was at the bar and heard what Jessica said and saw her vomit – and tells him, "Get them back safely and close out their tabs, got it?" Becky made Wacker repeat those instructions to him, which he did. Becky said she needed to give Wacker those

instructions because in her opinion, “they obviously could not do it themselves.” Becky did not think it was unsafe to leave Liz and Jessica with Wacker because she trusted him. Becky did not think Wacker was intoxicated and probably would have let him drive if that was the situation at that time. Forest then walks Becky and another girl from their group (Susan) back to their hotel. On the walk back to the hotel, Susan asks Becky if they were sure they wanted to leave Liz and Jessica with Wacker and Becky responded with, “they will be fine.” Becky gets back to her room, notes the time as about 2245 and falls asleep.

About an hour later Becky is awoken by the sound of Liz entering the room crying on her phone to Donald, “I love you, you and you only” and “I would never cheat on you.” At first Becky thought Liz was laughing, but then realized she was crying and very upset. Liz is upset and explaining that she woke up in a different room and Wacker was kissing her and Liz said “I couldn’t” and left. Becky asked Liz where Jessica was and Liz responded with, “She is in the room having sex with Doug.” Becky told Liz, “Go get her.” Becky did not go with Liz because she was not sure what was going on at that point and had no idea what room Jessica was in. Becky indicated that she told Liz to go get Jessica because she was worried that Liz was having consensual sex with Wacker and that Liz would not want to be there doing that.

A few minutes later Liz comes back with Jessica who is saying things but not making sense. Liz is panicking because Jessica is acting so weird. Jessica is looking around the room but not at anything, then grabs her cell phone and goes out in the hall way. Becky follows her out into the hallway and is trying to get her off the phone and back in the room but Jessica keeps talking about their being too many people in their room. Becky says it was difficult to convince Jessica there was no one else in their room and that she needed to get out of the hall way. Jessica was talking non-sense and at one point keeps asking for “concerts” which Becky figured meant pajamas. Liz and Becky then get Jessica into a pair of gym shorts from Jessica’s luggage and dress her for bed. The whole time they are dressing her for bed Jessica is uncooperative and crying. She continued to act like that for a few hours before they finally calmed Jessica down. Becky was under the impression that Jessica was real drunk. Becky also had to give Liz additional instruction to get her to go to bed, she was crying as well. Beck was under the impression that Liz was intoxicated.

Becky only got a few more hours of sleep before it was time for her to get up. She gets up and asks Jessica if she is going to go to work and Jessica grunts, says yes, but never moves. Becky has a brief conversation with Liz, who tells Becky she will take care of Jessica and for Becky to go on to work. Becky leaves the room and heads for breakfast in the hotel restaurant. On the elevator down, Wacker ends up with her on the elevator. He is dressed in a suit. Although they are the only two on the elevator, neither acknowledges the other in any way. After work, Becky goes back to the room and Liz and Jessica are still crying and upset and are now packing to go home. Both girls look awful to Becky and claim they have to go home because they do not remember what happened the night before. Becky finishes out her week in New Orleans. The only other contact Becky has had with Wacker was at a bar back in California after they both

returned home. Becky was at the bar and Wacker approached her and asked, “Are you mad at me?” to which Becky replied, “I don’t want to talk about it.”

Nicole Cusack: Nicole Cusack (Nicole) was called as a witness by the Government and testified substantially as follows: She met the accused (Wacker) in December 2006. Both Nicole and Wacker were first year law students at USD. She was not in the same class section as Wacker but met him when she went to his house to pick up a girl friend attending a party at Wacker’s home. Through introductions it was revealed that both Nicole and Wacker were from the same area of Seattle and that both would be in that area over the holiday breaks from their first semester of law school. Nicole gave Wacker her phone number. Nicole arrived in Seattle first and was surprised when Wacker called her the same day he arrived in Seattle. Still in December 2006, Nicole sent a mass email or text to all her friends that included Wacker where she offered to meet them all at a bar in Seattle. Nicole was surprised that Wacker showed up, and then involuntarily accompanied Nicole and her sister when they moved to another bar in Seattle with a smaller group of friends who were with them at the first bar. At the second bar Nicole found Wacker to pleasant and he bought shots for her and all her friends. Sometime thereafter, either in late December 2006 or early January 2007 they agreed to meet at an Improv club. Nicole felt Wacker was being overly aggressive with getting her to drink a beer during the show. After the show, Nicole and Wacker went to a local bar that Wacker was familiar with called “Fin McCool’s”. He knew a few of the bartenders there. While there, Nicole and Wacker had a drink. Nicole got up to go the bathroom and make a phone call on her cell phone and then returned to her seat at the bar with Wacker. From this point on, Nicole claims her memory is a blur with only small bits and pieces of memory. Using her own common sense, along with bits and pieces of flash memories, Nicole alleges the following:

