NAVY-MARINE CORPS TRIAL JUDICIARY
NORTHERN JUDICIAL CIRCUIT
GENERAL COURT-MARTIAL

UNITED STATES v. JAMES M. ROWE CAPTAIN UNITED STATES MARINE CORPS	GOVERNMENT RESPONSE TO DEFENSE MOTION TO COMPEL PRODUCTION OF WITNESSES 17 NOVEMBER 2011

1. **Nature of Motion.** The United States of America, by and through its trial counsel, moves this honorable Court to deny the Defense motion to compel the production of Captain Bryan Wilson and Major Andrew Warren as witnesses for this court-martial.

2. **Statement of Facts.** For the purposes of this motion, the government does not dispute the defense's summary of the facts on the charges.

3. **Discussion.**

The defense seeks to admit the testimony of Capt Bryan Wilson. The defense's own witness request states that:

> Capt Wilson will testify on the merits about information on 1stLt Klay's character, specifically that she lacks integrity and is untruthful. He will also testify that when he caught her in an act of misconduct she attempted to divert attention from the allegations by accusing him of sexual harassment.

The defense then contends in its motion that it does not seek to impeach Mrs. Klay's credibility. This is directly counter to the defense's assertion in its witness request, and this paragraph

requesting Capt Wilson shows the defense's true intention with regard to both Capt Wilson's testimony and Maj Warren's.

a. Testimony about Mrs. Klay's propensity to "divert attention" when accused of misconduct is not proper evidence of motive or intent to testify falsely.

The defense cites naught but persuasive authority for the proposition that the defense may admit evidence of a witness's propensity for fabricating allegations under M.R.E. 404(b). The defense's argument is based on the contention that evidence that Mrs. Klay may have fabricated allegations to divert attention from her own misconduct in the past is relevant to her motive to fabricate in this case. Essentially, the defense contention is that Mrs. Klay has an intention to divert attention from her own misconduct.

The defense cites both United States v. Stevens, 935 F.2d 1380 (3rd Cir. 1991) in which the accused sought to introduce evidence that a victim in another similar crime had identified someone other than the accused as the perpetrator (Id. At 1403), and United States v. Aboumousallem, 726 F.2d 906 (2nd Cir. 1984) in which the accused sought to introduce evidence that his co-conspirators had tricked an unknowing accomplice in the past as evidence that they had done so to him (Id. At 911). Neither of these cases is relevant to the court's decision in this case other than to show that the defense may offer "reverse 404(b)" evidence. In both cases the evidence offered by the defense was focused on the conduct of the accused, not the credibility of a witness. The only

case the defense cites in which the accused offered evidence focused on someone other than the accused is United States v. McCourt, 925 F.2d 1229 (9th Cir. 1991) in which the accused sought to offer evidence that another person had previously submitted false claims to the government, and therefore had done so in that case. The court excluded this evidence as pure propensity evidence, while holding that 404(b) would allow the defense to offer such evidence against some other witness or person.

While none of these cases preclude the use of 404(b) evidence to show the intent, or motive of another party or witness, there are bounds to the motives that are proper under M.R.E. 404(b). In United States v. Farmer, 923 F.2d 1557, 1567 (11th Cir. 1991) the 11th Circuit Court of Appeals stated that the word "motive" as used in M.R.E. 404(b) does not refer to a motive to testify falsely. Rather, as cited in Farmer, United States v. Sampol, 636 F.2d 621, 659 note 24 (D.C. Cir. 1980) clearly indicates that a "motive" to testify falsely is merely an aspect of credibility, evidence the admission of which is controlled by Fed. R. Evid. 608 rather than 404(b) (analogous to M.R.E.s).

Here, by the defense's own argument the evidence they seek to admit is evidence that Mrs. Klay allegedly fabricated allegations in the past in order to cover or divert attention from her own misconduct. Their theory is that this is relevant to her motive to fabricate and divert attention in this case. This is clearly a "motive to testify falsely" as contemplated in the Farmer and

Sampol cases, and is therefore improper "motive" evidence under M.R.E. 404(b).

b. The testimony the defense seeks to admit is propensity or character evidence which is too tenuously related to the instant case to be proper under M.R.E. 404(b).

Even assuming that M.R.E. 404(b) were the proper applicable rule to the testimony the defense seeks to elicit, the testimony is purely evidence of Mrs. Klay's propensity to prove her action in conformity with that propensity, and is thus inadmissible under M.R.E. 404(b). M.R.E. 404(b) specifically prohibits evidence of the character of any person to prove action in conformity therewith. Furthermore, under United States v. Reynolds, the Court of Military Appeals established a three-part test for determining the admissibility of evidence under M.R.E. 404(b). 29 MJ 105 (C.M.A. 1989). The Reynolds test contemplates the following three questions: (1) does the evidence reasonably support a finding that the [witness] committed the other acts, (2) does the evidence make a fact of consequence more or less probable, and (3) is the evidence's probative value substantially outweighed by the danger of unfair prejudice. Id.

i. The evidence does not reasonably support a finding that Mrs. Klay made the allegations in order to divert attention.

