

UNITED STATES MARINE CORPS
WESTERN JUDICIAL CIRCUIT

UNITED STATES)	GENERAL COURT-MARTIAL
)	
v.)	DEFENSE RESPONSE TO
)	GOVERNMENT MOTION TO PREADMIT
Douglas Wacker)	EVIDENCE
Captain)	
U.S. MARINE CORPS)	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.

2. **Summary of Facts.**

- a. Without offering any evidence, but caveating that they are prepared to do so upon objection by the defense; the government seeks to preadmit the following items:
 - a) Red Reebok basketball shorts worn by Jessica Brooder on 4 April 2007
 - b) Blue denim jeans worn by Jessica Brooder on 4 April 2007
 - c) Alternate light source photographs of shorts and jeans worn by Jessica Brooder on 4 April 2007
 - d) Photographs of Jessica Brooder, Elizabeth Easley, and Susan Minamizono at Audobon Park, New Orleans on 3 April 2007
 - e) Photographs from camera belonging to Rebecca Barker taken in New Orleans on 3-4 April 2007
 - f) Accused’s USAA bank records from April 2007.

g) Recording of accused's statements to University of San Diego Critical Issues Board on 21 June 2007.

b. The Government did not attach any evidence that they intend to introduce with their motion, so the defense is unsure as to exactly what evidence the Government intends on introducing.

c. Regarding the USD transcript, assuming it's the same item the Defense has; Capt Wacker was not placed under oath and he was not read his Article 31b or Miranda rights at anytime when he made certain exculpatory statements.

3. **Discussion.**

A. THE RED REEBOK BASKETBALL SHORTS WORN BY JESSICA BROODER ON 4 APRIL 2007 SHOULD NOT BE ADMITTED.

Under MRE 401 and 402 only relevant evidence is admissible and irrelevant evidence is not admissible. The burden is on the Government to show how these shorts are admissible. They don't do that in their motion.

Further, MRE 403 provides that 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 the considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

MRE 901 states that all evidence admitted has to be authenticated as a condition precedent to admissibility. This is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims.

Assuming that these are the shorts Ms. Brooder claims she wore on 3 April 2007, that fact alone doesn't make the shorts admissible. First, the shorts are not relevant as to the charge of

rape. The Government doesn't explain in its motion the causal connection of the shorts to proving or disproving the charges against Capt Wacker.

Assuming DNA were to be found on the shorts that links the shorts to Capt Wacker (the motion doesn't indicate), the Government still has the burden of proving that these shorts are the SAME shorts worn by Ms. Brooder on 3 April 2007 (3 April, not 4 April 2007 was the date of the incident as alleged on the charge sheet) and that the DNA on the shorts BELONGS to Capt Wacker. Therefore, according to the charge sheet, 4 April 2007 is irrelevant.

Finally, how is Ms. Brooder going to authenticate that these are her shorts? The defense believes she can't recall the events that happened on 3 April 2007. Therefore, how she can possibly remember that these exact shorts are the ones she was wearing on 3 April 2007 remains to be explained by the Government. She may merely testify that these are only some shorts that look like the shorts she was wearing—but that doesn't satisfy the authentication requirements. Shorts are fungible items that are indistinguishable from an identical product of shorts of the same manufacture and style. The Government provides no chain of custody to authenticate that these are those shorts worn that night.

In any case, the burden is on the government and that burden is not met here.

B. BLUE DENIM JEANS WORN BY JESSICA BROODER ON 4 APRIL 2007 SHOULD NOT BE ADMITTED EITHER.

Again, there is no chain of custody. Again, there is no explanation for what the jeans have to do with 3 April 2007. Again, there is no proof or explanation provided that these jeans belonged to Jessica Brooder or that she can identify them as the jeans worn on 3 April 2007, let alone Capt Wacker's DNA is on those jeans. This is what trial is for, however, without proper foundation this evidence should not be admitted.

C. ALTERNATE LIGHT SOURCE PHOTOGRAPHS OF SHORTS AND JEANS WORN BY JESSICA BROODER ON 4 APRIL 2007 SHOULD NOT BE ADMITTED.

The government should attempt to admit this item at trial in front of the members. What do these photos matter if the jeans and shorts are ultimately admissible? The defense imagines that these light photos will be offered to show stains of some sort on the jeans and shorts on 4 April 2007 that are not otherwise visible with the naked eye. This sounds like expert testimony and if the Government plans to offer it, it MUST obtain for the defense an expert with the same or better qualifications as the Government's alternate light expert.

Case law from CAAF indicates that "Where the Government has found it necessary to grant itself an expert and present expert forensic analysis often involving novel or complex scientific disciplines, fundamental fairness compels the military judge to be vigilant to ensure that an accused is not disadvantaged by a lack of resources and denied necessary expert assistance in the preparation or presentation of his defense." See United States v. Lee, 64 M.J. 213 (CAAF 2007) and United States v. McAllister, 64 M.J. 248 (CAAF 2007) for the same analysis regarding defense experts. See also United States v. Warner, 62 M.J. 114 (CAAF 2005), which held that the defense expert must be comparable to the government's expert in terms of qualifications. Accordingly, the defense will need an alternate light expert provided and paid for by the Government with the same or better qualifications as the Government's own expert.