- Wacker drove them both home to her sisters’ house
- Nicole began throwing up on herself
- Wacker got her undressed and into the shower
- She fell in the Shower and Wacker helped her up
- Wacker gave her a toothbrush to brush her teeth
- Wacker cleaned up the vomit and her cloths
- She ended up in a towel on her sisters’ bed
- Wacker undressed himself and had sexual intercourse with her
- During the sexual intercourse she said something to the effect that they could not do this because they are classmates
- Nicole woke up the next day feeling sicker than she ever has, worse than any hang-over and with no real memory of what happened after they left the bar

Following this incident, Nicole felt it was weird that Wacker would have had sex with her after she vomited in front of him, and she told a few friends about it, but at no time did she feel Wacker had done anything illegal to her. In fact, the incident in the shower where she is naked and falls was made into a joke by Nicole with her friends because

Nicole was sure Wacker would tell all her school friends about the incident and she wanted to make light of it. The morning after the incident, Nicole had no pain in her vaginal area, nor was any chaffing on her thighs from excessive rubbing, or any other physical injuries that would indicate physical force was used against her. She did feel physically ill to an extreme extent she never has before, and it took her much longer to recover than it ever has from past experiences with alcohol. She described her condition as one akin to “food poisoning.” When asked why she did not immediately report this incident to the police, Nicole claimed that she felt it was partially her fault the incident occurred.

After this incident, Nicole and Wacker entered into what Nicole calls a “friends with benefits” relationship. This was a sexual and intimate relationship where Nicole agrees it was not intended to be monogamous but that she remained so. Nicole admitted she would often “beg” Wacker to meet her for sex and that she discussed personal matters regarding her life with him. It did not bother her if he dated other women, unless he was dating or flirting with another class-mate that Nicole knew. Nicole said she liked Wacker as a “good friend” but had no long term interest in him. The relationship ended in May 2007 when Nicole went to Alaska.

In January or February of 2008 Nicole was in a car with a few friends (one being April Tatoon) who brought up the incident in New Orleans with Wacker that had occurred in April 2007. Although Nicole may have been aware of the allegations stemming from New Orleans, it was during this conversation in the car that she first became convinced that Wacker may have drugged her during their first sexual encounter or at least took advantage of her intoxicated state. Nicole was told or believed that the incident in New Orleans involved Wacker and two other female students getting out of control in New Orleans and then getting a separate room to hook up. She specifically asked her friend April to not tell anyone what happened with her and Wacker during their first sexual encounter because Nicole felt no one would believe her since she continued to have a sexual relationship with Wacker after that incident.

Investigating Officers Comments from Nicole Cusack video interview with NCIS (IE54)

On 6 January 2009, Nicole was interviewed by NCIS. It is important to note that prior to beginning his questioning, the NCIS agent gave Nicole the specific details of the allegations that were made against Wacker by Jessica Brooder and Elizabeth Easley from their trip to New Orleans in April 2007. The agent wanted Nicole to know that Jessica and Elizabeth were not mad at Nicole for not coming to them with what happened to her. The NCIS agent revealed that Joseph Gorman had made a previous statement to NCIS where he alleged that Wacker appeared to have knowledge about date-rape drugs. The agent told Nicole that Jessica had two separate drug tests done and that the first came back positive and the second came back negative and that NCIS had “determined” that Elizabeth may have been drugged by Wacker as well. *After informing Nicole of all this, the NCIS agent began taking her statement.* During this interview Nicole revealed that when she went to Alaska she realized her relationship with Wacker was wrong and that she would never do something like that again. She admitted she got angry when April

Tatoon told her about what happened in New Orleans because she and Wacker were still in a sexual relationship at that time. She claimed that Wacker “grossed her out” and that she needed to be drunk to have sex with him but that he was a nice guy so she kept doing it. She admitted she continued to sleep with Wacker despite finding him to be a “loser” and “creepy.” She claimed she really didn’t like him, found him to be a “weirdo” and that she normally only dates “stand-up guys.”

