

- b.Regarding the alleged misconduct, the complaining witnesses Jessica Brooder and Elizabeth Easley-Cook have at various times made references that they believed that they have been drugged by Capt Wacker to a state that Capt Wacker could then take advantage of them and sexually assault them. A drug test was done by Jessica Brooder under cover of false identity shortly after the evening at issue; but the urinalysis revealed no date rape drugs in the complaining witness's body.
- c.Additionally, this case occurred in early 2007 and has been investigated by the government since then. At various times, a very few witnesses interviewed by NCIS have referred to Capt Wacker as "Creepy Doug."
- d.Additionally, a few witnesses have testified in the two article 32 proceedings (this case was dismissed without prejudice by the US Government following evidence of UCI with the members that forms the basis of a UCI motion) that they recalled Capt Wacker mentioning in a informational luncheon while interning at the U.S. Attorney's Office for the Southern District of California that cat tranquilizers could be used as a date rape drug.
- e.Finally, there was another woman, Nicole Cusack, who Capt Wacker dated for several months, January to June

2007, during the same time period when Capt Wacker, Jessica Brooder, and Elizabeth Easley were going to have a threesome in New Orleans, LA.

- f. After Nicole Cusack learned that Captain Wacker was intimate with Jessica Brooder and Elizabeth Easley in a hotel room in New Orleans while Cusack and Wacker were dating; Cusack claimed in early 2009 that she too was raped by Capt Wacker in Seattle, WA the first time that they had sex in January 2007.
- g. Of course, even Ms. Cusack will admit that she and Captain Wacker engaged in a consensual sexual relationship that lasted from January 2007 until June 2007 and that they had consensual intercourse dozens of times during that time period.
- h. An Article 32 hearing held in April 2010, investigated the allegations of Ms. Cusack but it found her allegations not credible (and heavily influenced by the NCIS agent interviewing her) and charges regarding Nicole Cusack were NEVER referred by the GCMA.
- i. Specifically, the investigating officer LtCol Michael E. Sayegh wrote on page 11 of his report:
- j. "With regard to the charges with Nicole Cusack (Nicole) I find the following evidence to be most persuasive in determining whether reasonable grounds exist to believe

the accused committed the offenses alleged involving Nicole:

- k."-The significant time from the date of the alleged rape to Nicole formally making an allegation of rape against the accused. From the evidence it appears the alleged incident occurred in late 2006 or early 2007 and was not reported to NCIS until around January 2009.
- l."-The intimate and sexual relationship Nicole and the accused had after the alleged rape. The relationship ended in May 2007 when Nicole went to Alaska.
- m."-The conduct of the NCIS Agent conducting his interview of Nicole in IE: 54 where the NCIS agent gave Nicole the specific details of the allegations that were made against the accused by Jessica Brooder and Elizabeth Easley. The NCIS agent revealed to Nicole that Joseph Gorman had made a previous statement to NCIS where he alleged the accused had knowledge about date-rape drugs. It should also be noted that for the past two years, Joseph Gorman and Nicole Cusack have been dating. 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 the accused as well. This information

was provided to Nicole before she gave her statement to NCIS.

n."-Nicole's testimony at the Article 32 hearing was completely inconsistent with her statement in IE: 54 with regard to her feelings for the accused. She testified at the hearing that she liked the accused as a 'good friend' but had no long term interest in him. However, in her actual interview with NCIS at IE:54 she clearly states that the accused "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 the accused 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'.

o."-When the aforementioned is taken in conjunction with the fact that Nicole and the accused were still in a sexual relationship when the allegations from New Orleans arose in April 2007, I find significant issues with regard to the credibility of Nicole with regard to her honest belief she did not consent to sexual intercourse with the accused in Seattle in Dec 06/Jan 07. Her testimony at the Article 32 revealed she had a significant concern with her reputation and what

would happen if classmates found out that she fell naked in the shower in front of the accused. Nicole testified that during the sexual intercourse she said something to the effect that they could not do this because they are classmates and at no time prior to hearing about the allegations in New Orleans did Nicole ever feel the accused had done anything illegal to her."