While the testimony of both Maj Warren and Capt Wilson would support a finding by the members that Mrs. Klay made allegations against them, there is simply no evidence of her intent in making those allegations. Indeed, the defense could elicit the fact that Mrs. Klay made allegations against Maj Warren and Capt Wilson on cross-examination of Mrs. Klay. The requested witnesses add nothing

in the way of providing any motivation as the defense claims that Capt Wilson would testify.

ii. No fact of consequence is made more or less probable.

Both of the proffered incidents of fabrication are too tenuously linked factually to this case to have any real probative value. Neither incident is relevant to Mrs. Klay's motive to fabricate or testify falsely against the accused. In the incident involving Capt Wilson, she very specifically made claims against the person who had accused her of misconduct. In the incident involving Maj Warren, she made allegations at her NJP proceeding, but there is no logical connection to an allegation against Maj Warren and the allegations in the instant case. Absent some showing by the defense, there is no logical reason to infer that Mrs. Klay's motive to misrepresent or fabricate against the accused is in any way related to any such motive (if one exists) to fabricate against Maj Warren.

There is simply no factual basis for linking previous complaints of harassment, and sexual wrongdoing to the complaints made by Mrs. Klay in the instant case. The logical link between complaints against Maj Warren and Capt Wilson to any motive to fabricate or testify falsely against Capt Rowe is simply too tenuous to make any genuine fact of consequence more or less probable.

iii. The requested witness testimony risks confusion of the issues and misleading the members.

The defense seeks to offer the requested witness testimony as evidence of motive; however, the defense reliance on motive is misplaced. Because Mrs. Klay was disciplined for her actions at NJP, then the members will not likely find that she lied to get out of trouble. The members are more likely to believe that because she lied previously, then she is lying now. Thus, this is purely evidence of Mrs. Klay's propensity, and is offered to show her action in conformity therewith. Furthermore, the defense will very likely present evidence that Mrs. Klay is an untruthful person or has the reputation as being untruthful (other witnesses which the government has agreed to produce will purportedly testify as such). Therefore, there will already be evidence in front of the members that Mrs. Klay is an untruthful person. This evidence, of purported lies and falsehoods previously, will only serve to confuse the members and allow them to lump in this "motive" evidence with the character evidence they will also hear. Thus, the members are likely to believe that because Mrs. Klay apparently lied previously that she is lying now.

c. M.R.E. 608(b) specifically prohibits the impeachment of a witness's testimony through extrinsic evidence.

M.R.E. 608 governs the impeachment of witnesses at trial. M.R.E. 608(b) specifically prohibits the use of extrinsic evidence to prove specific acts relevant to truthfulness in order to impeach a witness. Here the defense may cross examine Mrs. Klay about the

allegations she made against Capt Wilson and Maj Warren. However, they may not offer testimony or evidence of any other witness or kind in order to prove that those complaints were made. The use of any such specific acts by the defense would violate the express terms of M.R.E. 608(b).

d. Any testimony as to the motive or intent of Mrs. Klay would be purely speculative.

Finally, the defense asserts in its witness request that Capt Wilson will testify that Mrs. Klay made allegations against him as an, "attempt to divert attention from the allegations" which he made against her. This assumes that Capt Wilson will be able to testify as to Mrs. Klay's motivation for accusing him of harassment and hazing; essentially that Capt Wilson knows and will be able to testify as to Mrs. Klay's subjective state of mind and intent when accusing him of harassment and hazing. This is clearly a matter outside of the specific competence of the witness under M.R.E. 602 regarding personal knowledge, and purely speculative on his part.

4. Burden of Proof. The defense bears the burden of proof and persuasion by a preponderance of the evidence.

5. Relief Requested. The government respectfully requests that the Court deny the defense motion to compel witnesses. In the alternative, the government respectfully requests that this court only allow Capt Brian Wilson to testify as to specific events regarding Mrs. Klay's truthfulness should she deny those events if and when cross-examined by the defense.

6. **Argument.** The government requests oral argument.

P. C. COMBE II
Captain, USMC
Chief Trial Counsel

CERTICATE OF SERVICE

I hereby certify that a copy of this motion was served on Defense Counsel and the Court on 17 November 2011.

P. C. COMBE II
Captain, USMC
Chief Trial Counsel