Amos Alexander Lowder: Amos Alexander Lowder (Lowder) was called as a witness by the Government and testified substantially as follows. He met the accused (Wacker) in August 2006. Wacker and Lowder were both first year law students at USD and in the same section of classes. Lowder feels like he knew Wacker well by April 2007. Lowder did not go on the trip to New Orleans. He became aware of something happening when Liz and Jessica did not return to school after spring break. He was and still is a good friend of Nicole’s as well as Wacker. He was aware they were in a relationship that involved sex, but never discussed the details with either Wacker or Nicole.

In the Fall of 2007, Wacker approached him and told him that during the trip to New Orleans, two girls want to hook up, so they went to a hotel, one of the girls passed out and that was it. Wacker claimed no sex happened. In Spring of 2008, Wacker told him he needed time off from their moot court class to deal with his case in New Orleans, that he was being charged with Rape and Sexual Assault. At some point after this, Wacker calls him and asks if he would talk to Nicole about her claims that Wacker took advantage of her when they first had sex in early 2007. Wacker never specifically asked Lowder to get Nicole to stop talking to people or the police, but Lowder clearly understood that Wacker wanted him to speak with Nicole because Wacker feared Nicole’s allegations would only bring more negative suspicion upon him regarding the incident in New Orleans. Lowder has not doubt that Wacker wanted Lowder to get Nicole to stop talking to people about her allegations against Wacker. Since Lowder was friends with Nicole and Wacker, he talked to Nicole about thinking about what she was telling people and to be sure she was being truthful because of the way it could impact the New Orleans allegations against Wacker. Lowder took Wacker at his word that nothing happened in New Orleans. Lowder does not believe Wacker was trying to get him to falsify or alter Nicole’s testimony, but he believes that Wacker specifically called him because he was a good friend of Nicole’s and that Wacker did specifically intend that Lowder get Nicole to stop talking about what she was alleging Wacker did to her. Lowder never discussed Nicole’s accusations against Wacker with Wacker. Nicole never used the word “rape” when she described to Lowder their first sexual encounter.

Investigating Officers Comments from Amos Alexander Lowder video interview with NCIS (IE58)

On 13 January 2009 Lowder was interviewed by NCIS. Lowder told NCIS that in February 2007 Nicole told him about the incident with Wacker and she stated she remembered throwing-up and Wacker cleaning it up and that she passed out and woke up with Wacker on top of her having sex. Nicole said she thought it was weird of him to be having sex with her like that. In the Fall of 2007, Wacker told Lowder he was being

charged rape from the incident in New Orleans. Wacker told Lowder he took two girls to a different hotel because the girls were not felling well and no sex happened because one of the girls passed out. Wacker mentioned that there was a discussion about a 3-some but Wacker claimed no sex happened. Lowder took the explanation of Wacker to mean, no sexual intercourse happened, but there was some sexual contact of a degree and nature he is not sure, but he presumes they did not go to that hotel room to, “watch T.V.” Lowder was approached by Nicole after she was hearing about the allegations against Wacker from the New Orleans trip. Nicole wanted to know what Lowder knew and after Lowder told her what Wacker had told him, Nicole indicated she thought it sounded very familiar from what Wacker did to her. The similarity being she did not drink much and can’t remember what happened either. She told Lowder she did not want to pursue it because no one would believe her since Wacker and she entered into a sexual relationship for a period of time after the night she woke up and Wacker was having sex with her.

Joseph Abraham Gorman: Joseph Abraham Gorman (Gorman) was called as a witness telephonically by the Government and testified substantially as follows. He met the accused (Wacker) in August 2006. Wacker and Gorman were both first year law students at USD and in the same section of classes. Gorman feels like he knew Wacker really well by April 2007. Gorman is currently the boyfriend of Nicole since fall of 2008. In March of 2008, Wacker sent a text message to Gorman that said Nicole made allegations the Wacker had sexually assaulted her. Wacker met with Gorman soon thereafter and asked Gorman to talk to Nicole as a friend and to ask her to be careful about what she was saying. Wacker wanted Gorman to tell Nicole it would be in her own best interest to not be involved. Gorman did not think Nicole understood that Wacker was being prosecuted for what happened in New Orleans. In the fall of 2008 Gorman was informed by another student-friend “Jodie” that NCIS would be calling him about their investigation into Wacker. Gorman believes Wacker was aware that NCIS was going to call him. Wacker approached Gorman before NCIS called Gorman. Wacker told Gorman that he might be asked about the nickname “creepy Doug” and Wacker wanted Gorman to not tell NCIS that he had heard of it. Gorman had never heard the nickname and told Wacker that. Wacker also reminded Gorman that he did not have any sexual intercourse with the girls in New Orleans. Gorman had no idea what happened in New Orleans and was not sure why Wacker would tell him that because Wacker knew that Gorman did not even go on that trip. Gorman’s understanding of what happened in New Orleans had previously come from Wacker and it was that Wacker, Liz and Jessica were at a bar in New Orleans, they started talking about a 3-some, Wacker and Jessica starting hooking up and Liz left the room.