p.Regarding the Government's proposed charge against Capt Wacker for his conduct towards Nicole Cusack, the investigating officer wrote at page 19 of his report:

q."Specification 2: Rape of Nicole Cusack. Reasonable grounds DO NOT exist to believe the accused committed the offense alleged. I recommend this specification be withdrawn and dismissed. The fact that Nicole Cusack engaged in an intimate sexual relationship with the accused for months after the alleged rape, the lack of any desire to report the rape until she was made aware of the allegations out of New Orleans and my personal observation of her demeanor on the witness stand, leave me with significant questions regarding her credibility. Furthermore, the conduct of the NCIS agent in conducting his interview of Nicole Cusack, when combined with her inconsistent statements regarding her feelings about the accused during their

close and personal relationship, will create significant hindrances in establishing her credibility to any judicial fact finder. Even assuming that Nicole Cusack did vomit and fall in the shower, facts the accused may have admitted to in IE:13, this does not establish reasonable grounds she was too incapacitated to consent to having sexual intercourse with the accused later that same evening. Although Nicole had revealed to a few friends her concerns about some memory loss on her first night with the accused in Dec 06 or Jan 07, she does not begin to view the incident as rape until after she finds out in February 2008 that the accused may have had sexual intercourse with Liz and Jessica in New Orleans while Nicole and the accused were still in a sexual relationship. Prior to giving her sworn statement to NCIS, the NCIS Agent gives her the details of the accusations of Liz and Jessica, as well as misleading information regarding the evidence NCIS had on the accused. All the information obtained during this Article 32 hearing on this specification came from Nicole. Her lack of credibility impedes my ability to find reasonable grounds exist the accused committed this offense."

r.The Government has now given notice that it intends to introduce evidence that Capt Wacker used Adderall

before and that Capt Wacker raped Nicole Cusack. See Exhibits B and D, attached to this pleading.

s.Capt Wacker is not charged with using Adderall, nor is Capt Wacker charged with raping Nicole Cusack.

III. Discussion (law and analysis).

A. The cat tranquilizer innuendo and the creepy Doug comments must be excluded because they are inadmissible under the Military Rules of Evidence.

MRE 401 defines relevant evidence as any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

MRE 403 excludes relevant evidence when the probative value of that evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the members or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

MRE 404 states that character evidence of the accused is inadmissible unless it is offered by the prosecution only after the accused has introduced evidence of the same character trait of the alleged victim.

Another exception to MRE 404's rule of exclusion is MRE 404(b) which allows the prosecution to introduce such evidence for the purpose of either showing proof of motive, opportunity,

intent, preparation, plan, knowledge, identify, or absence of mistake or accident.

For example, CAAF has held that "under M.R.E. 404(b), evidence of uncharged misconduct expressly was inadmissible as a general matter to show propensity to commit the charged crime, but that it may be admissible for other purposes." U.S. v. Tanner, 63 M.J. 445, 448 (CAAF 2006).

In United States v. Burton, 67 M.J. 150 (CAAF 2008), CAAF held that the government may not introduce similarities between a charged offense and prior conduct, whether charged or uncharged, to show modus operandi or propensity. Burton went on to hold that portions of a closing argument encouraging a panel to focus on such similarities to show modus operandi and propensity, when made outside the ambit of these exceptions, are not a reasonable inference fairly derived from the evidence, and are improper.

In this case, testimony about the use of any date-rape type drugs to drug Jessica Brooder or Elizabeth Easley would be evidence of an Article 128 Assault offense or event an Article 134 reckless endangerment offense. The government could have preferred and investigated those offenses, but it did not. Indeed, those allegations were discussed with the 32 Officer in this case.

