

DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE JUDICIARY

UNITED STATES)	
)	
)	GOVERNMENT RESPONSE TO
v.)	THE DEFENSE'S MOTION TO
)	COMPEL DISCOVERY
)	
Lt Col James H. Wilkerson)	
31st Fighter Wing (USAFE))	
Aviano AB, Italy)	19 October 2012

COMES NOW the United States and requests that this Honorable Court deny the defense's motion to compel discovery. If this Honorable Court grants the defense's motion, the Government requests that the Court first conduct an in camera review of material's that are limited in time and then deny defense's request of material that is neither relevant nor material to the preparation of its case.

FACTS

1. The Government concurs with the defense's statement of the facts of paragraph one, two, three and seven. The Government does not agree with the characterization of paragraphs four through six and eight through ten as they are merely speculation and otherwise unsupported. The Government specifically contests the assertion that there is "an oppressive atmosphere in the military and Air Force military justice system" cited by the defense in paragraph 10. An impartial Article 32 officer, Lt Col Paula McCarron, reviewed this evidence and recommended referral to a general court-martial.

LAW

2. While military law provides for broad discovery between the parties, the right to discovery is not unlimited. See *United States v. Mouganel*, 6 M.J. 589 (AFCMR 1978); *United States v. Reece*, 25 M.J. 93 (CMA 1987). Each party is entitled to production of evidence which is relevant and necessary to the subject matter of the inquiry and which can be reasonably provided. *Reece*, 25 M.J. at 95; R.C.M. 703(f)(1). Relevance and reasonableness depend on the facts of each case. *Mouganel*, 6 M.J. at 591, citing *United States v. Franchia*, 13 U.S.C.M.A. 315, 32 C.M.R. 315 (1962). After service of the charges the defense is allowed to inspect, R.C.M. 701(h), any documents which are material to the preparation of the defense or which will be used by trial counsel as evidence in its case in chief. R.C.M. 701(a)(2)(A). For a document to be material to the preparation of the defense, it must do more than bear some abstract logical relationship to the issues in the case. Where the defense has requested specific items of evidence, that evidence is material if there is a reasonable probability the evidence would affect the outcome of the trial. *United States v. Hart*, 29 M.J. 407 (CMA 1990)(citing *United States v. Bagley*, 473 U.S. 667, (1985).

Appellate Exhibit ✓
Marked Page 11

ANALYSIS & ARGUMENT

3. The defense requests that this Honorable Court enter an order compelling the Government to produce any non-privileged emails of Brig Gen Zobrist and Lt Gen Franklin concerning Lt Col Wilkerson's court-martial and/or investigation. In doing so, the defense cites an onslaught of leadership pressure that might have potentially compelled Gen Franklin to refer charges via unlawful command influence in their view. The defense leaps to the conclusion that because the military has been reacting fervently against sexual assault and rape accusations, the military's new goal is prosecution and conviction rather than justice. Using this conclusion, without citing any support, the defense holds that maybe Gen Franklin was compelled by this environment to act in an unlawful way. The defense then contends that based on this military pro-conviction environment and a potential push from Gen Welsh, such alleged unlawful command influence may have somehow been conveyed in the messages of Gen Franklin and Gen Zobrist. This defense speculation also fails to consider the existence in the Air Force of lawful command influence where senior officials speak to their subordinates about issues but do not substitute their judgment for that subordinate in making a decision potentially about referral.

4. What the defense's motion ultimately comes down to is a fishing expedition. There is no indication that an unlawful command influence took place in this case other than pure speculation based upon the current political climate surrounding sexual assault cases in the military. Speculation does not equal relevancy. If e-mails between Brig Gen Zobrist and Lt Gen Franklin are deemed relevant and necessary, then every sexual assault case in the Air Force demands the entire preferring and referring chain of command to produce their e-mails for review by all parties. The Defense in paragraph 10 talks about Lt Col Wilkerson's inability to be afforded an opportunity to "see the political pressure" on commanders when they made their decisions. There exists no right currently under the law where the Accused is afforded the right to review all communications of the convening authority to determine how much "political pressure" he was under.

5. R.C.M. 703(f)(1) restricts discovery to evidence that is relevant and necessary and the request must also be reasonable. R.C.M. (f)(4)(C). This can vary from case to case. *United States v. Mougeneil*, 6 M.J. at 591, citing *United States v. Franchia*, 13 U.S.C.M.A. 315, 32 C.M.R. 315 (1962). "But the availability of the machinery for extensive discovery and production of evidence does not entitle the accused to use the machinery for improper purposes." *United States v. Franchia*, at 320. The only evidence the defense has to support their request is a vague notion that the military is unfairly tough on those accused of sexual assault or rape. The thin relationship between the current military sexual assault climate and an actual occurrence of unlawful command influence as evidenced by e-mail correspondence is too far of a reach.

6. If the Honorable Court were to grant the defense's motion, the Government requests that the Court limit discoverable e-mails to a) e-mails that fall within the date the alleged crime was committed and the date of referral of charges and b) only the relevant e-mails as determined by a Court in camera review.