Admitting these alternate light photos still does not seem relevant, nor even admissible if relevant at this point without an explanation by the Government. This seems to be dangerously unfair prejudice as there is no evidence provided in their motion that Capt Wacker caused those potential stains on a day prior. There is no evidence provided that proves these stains are related to Capt Wacker's case or the charges he faces.

Further, what proof does the Government offer that these alternate light sources are accurate and not some computer generation or photography effect? Assuming the jeans and the shorts are admissible, why can't the members look at them themselves and see the condition of the clothing for themselves? Why are alternate light sources needed at all? The answer to any one of these questions, if not effecting admissibility, certainly effect weight of the evidence---again, something the members should see and hear at trial.

D. PHOTOGRAPHS OF JESSICA BROODER, ELIZABETH EASLEY, AND SUSAN MINAMIZONO AT AUDOBON PARK, NEW ORLEANS ON 3 APRIL 2007 SHOULD NOT BE ADMITTED.

Again, there is no mention or evidence provided by the Government to show this piece of evidence's relevance or authentication. The alleged rape allegedly occurred at a hotel in New Orleans near the famous Bourbon Street. Audubon Park is by the Mississippi River and the New Orleans Zoo, miles away from the hotel at issue. The Defense doesn't understand this photo's relevance, however slight it may be. Also, the photo is not authenticated with evidence as to the identity of the persons in the photo, confirmation of the place or time it was taken. It should not be admitted for failure of the Government to comply with MRE 402 and MRE 901.

E. PHOTOGRAPHS FROM CAMERA BELONGING TO REBECCA BARKER TAKEN IN NEW ORLEANS ON 3-4 APRIL 2007 SHOULD NOT BE ADMITTED.

For the reasons that the other photos should not be admitted, these photos should also not be admitted prior to trial: there is no compliance with MRE 402 or MRE 901. There are no photos attached to this motion. There is no explanation or evidence for why the photos are relevant or how they are going to be authenticated.

F. ACCUSED'S USAA BANK RECORDS FROM APRIL 2007 SHOULD NOT BE ADMITTED.

This is a sexual assault case that allegedly occurred on 3 April 2007, not a larceny or bad checks case. Why are bank records needed? The Defense does not understand the relevancy of Capt Wacker's bank records for the ENTIRE month of April 2007. That broad bank statement seems like an invasion of privacy for Capt Wacker. Do the members really need to know about his shopping tastes before and after the incident if they have nothing to do with the incident? The Government doesn't explain or provide evidence to justify relevance or authentication of these records under MRE 402 or MRE 901.

G. CAPT WACKER'S STATEMENT TO USD OFFICIALS SHOULD NOT BE ADMITTED.

Article 31b UCMJ provides that an Accused like Capt Wacker must be read his Article 31b rights before he gives a statement to law enforcement officials that suspect him of an offense. USD officials are not law enforcement, but at the time of the hearing they were well aware that there were or were going to be law enforcement investigations into this matter. Now, those statements gathered by USD are being produced by the Government to be used against Capt Wacker.

United States v. Paige, 67 M.J. 442 (CAAF 2008) held that members of the armed forces, like their civilian counterparts, may not be compelled to incriminate themselves in a criminal case. Paige further said that a military accused has the right not to testify, and trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense.

United States v. Chatfield, 67 M.J. 432 (CAAF 2008) held that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the

accused unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Chatfield said that the safeguards must take the form of specific warnings. Chatfield held that prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

Although the exact statements at issue were not attached by the Government to their motion, the Defense anticipates that the Government will attempt to introduce a USD transcript or audio recording from a USD hearing where Capt Wacker purportedly said that he had sexual contact with Jessica Brooder. At such hearing Capt Wacker was not placed under oath or read any rights. At such hearing, Capt Wacker admitted that he and Jessica Brooder had consensual sexual contact and mutual masturbation with each other, but there was no sexual intercourse.

The burden is on the government to authenticate that this statement was made. The burden is also on the government to show that Capt Wacker did not make this statement involuntarily.

4. **Relief Requested.** The defense respectfully requests that the Government's motion, which is the subject of this response brief be denied in full.

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, except for the admission of Capt Wacker's statement. In that regard, the Government has a burden of proof of clear and convincing evidence.

6. **Argument.** The defense desires oral argument.

7. **Evidence.** The defense requests the following witnesses and evidence be produced by the Government. All witnesses' full names and contact information are believed to be in the

possession of the trial counsel.

- JESSICA BROODER
- ELIZABETH EASLEY
- SUSAN MINAMIZONO
- REBECCA BARKER
- NCIS OR OTHER CHAIN OF CUSTODY WITNESSES FOR BOXERS, JEANS AND ALTERNATE LIGHT PHOTOS, BANK STATEMENTS, USD TRANSCRIPT AND PARK PHOTOS
- THAT THE GOVERNMENT PRODUCE ALL EVIDENCE IT SEEKS TO ADMIT

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