

UNITED STATES MARINE CORPS
WESTERN JUDICIAL CIRCUIT

UNITED STATES)	
)	GENERAL COURT-MARTIAL
)	
v.)	DEFENSE RESPONSE IN OPPOSITION
)	TO GOVERNMENT MOTION FOR
Douglas Wacker Captain U.S. MARINE CORPS)	APPROPRIATE RELIEF
)	(Exclude Irrelevant Evidence- Prior
)	Findings)
)	
)	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. The defense asks that the Government motion be denied.

2. **Summary of Facts.**

- a. The State of Louisiana, the State of California declined to prosecute Capt Wacker for lack of evidence.
- b. Louisiana detectives investigated the case.
- c. The University of San Diego investigated this incident and found no misconduct on the part of Capt Wacker.
- d. The standard of proof for the USD hearing was merely preponderance of the evidence, much less than the beyond a reasonable doubt standard Capt Wacker now faces in order to have a conviction.
- e. Despite other non-DOD investigations determining no misconduct, the U.S. Marine Corps is nonetheless prosecuting Capt Wacker for incidents investigated by Louisiana, California and the University of San Diego.
- f. Maj Samuel Jackson (referenced in Government’s motion), the former deputy SJA of

MCRD San Diego, CA previously worked for Col Stephanie Smith, the former SJA of MCRD San Diego, CA whose actions form the basis of Capt Wacker's UCI motion and the reason that Capt Wacker is no longer stationed at MCRD San Diego and the reason charges in this case were dismissed without prejudice and then repreferred and rereferred.

- g. Maj Ted Bannanno, who conducted the first Article 32 hearing, was not recorded during that Article 32 hearing by audio devices and he didn't have the benefit of Ms. Brooder or Ms. Easley attending the hearing because allegedly they were told that they did not need to testify by the NCIS agent.
- h. The DNA evidence cited by the prosecutor is irrelevant because all along (first in what he told Ms. Brooder and later in what he told the USD board) Capt Wacker has admitted that he had sexual contact with Ms. Brooder (but not sexual intercourse) and that such contact was at all times consensual and mutual.

3. **Discussion.**

A. EVIDENCE THAT PRIOR INVESTIGATIONS (OTHER THAN THAT OF NCIS) WERE CONDUCTED IS ADMISSIBLE.

The Government will undoubtedly introduce evidence that NCIS conducted an investigation into this case. The Government will then infer that the investigation of that NCIS agent and agents resulted in Capt Wacker being accused and then charged of rape. The Defense should be permitted to offer NOPD's and the USD investigation into this case, which such investigations tended to exculpate Capt Wacker of rape. The Defense's argument in favor of admission is based on the rule of completeness.

CAAF said in United States v. Rodriguez, 56 MJ 336 (CAAF 2002) that the rule of completeness, which has its roots in common law principles of evidence, has two purposes: (1) to

ensure that the court not be misled because portions of a statement are taken out of context, and (2) to avoid the danger that an out-of-context statement may create such prejudice that it is impossible to repair by a subsequent presentation of additional material. Rodriguez held that under the Military Rules of Evidence, there are two distinct rules of completeness: Rule 106, the general rule of completeness, and Rule 304(h)(2), which applies when a confession or admission is introduced against an accused.

It is the general rule of completeness, not completeness as to any statement, which the defense argues for the denial of the government's motion.

Rodriguez went on to say that Mil. R. Evid. 106 may be invoked by either the prosecution or defense to address matters introduced by the opposing party. Rodriguez noted that the primary concern of Rule 106 is the order of proof, permitting an adverse party to compel the introduction of favorable evidence during the opponent's case.

If the Government introduces matters concerning how this case was investigated (including "investigative" material from the USD Critical Issues Board Hearing; also 32 Officer Maj Bonnano's recommendation of referral without all the evidence), then the rule of completeness requires that the ENTIRE investigation be introduced in fairness to Capt Wacker so as to not give an unfair advantage or misleading presentation of Capt Wacker to the members.

Further in United States v. Roberson, 65 M.J. 43 (CAAF 2007), CAAF held that MRE 701 provides that a lay witness may express an opinion based upon personal observation where that opinion is relevant to a fact in issue and not based upon specialized, scientific knowledge). This means that if NCIS talks about the investigation they did, the USD and NOPD witnesses should be permitted to talk about the investigation they did and their personal observations as well as what happened factually during and as a result of their own investigations.

It is not merely ironic that the prosecutor is attempting to introduce Capt Wacker's testimony before the USD critical issues hearing board (Capt Wacker faces an Article 133, novel spec language, charge for that conduct), the fact of the USD Hearing board is material on the merits. There can be no way for the Government to prove that Article 133 charge without evidence of the hearing being admissible.

The defense is seeking an opinion that Capt Wacker is innocent, merely a recitation of the facts that the USD critical issues board took no action and that the New Orleans's District Attorney dismissed all charges against Capt Wacker. The Government can't be permitted to introduce only the portions of those investigations it likes and then deny the defense the same opportunity to truly show the members what actually happened.

Accordingly, if the prosecution is going to introduce the fact that part of the investigation, the NCIS portion, resulted in the accused being implicated in this case; then the defense ought in fairness be able to offer the COMPLETE investigation, which is that the USD and NOPD investigations exculpated the accused. Otherwise, in fairness the Government should not be permitted to disclose to the members that there was an NCIS investigation at all or that Capt Wacker gave any testimony before the USD hearing board.

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 introduce evidence of the USD hearing board and the NOPD investigation.

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.

- DETECTIVE CLIFTON NEELY, NEW ORLEANS POLICE DEPARTMENT
- LIEUTENANT QUINTON KAWAHARA, UNIVERSITY OF SAN DIEGO POLICE DEPARTMENT
- CARRIE WILSON, ASSISTANT DEAN, USD.
- KEVIN COLE, DEAN, USD.
- JOHN BURGE, SA, NCIS.
- DONALD GODWIN, ASST VP STUDENT AFFAIRS, USD.
- LARRY BARNETT, ASST VP PUBLIC SAFETY, USD.

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