7. Although production of discovery is a much lower bar than admission at trial, relevancy is still required. There is no personal suspicion of unlawful command influence, only a tenuous

relationship between the military environment, Gen Franklin's rater's future job promotion, and e-mail correspondence. Disclosure of the e-mail correspondence between Gen Zobrist and Gen Franklin is not necessary to secure the defense's rights under the Uniform Code of Military Justice as there is not even a reasonable suspicion that unlawful command influence occurred or that even lawful command influence occurred. Additionally, these emails are in no way probative of any matter of evidence in the court martial and thus are not material in any way.

CONCLUSION

8. For the reasons stated herein, the Government respectfully requests this Honorable Court deny the defense's motion to compel discovery.

//Signed-19 Oct 12//
VY S. NGUYEN, Capt, USAF
Assistant Trial Counsel

CERTIFICATE OF SERVICE

I certify that a copy of this government response to the defense's motion to compel was served via e-mail on the Military Judge (Col Brown) and trial counsel (Capt Beliles and Capt Nguyen) on 19 October 2012.

//Signed-19 Oct 12//
VY S. NGUYEN, Capt, USAF
Assistant Trial Counsel

**DEPARTMENT OF THE AIR FORCE
AIR FORCE LEGAL OPERATIONS AGENCY
IN THE USAF TRIAL JUDICIARY**

UNITED STATES

vs.

**LT COL JAMES H. WILKERSON
31st Operations Group (USAFE)
Aviano Air Base, Italy**

**DEFENSE MOTION TO
VIEW CRIME SCENE**

2 October 2012

Comes now the Accused, Lt Col James H. Wilkerson, by and through defense counsel, and respectfully moves the Court to order a viewing of the crime scene by the court members pursuant to R.C.M. 913(c)(3).

FACTS

1. The alleged offenses occurred in the off-base residence occupied by Lt Col Wilkerson and his family. The complaining witness, Ms. (b)(6) had never previously been a guest at their home. Her statements describing the residence and her movements within the residence are inconsistent with the actual physical layout of the residence.
2. There is no objective evidence that corroborates Ms. (b)(6) claim that she was sexually assaulted by Lt Col Wilkerson. The case is essentially a credibility contest between Ms. (b)(6) and Lt Col Wilkerson.

LAW AND ARGUMENT

3. R.C.M. 913(c)(3) authorizes the military judge "as a matter of discretion, [to] permit the court-martial to view or inspect premises or a place or an article or object." The discussion following the rule adds that "[a] view or inspection should be permitted only in *extraordinary circumstances*." (emphasis added). In *United States v. Huberty*, 50 M.J. 704, 708 (A.F.C.M.R. 1999), the Air Force Court of Military Review, citing *United States v. Ayala*, 22 M.J. 777 (A.C.M.R. 1986), agreed that the language in the discussion is binding in applying the rule. The Court added that matters to be considered by the military judge in assessing whether extraordinary circumstances exist and in exercising his or her discretion include, but are not limited to, orderliness of the trial, the amount of time that will be consumed, logistical difficulties, safety concerns and whether the viewing will mislead or confuse the members.
4. At this point, there has been no determination what photographs or videos will be used by either side in presenting their respective cases. Until it is known what, if any, photographic evidence will be presented, the only viable objective method to assess Ms. (b)(6) credibility involves viewing the alleged crime scene. A motion hearing is required to assess all of the factors cited in *Huberty*.

5. Lt Col Wilkerson is facing a court-martial at which he may be convicted of a sexual assault, which could result in loss of all retirement benefits, lengthy confinement and a requirement to register as a sex offender the rest of his life. Given the significant adverse consequences of such a conviction and the fact that the government is relying on uncorroborated claims made by Ms. (b)(6), the defense maintains that extraordinary circumstances exist which justify an order authorizing the court members to view the alleged crime scene under the parameters of R.C.M. 913(c)(3).

Respectfully Submitted,

(b)(6)

Defense Counsel

DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA)	
)	
)	GOVERNMENT RESPONSE TO
)	DEFENSE MOTION TO VIEW
v.)	CRIME SCENE
)	
)	
LT COL JAMES H. WILKERSON)	Date: 12 October 2012
31st Operations Group (USAFE))	
Aviano Air Base, Italy)	
United States Air Force)	

Comes now the Government, and moves this Honorable Court to deny the Defense's motion to order a viewing of the crime scene by the court members pursuant to R.C.M. 913(c)(3), based on the facts and arguments set forth below.

FACTS

1. The Government agrees with the Defense that the alleged offenses occurred in the off-base residence occupied by the Accused and his family. Also, Ms. (b)(6) had never previously been a guest at the Accused's home.

LAW

2. R.C.M. 913(c)(3) authorizes the military judge "as a matter of discretion, [to] permit the court-martial to view or inspect premises or a place or an article or object." The discussion following the rule adds that "[a] view or inspection should be permitted only in extraordinary circumstances." In United States v. Huberty, 50 M.J. 704, 708 (A.F.C.M.R. 1999), the Air Force Court of Military Review, citing United States v. Ayala, 22 M.J. 777 (A.C.M.R. 1986), agreed that the language in the discussion is binding in applying the rule.