Now, Capt Wacker is not charged with either of those crimes, therefore, introduction of testimony about cat tranquilizers would not only be an inflammatory red herring but it would also be

uncharged misconduct in violation of case law and MRE 404. Capt Wacker could not hope to have a fair trial if the government were to imply he used date rape drugs to drug Brooder and Easley, even despite the fact that a drug test was taken by Ms. Brooder and it showed no date rape drugs.

Similarly, the "Creepy Doug" comment is not even relevant, let alone less prejudicial than probative. It's inflammatory potential use has nothing to do with the facts at issue in that it does not make it more or less probable that Capt Wacker had a consensual threesome with the women at question or not. Further, this is exactly the sort of character evidence that MRE 403 and 404 were meant to exclude as it is simply a derogatory phrase that would deprive Capt Wacker of a fair trial. There is no context to this phrase other than insulting Capt Wacker. It must be excluded, along with the date rape drug allegations that were not charged.

B. The Nicole Cusack case should not be heard by the members because it was discredited at an Article 32, the GMCA intentionally did not refer it and allowing the evidence will result in a trial within a trial substantially more prejudicial than probative to the rights of Capt Wacker.

Even if the court deems that the assertions outlined in the government's MRE 413 notice are sufficiently relevant to the matters at issue in the instant case and that the government demonstrated a good faith basis from which to introduce such

matters, the defense submits that the MRE 413 evidence proffered by the government should be excluded IAW MRE 403. M.R.E 403 states that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. Manual for Courts-Martial, United States, Mil. R. Evid. 403 (2008).

Unfair prejudice signifies that the danger to be avoided is using the evidence for something other than its logical, probative force. See United States v. Owens, 16 M.J. 999 (A.C.M.R. 1983); See generally United States v. Abel, 469 U.S. 45 (1984);. The court in Ballou v. Henri Studios, 656 F. 2d 1147 (5th Cir 1981), further articulated the notion that unfair prejudice means “. . .an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.” Id.; See generally Old Chief v. United States, 117 S. Ct. 644 (1997).

Allowing the government to even hint at allegations of prior crimes of sexual assault allegedly committed by the accused invites an unwelcome influence on the logical process. Such innuendo invites the fact finder to dramatically over estimate the value of the purported evidence, appeals only to the fact finder's emotional views, and serves to cause confusion as to the actual probative value and weight (if any) that should be placed

on said evidence. Owens at 1002. Owens held that the government's desire to parade these rumors before the fact finder is an attempt to prosecute PFC Doe based on the suspicion that the aforementioned crime may have been committed. The government seeks to use references to "other sexual misconduct" to gain an "unfair advantage" by inflaming or shocking the consciousness of the fact finder, and hence, painting PFC Doe as a "bad person and/or a sexual deviant" who deserves punishment. See generally United States v. White, 23 M.J. 84 (C.M.A. 1986).

The admission of this evidence does nothing more than entice the finder of fact into declaring guilt on impermissible grounds different from proof specific to the charged offense, and further, it ultimately denies Capt Wacker a fair opportunity to defend against the actual offense charged. Neither a limiting nor curative instruction can cure the inflammatory and prejudicial effect that introduction of this type of evidence will have on the minds of the finder of fact. The probative value of the use of unsubstantiated allegations or hearsay relating to a date rape supposedly committed by Capt Wacker against his girlfriend of six months is substantially outweighed by the danger of unfair prejudice to the accused.

The most dispositive CAAF opinion regarding MRE 413 is United States v. Berry, 61 M.J. 91 (CAAF 2005). Berry resulted in CAAF overturning a trial court's conviction in a forcible sodomy case where the government erroneously introduced evidence

of another forcible sodomy that was more prejudicial than probative. Berry held that inherent in MRE 413 is a general presumption in favor of admission; however, it is a constitutional requirement that evidence offered under Rule 413 be subjected to a thorough balancing test under MRE 403 where its probative value is balanced against its prejudicial impact; where that balancing test requires exclusion of the evidence, the presumption of admissibility is overcome.

