

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

UNITED STATES)	GENERAL COURT-MARTIAL
)	
v.)	MOTION TO COMPEL PRODUCTION OF
)	WITNESSES
JAMES M. ROWE)	
CAPTAIN)	
U.S. MARINE CORPS)	15 NOVEMBER 2011
)	

1. Nature of Motion.

This is a motion requesting the production of the following witness: Major Andrew Warren, USMC and Captain Bryan Wilson, USMC. The request for Maj Warren and Capt Wilson is submitted pursuant to RULES FOR COURT-MARTIAL (hereafter RCM) 703 and MILITARY RULES OF EVIDENCE (hereafter MRE) 404a.

2. Summary of Facts.

Capt Rowe is alleged to have had abusive sexual contact and forcible sodomy with the prosecutrix, the former First Lieutenant Ariana Klay on or about 28 August 2010, among other charges. At the time of the allegations, Mrs. Klay was facing disciplinary action for substantiated and videotaped misconduct. Mrs. Klay was subsequently given Article 15 punishment and administratively separated from the US Marine Corps in lieu of further disciplinary action. Maj Warren and Capt Wilson were both stationed with Mrs. Klay and Capt Rowe at Marine Barracks Washington (commonly referred to as 8th and I) before, during and after the alleged sexual assault. Maj Warren and Capt Wilson will testify about Mrs. Klay's use of allegations to divert attention away from her own misconduct.

3. Discussion.

Capt Rowe is entitled to have material witnesses provided for his court-martial. Article 46, Uniformed Code of Military Justice (UCMJ), see also United States v. Manos, 17 C.M.A. 10, 37 C.M.R. 274 (C.M.A. 1967)(applied the holding in Washington v. Texas, 388 U.S. 14 (S.Ct. 1967) to the military: compulsory process for criminal accused).

The factors the military judge should consider in determining whether the personal appearance of a witness should be compelled are set forth in United States v. Allen, 31 M.J. 572 (N.M.C.M.R. 1991), *aff'd*, 33 M.J. 209 (C.M.A. 1991), *cert. denied*, 112 S.Ct 1473 (1992).

They are:

1. issues involved in the case and importance of requested witness to those issues;
2. whether witness was desired on the merits or sentencing;
3. witness unavailability/ alternatives to live testimony;
4. military status;
5. whether compelling the witness's appearance would interfere with mission accomplishment; and
6. whether the witness's testimony would be cumulative.

Applying the facts to the law, the witnesses' presence at trial is of the utmost importance. First, their testimony is pertinent to the nature of the allegations of which Capt Rowe is being accused and the motive that Mrs. Ariana Klay has to fabricate these allegations. As Marine Officers who know both Capt Rowe and the prosecutrix, Maj Warren and Capt Wilson can speak to her motives under MRE 404(b). Providing the trier-of-fact the reason why a Marine Officer would make such heinous allegations gives the Court the lynchpin - why. Third, the witnesses are available and willing to testify. Fourth, there has been no averment by the government that their absence will negatively impact mission accomplishment. Finally, their testimony will not be cumulative. Having two witnesses who can independently testify about a topic is not cumulative

– it is confirmative. Anything but their live testimony would deprive the accused of an opportunity to use important witnesses to contest the charges against him.

In the Government's response to the witness request, MRE 608(b) is cited. The Government's reliance on MRE 608(b) is misplaced. The defense is not seeking to impeach Mrs. Klay's character for truthfulness through extrinsic evidence, but rather the requested witnesses' testimony speaks to a pivotal issue in the case – motive to fabricate. The MREs are based off of the FEDERAL RULES OF EVIDENCE (hereinafter FRE). FRE 608 was amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. See Committee Notes on Rules, 2003 Amendment, FRE 608, *citing* United States v. Abel, 469 U.S. 45 (1984); United States v. Fusco, 748 F.2d 996 (5th Cir. 1984).

Simply put, Maj Warren and Capt Wilson's testimony is not character evidence. Unlike the general prohibition under MRE 608, evidence falling under MRE 404(b) may be proved through extrinsic evidence. Specifically, the defense can use extrinsic evidence to prove Mrs. Klay's motive's in making the allegations; her modus operandi; or her intent to divert attention from her own misconduct. Some courts have held that the defense faces a lower burden of admissibility because there is no danger of prejudice to the accused. See United States v. Stevens, 935 F.2d 1380, 1403 (3rd cir. 1991). In United States v. Aboumoussallem, the Court stated "[w]e believe the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword." United States v. Aboumoussallem, 726 F.2d 906, 911-12 (2nd Cir. 1984). In an extensive analysis of the law in the various circuits, the Ninth Circuit opinion clearly finds that

FRE 404(b) [and analogously MRE 404(b)] applies a lower standard to the Defendant. See United States v. McCourt, 925 F.2d 1229 (9th Cir. 1991).

Using the test under United States v. Allen and applying MRE 404(b) to the testimony of Maj Warren and Capt Wilson, the defense's motion to compel production of the requested witnesses should be granted.

4. Relief Requested.

The defense respectfully requests that the military judge order the government to produce Maj Warren and Capt Wilson.

5. Evidence.

- a. Proffers
- b. The defense is prepared to call the two witnesses by telephone

6. Oral Argument. The defense requests oral argument.

/S/
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/S/
Scott R. Shinn
Captain, U.S. Marine Corps
Detailed Defense Counsel

Certificate of Service

I hereby attest that a copy of the foregoing motion was electronically served on the Court and opposing counsel on 15 November 2011.

/S/

Scott R. Shinn
Captain, U.S. Marine Corps
Detailed Defense Counsel