3. The Court in Huberty specifically held that the party who requests a view or inspection has the burden of proof both as to relevancy and extraordinary circumstances. To meet the first prong, relevancy, the proponent must establish to the military judge's satisfaction that a view or inspection is relevant to the issue of guilt or innocence of the accused, as opposed to a collateral issue. Id. Should the military judge conclude the relevancy requirement is met, the proponent must still demonstrate the existence of extraordinary circumstances. Id. The military judge must find that sufficient extraordinary circumstances exist to justify a view or inspection. Id.

4. Extraordinary circumstances exist only when the military judge determines that other available alternative evidence is inadequate to sufficiently describe the premises or object. Id. Alternative evidence includes testimony, diagrams, photographs, or videos. When assessing this factor, the military judge may consider the orderliness of the trial, how time consuming a view or inspection would be, the logistical difficulties involved, safety concerns, or whether a view or inspection would mislead or confuse the members. Id. Furthermore, a request for a view or inspection falls squarely under the military judge's inherent authority to manage and control the court-martial. Id. at 709.

ARGUMENT

5. The Government completely agrees with the Defense's citation of U.S. v. Huberty. In Huberty, the Accused, a Lt Col, was convicted by general court-martial of consensual sodomy, wrongful and dishonorable fondling of his genitals in an area open to public access and view, wrongfully and dishonorably committing indecent acts, and adultery. In that case, civilian trial defense counsel argued that a view of the swimming pool by the members was desired because it was important that the members see how clearly the men's and women's dressing areas were marked and that the Accused was where he had a right to be. Further, civilian trial defense counsel argued a viewing was necessary so that the members could see that, contrary to a witness' testimony, that witness did not have an unobstructed line of sight view into the large area but had to exert considerable effort to see the Accused. The military judge denied the Defense's request to view the swimming pool by the members and it was upheld by the appellate court.

6. The military judge denied the request stating, "[f]irst, I don't see where this is a complicated thing where either photographs or videos wouldn't be appropriate to use." Id at 708. He also based his decision on the anticipated logistical requirements, including the necessity of taking a court reporter in the event the members had questions during the viewing. Id at 708. In addition to diagrams used by the witnesses, the military judge allowed the prosecution and defense to introduce video tapes of the swimming pool which each had made. Id at 708.

7. The Government argues that a viewing of the residence by the members is not relevant to the issue of guilt or innocence of the Accused. The Government argues the Defense's request to view the premises is a collateral issue, which is clearly prohibited. Ms. (b)(6) inability or inability to recall the physical layout of a home she was in for the first time and for only approximately 5 hours is collateral, and would both mislead and confuse the members. The issue at stake here is whether the Accused digitally penetrated the vagina and fondle the breasts of Ms. (b)(6) while she was substantially incapable of appraising the nature of the sexual contact. The issue is not whether the floors in the house are wood or tile or how high the wall around the house is or which door she left by.

8. If the military judge believes the Defense has satisfied the first prong of relevancy, then according to Huberty, the military judge must find that sufficient extraordinary circumstances exist to justify a view or inspection. Id. Like Huberty, the Government argues similar to the military judge that this issue is not complicated or extraordinary and that pictures, diagrams, and even videos could be used. Extraordinary circumstances do not exist and there are alternatives available. In fact, the Defense introduced 23 pictures of the residence at the Article 32 hearing.

9. Furthermore, the Government argues that a viewing of the residence would disrupt the orderliness of the trial, it would be time consuming, there would be logistical difficulties involved, and the viewing would mislead or confuse the members. According to Huberty these are all factors that the military judge can consider. Additionally, the Government trial counsel have not been given the opportunity to review the premises themselves. However, there are many collateral issues that could be raised by viewing the premises of where the Wilkersons live to include evidence of specific acts of good conduct which are generally inadmissible under MRE 405. Generally, individuals put pictures of their family, friends, accomplishments, items affiliated with ones' religious beliefs, and portray themselves in the most positive light with tokens of places one has visited and ways in which they have been recognized. First, the Government has no way to control what the members see when they visit a house and secondly,

this evidence would likely be evidence of specific acts of good conduct which should not be admissible.

10. In closing, the Government contends that the Defense has raised a collateral issue in viewing the residence, which is strictly prohibited. The Defense has failed to demonstrate that extraordinary circumstances exist to justify a view or inspection. Furthermore, the Defense's motion even states, "There is no objective evidence that corroborates Ms. Hank's claim that she was sexually assaulted by Lt Col Wilkerson." Defense Motion paragraph #2, dated 2 Oct 12. If one believes this is the case as the Defense asserts, then the Defense's motion clearly fails to meet the second prong of the two prong test set out in Huberty.

PRAYER FOR RELIEF

WHEREAS, for the foregoing reasons, the United States requests the Military Judge deny the Defense's Motion to view the crime scene.

Respectfully submitted,

//Signed-VSN-12Oct12//
VY NGUYEN, Capt, USAF
Assistant Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of this RESPONSE TO DEFENSE'S MOTION TO VIEW CRIME SCENE, to be served on the Military Judge and Defense Counsel, via e-mail, on 12 October 2012.