Berry went on to hold that to admit evidence under MRE 413, three threshold determinations must be made: (1) the accused is charged with an offense of sexual assault; (2) the evidence proffered is evidence of the accused's commission of another offense of sexual assault; and (3) the evidence is relevant under the evidence rules governing relevance, MRE 401 and 402).

Berry further said that once the evidence meets the threshold requirements of MRE 413, a military judge must apply the balancing test of MRE 403 under which the testimony may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members.

In Berry, evidence of a prior uncharged sexual assault by an accused involving a younger victim satisfied the relevance prong of the threshold test for the admission of uncharged sexual assault in a case where the accused was charged with forcible sodomy of a victim who was drunk, as it has some tendency to make

it more probable that the accused committed a nonconsensual act against a vulnerable person.

However, in Berry the trial military judge erred in admitting evidence of an uncharged sexual act between the accused and another victim that occurred eight years earlier than the charged forcible sodomy when the accused was thirteen and the other victim was six; although the evidence was relevant, it failed the balancing test after consideration was made of its probative weight, the frequency of the acts, the temporal proximity of the prior act and the presence of intervening circumstances, and the distraction of the factfinder which might result in a distracting mini-trial on a collateral issue.

CAAF found that in Berry the length of time between the events alone is generally not enough to make a determination as to the admissibility of MRE 413 testimony; the circumstances surrounding the individual and the events that transpired in the intervening period must be taken into consideration; where an accused was an adult at the time he committed the prior sexual assault, this court has found incidents occurring more than eight years prior to the charged incident to be relevant under MRE 413; a similar finding is not readily made where a prior incident is between children or adolescents.

Again, the Berry decision of the conviction being overturned occurred because the evidence admitted was more prejudicial than probative and resulted in a distraction from the case at hand.

While not identical to Captain Wacker's case, the test remains the same. Here, Capt Wacker attempted to have a one night stand with two women at once in New Orleans. He has been charged with several offenses relating to that night. During the same period, Captain Wacker dated a Ms. Nicole Cusack. On the first night he and Ms. Cusack had sex, Cusack two years later claimed she did not consent (after NCIS tainted her testimony, according to the 32 Officer). Ms. Cusack admits that she went on to have an almost six month consensual sexual girlfriend-boyfriend relationship with Capt Wacker following that first night of sex. Only after Ms. Cusack learned of the New Orleans incident of April 2007 did Ms. Cusack claim her first night in bed with Capt Wacker was anything other than consensual.

This is not only not a crime, but it is highly speculative and not credible. Unlike Berry, there was not a significant temporal difference between the incidents alleged against Capt Wacker to which CAAF, in Berry, found a failure to meet the requirements of MRE 401 and 402. The court's holding, inclusive of the final balancing test under MRE 403 is the most relevant. The government has fully investigated this allegation by Ms. Cusack. An impartial investigating officer heard testimony and other evidence and found NO REASONABLE GROUNDS for the inclusion of this charge against Capt Wacker.

There is a reason both the investigating officer and the GCMA recommended or decided to not bring up the story of Ms.

Cusack on the charge sheet (indeed the charge sheet shows that all Cusack charges on the charge sheet were lined out and the words "withdrawn and dismissed" were written underneath). That reason is that her story is not credible, no offense took place, and having this case litigated would distract the members from the true issue at hand: what happened in April 2007 in New Orleans. To allow such testimony under MRE 413, would circumvent the entire investigative process of military justice (i.e. Article 32 Hearings and the GCMA's referral decision) and remove the protections afforded the accused to fully defend himself against the allegations brought forward by the government.

C. The Adderall and Nicole Cusack hyperbole should be excluded at trial on the merits because 1. Both are irrelevant to the charges in this case, 2. Both constitute uncharged misconduct and 3. Both are substantially more prejudicial than probative.

