

**NAVY-MARINE CORPS TRIAL JUDICIARY  
WESTERN JUDICIAL CIRCUIT**

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UNITED STATES	)	GENERAL COURT-MARTIAL
	)	
v.	)	GOVERNMENT RESPONSE TO
	)	DEFENSE MOTION TO DISMISS
Douglas S. Wacker	)	SPECIFICATIONS 1 THROUGH 4 OF
XXX XX 3913	)	CHARGE III
Captain	)	(Unreasonable multiplication of charges and
U.S. Marine Corps	)	failure to state an offense)
	)	
	)	1 November 2010

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**1. Nature of Response**

This response opposes the defense motion to dismiss Charge III, Specifications 1 through 3, based on unreasonable multiplication of charges. This motion also opposes the uncaptioned motion to dismiss specification 4 of Charge III for failure to state and offense. The defense bears the burden as the moving party, per R.C.M. 905(c)(2).

**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. The accused was participating in the Excess Leave Program, and was a first-year law student himself at the time. 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, and did buy drinks, for both Ms. Brooder

and Ms. Easley. Both Ms. Brooder and Ms. Easley experienced a significant decline in their ability to recall the events of that night after 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.

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.

### **3. Discussion**

#### **A. Unreasonable Multiplication of Charges**

The defense seeks to dismiss Specifications 1 through 3 of Charge III on the theory that they are multiplicitous with Charge I and Charge II. The government avers that the acts alleged in Charge III are separate offenses for findings. The government must concede that the facts alleged in Charge I and II are the same underlying facts that are the basis for Specifications 1 and

3 of Charge III. However, the government has charged the conduct unbecoming charges for contingencies of proof, as contemplated by the case law (*see, e.g., United States v. Quiroz*, 57 M.J. 583 (N.M.C.C.A. 2002)) and (R.C.M. 907(b)(3)(B)). As outlined in the government's response to the defense's motion to dismiss Specifications 1 through 3 of charge III based on the notion that the charges were unconstitutional, the theory of guilt under the conduct unbecoming charges is completely separate from the theory of guilt under Charges I and II. To convict the accused under the conduct unbecoming specifications, the government need not prove lack of consent, and a reasonable mistake of fact is inapplicable. That is, the factfinder could find the accused guilty based on the fact that he engaged in this conduct with the victims while they were incapacitated—regardless of whether they consented and regardless of whether he had reasonably believed they consented. If members convict on all charges, the government will concede that Charges I and II should be considered synonymous for sentencing with Specifications 1 and 3 of Charge III.

Specification 2 of Charge III, however, is factually distinct from (although partially overlapping with) both Charge I and Specification 1 of Charge III. The government does not need to prove that the accused straddled Ms. Cook in order to show attempted rape, nor does the government need to show specific intent and a substantial step towards rape in order to show that he committed an indecent assault. The members could logically find the accused guilty of Charge I in addition to this particular specification, or they could also logically find him guilty of either specification but not the other. Therefore, these specifications can remain on the charge sheet as separate offenses.

**B. Specification 4 of Charge III states an offense**

Specification 4 of Charge III alleges that the accused lied before a University of San Diego “Critical Issues Board.” This hearing was held to investigate the allegations that the accused had raped Jessica Brooder and attempted to rape Elizabeth Easley. If the hearing had substantiated these allegations, the accused faced expulsion from USD School of Law. At the hearing, the accused stated that he did not have sex with Jessica Brooder. The government is in possession of DNA evidence which indicates that this statement was false. The defense argues that the charge cannot stand because the most closely related offense in the Manual for Courts-Martial is Article 107, and the accused cannot be charged under Article 107 because the statement was not “official.” The defense argues in effect that Specification 4 of Charge III is preempted by Article 107; yet, as discussed in detail in the government’s response to the defense’s motion to dismiss Specifications 1 to 3 of Charge III based on unconstitutionality, the preemption doctrine does not apply to offenses charged under Article 133. There is no requirement that a 133 offense allege an offense under another article of the UCMJ, nor any other offense at all. The government must only allege facts which amount to conduct unbecoming an officer.

In the instant case, the accused is charged with lying to an administrative board hearing at the university he was attending as a member of the Excess Leave Program. He was certainly on notice that lying to this body would tend to denigrate his status as a Marine Captain. He in fact invoked his status as a Marine officer in an attempt to bolster his credibility. Not every lie by an officer will necessarily amount to a crime. However, as an officer the accused was on notice that lying before an official body—even though that body is not a governmental body—would bring discredit upon himself as well as the Marine Corps. (*See, e.g., United States v. Ashby*, 68 M.J. 108, 119 (C.A.A.F. 2009)) “[n]otice also arises from the fact that acts of dishonesty and deceit are

prohibited by illustration in both Article 133, UCMJ, and Article 134, UCMJ.”). This is particularly true where the outcome of the board had the potential to impact, or even cut short, his Marine Corps career, for if he had been expelled from the university for misconduct, he most certainly would have faced repercussions in his chosen profession.<sup>1</sup> As a prospective judge advocate, the accused would have had to pass a bar character and fitness review in order to achieve his chosen military occupational specialty. Therefore, the accused’s integrity in an official proceeding at the university that was to grant his law degree was essential to his chosen career as an officer. The accused was on notice that the facts alleged in Specification 4 of Charge III constituted an offense, and thus the defense motion to dismiss this specification should be denied.

**4. Relief Requested**

The government requests that the court deny the defense motion.

**5. Evidence and Burden of Proof**

The defense bears the burden of proof. The government does not intend to offer any evidence on this motion. All defense requests for production of witnesses pertaining to this motion are denied.

**6. Oral Argument**

The government respectfully requests oral argument on this motion.

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

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<sup>1</sup> The government also notes that, although not binding, Paragraph 59 of the Manual for Courts-Martial (2008 edition) specifically lists “cheating on an exam” as an example of a punishable Article 133 offense both under the examples of offenses and in a model specification.

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