//Signed-VSN-12Oct12//
VY NGUYEN, Capt, USAF
Assistant Trial Counsel

STATEMENT OF SUSPECT/WITNESS/COMPLAINANT					SUSPECT
					<input checked="" type="checkbox"/> WITNESS/COMPLAINANT
PRIVACY ACT STATEMENT					
<p>AUTHORITY: 10 U.S.C. 8013; 44 U.S.C. 3101; and EO 9397</p> <p>PRINCIPAL PURPOSES: Used to record information and details of criminal activity which may require investigative action by commanders, supervisors, security police, AFOSI special agents, etc.; and to provide information to appropriate individuals within DoD organizations who ensure proper legal and administrative action is taken.</p> <p>ROUTINE USES: Information may be disclosed to local, county, state, and federal law enforcement/investigative authorities for investigation and possible criminal prosecution or civil court action. Information extracted from this form may be used in other related criminal and/or civil proceedings.</p> <p>DISCLOSURE IS VOLUNTARY: SSN is used to positively identify the individual making the statement.</p>					
I. STATEMENT INFORMATION					
DATE (YYYYMMDD)	TIME	LOCATION AND INSTALLATION (Bldg/Room No)	UNIT TAKING STATEMENT	REPEAT (If known)	
20120417	1205	Bldg 600 AFOSI	Det 531 AFOSI	<input type="checkbox"/> OFFENSE	<input checked="" type="checkbox"/> COMPLAINT
II. PERSONAL IDENTIFICATION (Print or Type)					
NAME (Last, First, Middle Initial)		SSN	STATUS/GRADE		
(b)(6)		(b)(6)	CIV		
LOCAL ADDRESS (Include Zip Code)		DATE AND PLACE OF BIRTH (If required)	TELEPHONE		
(b)(6)		(b)(6)	HOME	DUTY 632-3998	
PERMANENT ADDRESS OR HOME OF RECORD (Include Zip Code)		MILITARY ORGANIZATION/EMPLOYER	DEROS		
(b)(6)		AMDS/SGPM independent contractor	(b)(6)		
SPONSOR INFORMATION					
NAME (Last, First, Middle Initial)	GRADE	SSN	ORGANIZATION	DUTY PHONE	
(b)(6)	(b)(6)	NA	(b)(6)	(b)(6)	
III. ACKNOWLEDGEMENT OF OFFENSES AND 5TH AMENDMENT/ARTICLE 31 RIGHTS ADVISEMENT (Suspect Only)					
I have been advised that I am suspected of the following offenses:					
ADVISED BY (Full Name and Rank)			INDIVIDUAL IDENTIFIED HIMSELF/HERSELF AS A (SF, special agent, etc.)		
SUSPECT INITIALS	and advised me that I have the following rights according to the 5th Amendment of the U.S. Constitution/Article 31 of the Uniform Code of Military Justice.				
	I have the right to remain silent - that is to say nothing at all.				
	Any statement I make, oral or written, may be used as evidence against me in a trial or in other judicial, non-judicial, or administrative proceedings.				
	I have the right to consult with a lawyer.				
	I have the right to have a lawyer present during this interview.				
	I may obtain a civilian lawyer of my own choice at no expense to the government.				
	I may request a lawyer any time during this interview.				
	If I decide to answer questions with or without a lawyer present, I may stop the questioning at any time.				
	MILITARY ONLY: If I want a military lawyer, one will be appointed for me free of charge.				
	CIVILIANS ONLY: If I cannot afford a lawyer and want one, a lawyer will be appointed for me by civilian authorities.				
SUSPECT INITIALS	I have read my rights as listed above and I fully understand my rights. No promises, threats, or inducements of any kind have been made to me. No pressure or coercion has been used against me. I make the following choice. (Initial One)				
	I do not want a lawyer. I am willing to answer questions or make a statement or both, about the offense(s) under investigation.				
	I do not want a lawyer and I do not wish to make a statement or answer any questions.				
	I want a lawyer. I will not make any statement or answer any questions until I talk to a lawyer.				
I fully understand my rights and that my signature does not constitute an admission of guilt.					
(b)(6)	OF SUSPECT		SIGNATURE OF WITNESS/INTERVIEWER		

AF IMT 1168, 19980401, V2

PREVIOUS EDITIONS ARE OBSOLETE.

PAGE 1 OF 7 PAGES

I.O. Exhibit 3
page 1 of 7

Appellate Exhibit 1111
Marked Page 12

IV. STATEMENT

(b)(6)

// See ATTACHED //

(b)(6)

[Redacted Statement Area]

V. OATH/SIGNATURE

(b)(6)

(b)(6)

I voluntarily and of my own free will make this statement without having been subjected to any coercion, unlawful influence, or unlawful pressure. I swear (or affirm) I have read this statement, initialed all pages and corrections, and it is true and correct to the best of my knowledge.

(b)(6)

SIGNATURE OF PERSON MAKING STATEMENT

(b)(6)

SIGNATURE OF WITNESS/ANTHROPOLOGIST

(b)(6)

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 17 day of Apr, 2012 (year).

SIGNATURE OF PERSON ADMINISTERING OATH

(b)(6)

VI. INSTRUCTIONS FOR CONTINUATION PAGE(S)

Use plain bond paper (both sides optional). At the top right of each page, print or type "(Last name of individual making the Statement) on (Date)". At the bottom of each page, print or type: "Page ___ of ___ Pages." The individual must initial the top and bottom entries and sign his/her name at the bottom of each page.