United States v. Burton, 67 M.J. 150 (CAAF 2008) held that the government may not introduce similarities between a charged offense and prior conduct, whether charged or uncharged, to show modus operandi or propensity without using a specific exception within our rules of evidence, such as MRE 404 or 413. Burton went on to hold that it follows, therefore, that portions of a closing argument encouraging a panel to focus on such similarities to show modus operandi and propensity, when made outside the ambit of these exceptions, are not a reasonable inference fairly derived from the evidence, and are improper.

The 2006 case of United States v. Barnett, 63 M.J. 388 (CAAF 2006) is also relevant to this issue. Barnett laid out a three-part test for the military judges to use when determining the admissibility of uncharged misconduct under MRE 404(b): (1) does the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs or acts; (2) what fact of consequence is made more or less probable by the existence of this evidence; AND (3) is the probative value substantially outweighed by the danger of unfair prejudice.

Barnett explained that the evidence at issue must fulfill all three prongs to be admissible. The first and second prongs address the logical relevance of the evidence. The third prong ensures that the evidence is legally, as well as logically, relevant.

Here, Capt Wacker's use of Adderall and his supposed rape of Nicole Cusack are not relevant to the issue of whether or not Capt Wacker sexually assaulted Ms. Brooder and Easley in a one night stand. First, the Cusack story was discounted at the Article 32 hearing and then not referred to GCM. Allowing the Government to introduce it violates the whole premise of what an Article 32 investigation is for and the meaning and discretion of the GCMA to charge certain offenses and not others. See analysis in previous section.

Further, the Cusack instance is not remotely relevant to the Easley and Brooder story. This is because Cusack and Wacker

dated for many months into the future afterwards and Cusack only claimed she was sexually assaulted on their first night of sex **AFTER** NCIS SA Burge introduced the idea of sexual assault into Cusack's mind. There was NCIS misconduct and the 32 Officer in this case immediately and correctly called NCIS out for what they did in their Cusack interview.

Regarding the Adderall use, defense counsel is at a loss for how Adderall use is remotely relevant to the charges at issue. This was something that could have been investigated at an Article 32, but wasn't. There is no evidence that Capt Wacker even used Adderall. Defense suspects that Cusack is going to make up some story that Capt Wacker used Adderall in law school as part of a retaliation scheme for the 32 officer not believing her story at the Article 32. This is a bad reason to allow it to come in at trial on the merits. It's not probative, it's extraordinarily prejudicial and it's not even logically relevant to the underlying offenses on the charge sheet. The members should not hear about the incredible Adderall story.

IV. Relief Requested.

The defense respectfully requests that the Government be prevented from eliciting testimony, introducing evidence, or arguing any of the following subject areas:

1. That a nickname of the accused was "Creepy Doug"
2. That the accused drugged anybody with any substance.
3. The Nicole Cusack date rape story.

4. Adderall use by Capt Wacker.

V. Evidence and Burden of Proof.

a. The defense requests production of the following witnesses by the Government at the motion hearing:

1. Nicole Cusack (to testify about Adderall and her sexual assault claims)
2. Jessica Brooder (to testify about date rape drug claims)
3. Elizabeth Easley (to testify about date rape drug claims)
4. LtCol Michael E. Sayegh (to testify about the scope of the Article 32 investigation and his conclusions)
5. NCIS SA John Burge (to testify about his investigative actions with Ms. Cusack)
6. Joseph Gorman (to testify about the creepy Doug comment)

b. The following exhibits are provided:

- Exhibit A: Article 32 report ICO Capt Wacker
Exhibit B: Government MRE 413 Notice
Exhibit C: Statement of Brooder and Easley and lab note
Exhibit D: Government's 100825 MRE 304 notice ICO US v Wacker

c. The burden is on the defense to support all of its alleged facts by a preponderance of the evidence. 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.

VI. Argument.

The defense desires oral argument. This pleading was served on the parties and the Court on 1 September 2010.

/s/

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Detailed Defense Counsel