At not time does Gorman believe Wacker was trying to get Gorman to withhold testimony or information from investigators. Gorman also does not believe that Wacker ever intended to influence his testimony in this case. His belief is based on what he knows about Wacker as his friend, and what Gorman believes Wacker knows about Gorman. Gorman believes that Wacker would never ask him to do anything like that.

In March 2008, Gorman and Wacker were at a presentation being given by the U.S. Attorneys Office and the instructor named off a drug and asked who knew what it was

and Wacker immediately was able to respond that it was a “cat tranquilizer” and it was most commonly used as a date-rape drug. Gorman recalls looking at Wacker in a way that Wacker understood that was not a good thing to reveal your knowledge of given the allegations pending from New Orleans.

Investigating Officers Comments from Joseph Gorman video interview with NCIS (IE56)

On 6 January 2009 Gorman was interviewed by NCIS. Gorman acknowledged he was good friends with Jessica and Wacker. He also stated that Wacker had mentioned to him that Wacker was concerned about someone viewing the video-tape from the hotel lobby in New Orleans because the girls were wasted and it would look bad for him. The NCIS agent tells Gorman that he thinks Wacker used Rohypnol to drug Liz and Jessica and that Wacker probably overdosed them. The agent goes on to tell Gorman that Wacker is being charged with 5 to 7 felonies. *It was after this that Gorman reveals the information about Wacker’s knowledge of cat tranquilizer as a date rape drug during the U.S. Attorneys’ presentation.* The NCIS agent then tells Gorman that Wacker is going to be pulled from the Marine Corps’ law program and that NCIS has a file three feet high (using his hands to demonstrate) on toxicology from this case. Gorman does recall that Wacker explained how he knew about date rape drugs, but Gorman could not recall what it was specifically.

Amber Davis: Amber Davis (Davis) was called as a witness telephonically by the Defense and testified substantially as follows. She has been a friend of Wackers for about six years. She is goods friends with him and his family. She was a bartender at Fin McCool’s the night Wacker came in with Nicole in December 2006. She remembers Wacker coming to the bar with a girl Davis had never met before. Davis described her as a blonde of small stature. That was also the last time Davis ever saw Wacker with this girl. Davis remembers Wacker introducing the girl to her and that she observed Wacker and the girl to be on a date and “chatting.” She did not observe either of them to be intoxicated while they were at the bar. Davis explained she is not allowed to continue to serve people alcohol if they appear overly intoxicated. She never saw Wacker kiss the girl. Before Wacker and the girl left, Wacker gave Davis a hug and said good-bye. Davis did not observe Nicole to be intoxicated to any degree the entire time she was in the bar with Wacker. Davis does not see Wacker as often as she used to.

Justin Charles Micklish: Justin Charles Micklish (Justin) was called as a witness telephonically by the Defense and testified substantially as follows. Justin dated Jessica for seven years but it ended in March 2009. Justin remembered getting a call from Jessica early on 3 April 2007 from New Orleans where she said she was going out to dinner with some friends. When Jessica did not call him back after a few hours, he began to worry and left her a few messages on her cell phone. As he was heading to work in the very early hours of 4 April 2007, Jessica called him hysterical. She told me I was going to break up with her because something happened. When Justin asked her about what happened, Jessica could not calm down enough to tell him. Justin told Jessica to calm down and call him back later. Jessica called him back a little later and said Wacker told her they had engaged in some heavy petting but not sex. Jessica was still very upset.

Jessica called him from the airport after she found her tampon pushed inside her and was very hysterical again because she realized she did in fact have sexual intercourse with Wacker. Justin and Jessica did spend time researching on the internet what date-rape drugs may cause a person to have no memory for a short period of time.