~~I.O. Exhibit~~
I.O. Exhibit
7/02/2012

(b)(6)

3 Mar 17:30 - Met friends at TLF where we'd reserved rooms (5 other people) - 2 I know well, 3 fairly new acquaintances.

1980 - walked over to USO concert

time? 20:30-21:00 - walked to La Bella Vista after concert

3 people went home of our group (including my two friends).

We were talking with some people the other 2 women knew. I know one of them peripherally. They wanted to go somewhere, I thought I heard them mention the pub, and thought we were going there where some friends of mine were. One of the women asked me to come and I said yes.

time? Instead we drove to someone's house, the man who sat in the front passenger seat. I asked how we were going to get home and where were we to one of the people in the car and he said he wasn't sure.

The man who lived there * I asked someone today prior to this appointment with OSI the name of person who lived there *

Wilkerson - poured us a glass of wine and we toasted. We all met his wife Beth. The others went outside, I was not comfortable there, I didn't know anyone very well and did not want to drink more so I hung out with Beth, her friend who was visiting and their kids.

time? At some point I told both women I'd come with that I was ready to go home whenever they were, and went back to talk with Beth and the kids.

time?

? 00:30-01:00 - Beth told me the people I came with left without me. She explained they could drive me back to the TLF but would have to drop me off outside the gate, and that they had done that for one of the other women. The second woman had gotten a ride home with the person who drove us over.

She asked me to stay over but I didn't want to.

00:30 Beth went off to do something - make up a bed I think

her husband asked me if I wanted a drink. Initially I said no but I may have had a glass of prosecco or asked for a non-alcoholic drink, I can't remember.

00:45-01:00 called my girlfriend. I didn't remember calling her until she told me - she said "you were slurring your words - you were making sense and sort of not making sense, it didn't sound like you." I remember telling her I didn't know where I was but that it is too late and too far to drive and I will stay there. Beth made a twin bed up in a downstairs room and said

they would get me up in time to check out of the TLF.

I was so tired, I remember crawling into the bed fully clothed and turning out the light and went to sleep. (b)(6)

(b)(6)

(b)(6)

(b)(6)

(b)(6)

I.O. Exhibit 3

Pl 3 of 7
(b)(6)

page 3 of 7

4 Mar 2 0300-0320

I was having a dream, it felt like I was floating, and I was being touched over my body. I felt a little initial pain when being touched between my legs.

A very bright light came on, I rolled over to cover my eyes and I heard a man say loudly "what the hell is going on?" I woke up and felt ahead that was down the front of my pants being removed. I opened my eyes and saw a man about 6 inches from my face squinting with his eyes closed.

I didn't know at first who he was or where I was. I heard

"Get the Hell out of my house," looked up and saw Beth at the light. I realized where I was. I don't know if her husband was dressed or not or what he did, I didn't look at him. I sat on the side of the bed and felt very woozy. I looked down and saw I was still fully clothed, with my belt buckled.

She asked me to get up and leave, I didn't know where my shoes or sweater were. I started to walk out of the door she had open and saw my wallet and glasses on the counter. I went back in. She said "I really liked you" I said I really liked her too and of course I was leaving. I checked my phone it was I think 0320.

0320-20415

I had to climb over their low wall in front and walked into some town in my socks. I do not remember but was told I called twice the same friend I called before. I do remember calling one of my friends I had gone to the concert with, who had gone home early. I was really foggy, crying and didn't know where I was. There was a group of English speaking young men walking down the street luckily, they told my friend where I was and stayed with me until she got there to pick me up.

0430-0730

back at TLF I slept, got a phone call from the friend I'd called but did not remember, she was concerned I hadn't seemed myself, as was I, and I still felt out of it, and we decided to go to the clinic to get tested,

0900 - my friend drove me to clinic where I requested a full drug panel including GtB (?spelling) and Rokypho 1.

I have had a follow up appt. with PCM Maj. O'Keefe (who was working the sat. clinic)
I have had 2 meetings with MH Tom Moran for issues regarding the assault.
I have met 3 times with SARC ~~let~~

(b)(6)

(b)(6)

(b)(6)

(b)(6)

I.O. Exhibit 3 pg. 7 of (b)(6)

page 4 of 7

(b)(6) Continuation of what I have provided the OSI officers

I fell asleep fully clothed. I was dreaming that I was on my back floating and was being touched. I don't remember any talking. I was touched over my breasts but can't recall if under clothes just dream-like.

I felt pain initially being touched on the left inner labia, then it stopped hurting and I felt being touch just inside my vagina with ~~my~~

When the light got really bright I rolled over to my left and heard a man say, "What the hell's going on?" and his hand was inside the front of my pants and his finger was in my vagina and he pulled his hand out. It didn't feel like his entire ^{is} finger, it was curled/flexed and felt like perhaps to middle interphalangeal joint. (b)(6)

(b)(6)

(b)(6)

Signature of Individual Making Statement

(b)(6)

Page 5 of 7

(b)(6)

(b)(6) Continuation of what I have provide the OSI concert officers,
Names of people:

friends < Sgt Danielle Duminvant - went back to TLF after Seether concert

acquaintances < Cpt Bob Pearson - walked ^{to} to BV club but left early.
< Cpt Tanya Manning - went to concert, BV club and house - brought home by
< Cpt Dawn Brock - went to concert BV club and house - driven home
by Beth or husband?

friend of Duminvants < S-A Michelle - works in Pharmacy - she left after Seether concert

friend - Suzanne Berrong Ctr in Public Safety - called her @ 0045 and twice @ 0330 she drove me to Saturday clinic on base at 0900.
Sgt Danielle Duminvant picked me up and took me to TLF at around 0415-0430

Col. Dean Ostovich (spelling) - I just met him briefly, we talked about his kids being in Colorado. He and drove us to Wilkerson's house, Wilkerson in passenger seat.

Jeremy (spelling) Goldsberry - I don't know his rank but he is a flier my co-worker's husband - was at BV club and sat in back of car on way to Wilkerson's house (b)(6)

(b)(6)

(b)(6)

Signature of Individual Making Statement:

(b)(6)

I.O. Exhibit 3
page 6 of 7

Name of Individual Making Statement: (b)(6)

Date: 17 April 2017

(b)(6)

In Continuation of what I have provided the OSI officers -

Food: breakfast burrito
- lunch ? sandwich
no dinner

Alcohol: 1/2 bottle mulled red wine from Raffa's - 1730-1900 23 Mar

1 1/2 plastic cups draft beer from BV club, 2100 -

1 sip Gatorade (grape juice?) and vodka 1730-1900

1 small glass white wine at Wilkersons - about 4oz ≈ 2200?

unsure if prosecco or non-alcoholic around 0030 24 March

drank part of a cheap light beer from ≈ 0415

young airman waiting with me - no wat (b)(6) Full of State int // (b)(6)

(b)(6)

Signature of Individual Making Statement

(b)(6)

(b)(6)

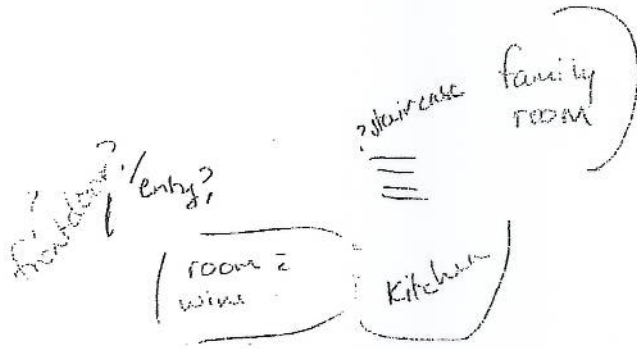
Page 7 of 7

(b)(6)

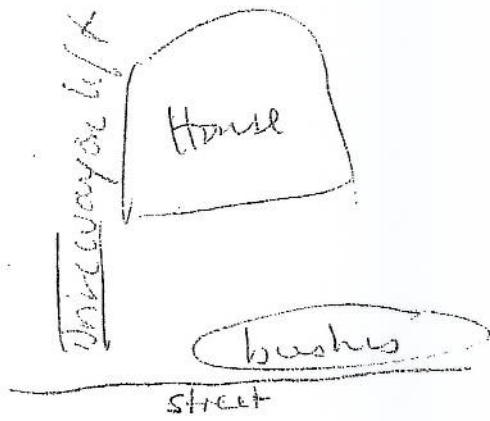
I.O. Exhibit 3
page 7 of 7

inside

Some bedroom upstairs



Outside



I.O. Exhibit 4
page 1 of 1

Appellate Exhibit 4X
Marked Page 12

SUMMARIZED TESTIMONY OF (b)(6)

Ms. (b)(6) appeared at the investigation, was sworn and testified substantially as follows:

I am a PA at Public Health at Area 1, Aviano AB. I started working there on 1 September 2011. This is my first time being employed by the military. I am from California. Prior to this job, I worked in emergency medicine. I divorced in 1992. I am not in a serious relationship. I was not in a relationship on 23 March 2012.

IO exhibit 3 is my sworn written statement made to OSI on 17 April 2012. I adopt it as part of my testimony.

I had not met the accused prior to 23 March 2012. I didn't know his rank. I thought he was a master sergeant. I discovered his name when IM'd Capt Tanya Manning before I went to OSI and asked her the name of the people's house we were at on 23 March 2012. I didn't know his name on 23 March because I didn't want to know it. I had never met Beth Wilkerson before that night. I have not seen the accused since that night.

On the night of 23 March, I was going to meet friends in the lobby of the TLF and then walk to the Seether concert. I wasn't initially going to spend the night on base, but found out a TLF had come open, so I booked it. I was planning on going to the concert with Bob Pearson, Capt Dawn Brock, MSgt Danielle Dunnivant, Capt Manning and Michelle, I don't know her last name.

I got to billeting around 1630 or 1700 hours. I had picked up a bottle of hot mulled wine from Rafa's at the commissary. I drank about 1/2 of the bottle. The concert was okay. It lasted about 90 minutes. After the concert, I walked to the La Bella Vista Club. I didn't wear a watch. I had a beer and 1/2 at the club. I bought them myself. Capt Manning offered me a drink, but I didn't want to mix. I saw Maj Gerremy Goldsberry. His wife works for me. Maj Goldsberry was with a friend. Capt Manning saw Col Dean Ostovich and said he was "cute." I wasn't familiar with the name. I didn't have any interaction with the accused at the club. I don't know what time we left the club. I thought I heard someone mention a pub and I assumed that's where everyone was going. Suzanne Berrong was at the pub.

We got into Col Ostovich's car. There were seven people. Col Ostovich drove. I was talking with Maj Goldsberry and his friend, and didn't pay attention to where we were going. Capt Brock, Maj Goldsberry and his friend were in the back of the car with me. We pulled up at a residence. I wasn't happy about going to someone's house. As we were walking to the house, I asked how I was going to get home. Either Maj Goldsberry or his friend said they'd figure out a way. I met Beth Wilkerson in the house.

While there, the accused got wine and glasses. Capt Manning and I got a glass. I commented on the crystal. It was a Baccarat pattern. I didn't pay attention to what everyone was drinking. I was not drunk, a little buzzed. I didn't know anyone, so I was uncomfortable.

I hung out with Beth Wilkerson for awhile. It was a getting to know each other kind of conversation. She told me about a friend staying with her. Beth introduced me to someone. For some reason, I thought it was the woman staying with Beth. I liked Beth right off the bat.

I don't know what the others in the house were doing. I talked to a boy downstairs.

I saw Capt Brock and we both said we were ready to go. I told Capt Manning I was ready to go. I was not aware of others leaving. They took Capt Brock home and left her outside the gate.

I.O. Exhibit 24
Page 1 of 5

Appellate Exhibit X
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When I was leaving that night, I didn't know where my shoes and sweater were. I never got them.

I talked to Suzanne Berrong on the phone, but didn't initially remember until she reminded me then next day. Then I remembered parts of our conversation.

Beth Wilkerson offered me a ride to base after she said everyone had gone. I said I couldn't stay at the house. I was freaking out that I had been left at the house. I didn't take Beth up on the offer to get a ride. I was worried about going past the gate people intoxicated. Beth told me several times to stay there. She made up a small single bed in a small room. There were two or three steps down into the room. I thought the room may have been off the kitchen.

I was wearing a black V-neck T-shirt with ¾ length sleeves, a black cashmere sweater, jeans, belt and clogs.

The accused got me a drink after everyone left his house.

I was suddenly really tired. They walked me part way down to the room. I went straight to bed. I don't know if they stayed up.

My next memory: I felt like I was having a dream. I was on my back, floating. It was very quiet. I felt being touched over my clothes on my torso area, breasts and stomach. After that, my next memory was, I felt a little pain on the left side of my inner labia near my vagina. I felt a finger go partially in my vagina. The finger felt like it uncurled and curled in my vagina. My underwear was on. After I felt the finger, it got really bright. I rolled over on my left side and felt a hand come out of my pants. I heard a guy yell loudly "what the hell is going on." I saw a man's face about 6 inches away from mine. He was facing me. We were both under the covers. Initially, I didn't know who it was. I didn't realize where I was. Beth said "get the hell out of my house." The man rolled off the bed to the left. It was the accused.

I sat up. My belt was still buckled and my clothes were still on. Beth Wilkerson said I want you to leave the house now. I don't know where the accused went. I didn't know what happened or what to think. I walked past Beth. I walked out and realized I didn't have my wallet and glasses. I saw them on the counter and grabbed them. Beth came down the hallway and said "I really liked you but want you to leave now." I told her I liked her, too, that I was sorry and didn't know what happened.

After I left the house, I went over a white stucco wall. Once on the street, I started walking. I apparently made three phone calls to Suzanne Berrong which I don't remember. The next morning, Suzanne told me about the calls.

I called MSgt Dunnivant and told her I didn't know where I was. I saw a group of guys on the other side of the street. I walked over to them and asked them where I was and could they stay with me until my friend arrived. There were around five English speaking men. The guys had cheap, canned beer with them. I had a beer. I was incredibly thirsty.

It wasn't long until MSgt Dunnivant came and took me to the TLF. I told her what happened. I don't know how much I told her, but it was the basic gist. When I got to the TLF, I set my alarm for 0730 hours.

I was thankful Beth Wilkerson came in and told me to leave because I don't know what would have happened.

It is embarrassing. I felt stupid. This doesn't happen to a 48 year old well educated woman.

The next morning, I was really out of it. I went online, I was concerned about how I had been feeling because I was so out of it. I looked up my symptoms online. I told Suzanne Berrong I thought I may have been drugged. She and I discussed going to Pordenone or the clinic. I wanted to get tested to see if I had been drugged. Suzanne drove me to the 31 MDG.

Major Michael O'Keefe was working. I told him about the hand. I asked him to keep it quiet because I didn't know what I wanted to do. I was inclined not to report it if the drug test came back negative, but to report it if it came back positive. If the tests were negative, it would have been my fault for being so irresponsible. Maj O'Keefe ordered a drug panel to include GHB/Rohypnol. He agreed not to tell leadership. He gave me information about counseling. I saw Tom Moran. He suggested the SARC.

Suzanne Berrong was very supportive, very nice. I told her Col Ostovich had taken Capt Manning home. Suzanne had gone on a date with Col Ostovich the night before. Suzanne took me home from the clinic. I laid on the sofa and slept the rest of the day.

Maj O'Keefe later told me all the tests came back negative.

The SARC described restricted/unrestricted reporting. I initially decided to go restricted. The SARC called me the following week. Rebecca White told me because I was a civilian, a restricted report was not an option. I neither had to file a restricted report or drop it.

I went to Croatia. While there, I talked to a friend. His question to me was: why does it matter whether it was alcohol or drugs, I was still assaulted. I felt it would be hypocritical of me to support others making a complaint, and then put my own head in the sand.

I signed a document to make it an unrestricted report. Not long after, I talked to OSI.

I have no desire for revenge. My main concern was that I was afraid I wouldn't get over it if I didn't do the right thing. I have not been sleeping well.

This wasn't my fault.

I had ½ a bottle of mulled wine. I took a sip of Capt Manning's Vodka and grape juice and a sip of someone's Gatorade and Vodka. I started to feel buzzed at the concert. I had white wine at the Wilkerson's, maybe a Prosecco. I had a beer with the five Americans.

I was tipsy, but not drunk. I didn't feel drunk when I got to the Wilkerson's. I did not have the spins when I went to bed there.

After the concert, MSgt Dunnivant went back to the TLF.

I met three kids at the Wilkerson's. Beth indicated her son had been sick and was getting better, but they had been worried. I told Beth I taught elementary school.

On the main level of the Wilkerson's house, there is a kitchen, a family room and a non-functional room. The room with the French doors is a straight shot from the room I slept in. The doors lead to the yard, not the driveway. IO Exhibit 4 is my rough sketch of the layout of the house.

I never talked to Maj Goldsberry or Maj Albert Lowe after we arrived at the party. I talked to Col Ostovich and only spoke to the accused for a few seconds.

When I came out of the son's room, Beth said "(b) I'm sorry, but everyone is gone." She said she had taken Capt Brock home and left her at the gate. Beth never offered me a pair of shoes. The bed in the room made for me was made up with sheets, a coverlet and one pillow. I got under the sheets. Beth was not yelling when she told me to leave.

The stucco wall was smooth, sort of white. It was torso height.

When MSgt Dunnivant came to pick me up, I thanked the American guys.

I told MSgt Dunnivant the basics: I felt like I was being touched in a dream, there was a bright light, a hand came out of my pants, and Beth Wilkerson was there. I was crying, upset and out of it. I don't think I told MSgt Dunnivant I was drugged or that it was my fault.

Things I don't remember:

- How long I was at the club.
- How long it took to get to the accused's house.
- Whether Maj Goldsberry or Maj Lowe said they'd figure out how to get home.
- Going through a gate to the house.
- Whether there was a path or stairs to the house.
- How the yard at the house was landscaped.
- I didn't immediately recall Beth Wilkerson's name.
- That people went outside the house that night.
- The oldest Pone child's name.
- Talking to the younger Pone child, his name, age or hair color.
- Why Beth Wilkerson's son was sick.
- Beth's son's name.
- The name of the woman with the dark hair.
- The specifics of my conversation with Beth Wilkerson.
- How long I talked to Beth or how many times we talked.
- Texting Suzanne Berrong after the concert.
- Whether there was an overhead light in the room I slept in.
- Where my shoes or black sweater were.
- Whether I was touched over or under my clothes.
- What the accused was wearing.
- Whether the accused was unclothed.
- Whether the man in the bed had facial hair. I don't recall any facial hair.
- How long I walked after I left the house.
- Calling Suzanne Berrong after I left the house.
- Texting anyone that it was my fault.

When I saw Maj O'Keefe, we specifically looked for tests that would detect GHB/Rohypnol.

At the Wilkerson's house I had an overwhelming feeling of being tired. I just wanted to go to bed.

When I woke up at the Wilkerson's I felt foggy. I didn't know where I was. I was not very calm. I felt "shocky."

I don't recall where the fence was in relation to the house.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Aviano Air Base, Italy, on 22 June 2012.



(b)(6)

I declare under penalty that the foregoing is a true and correct summary of the testimony given by the witness. Executed at Aviano Air Base, Italy, on 22 June 2012.



PAULA B. McCARRON, Lt Col, USAFR
Investigating Officer

SEALED MATTERS

**SEALED BY MILITARY JUDGE, ROT PAGE
13. It is to remain sealed and opened only by
order of the court.**

Appellate Exhibit XI

Marked Page 13

**UNITED STATES AIR FORCE TRIAL JUDICIARY
IN THE EUROPEAN REGION**

UNITED STATES OF AMERICA

v.

**LT COL JAMES H. WILKERSON
31st Operations Group (USAFE
Aviano Air Base, Italy**

Ruling on Motion For Appropriate Relief:

**Compel Mental Health Records of Alleged
Victim**

26 Oct 12

On 26 Oct 12, the court was notified that the mental health clinic refused to release certain records of alleged victim without a court order. The government supported release of these items to counsel with a protective order.

This court finds the following facts by a preponderance of the evidence:

FACTS

1. Lt Col James Wilkerson is the accused under court-martial charges preferred 14 June 2012 and referred on 2 August 2012. He is charged with Abusive Sexual Contact, Aggravated Sexual Assault, and three specifications of Conduct Unbecoming an Officer. The trial began today, 26 October 2012.
2. On 26 October 2012, trial and defense counsel notified the court that the alleged victim, Ms. (b)(6) consented to the release of her mental health records and that all but one document had been provided to counsel: the OQ-45 (with questions and answers).

LAW AND ANALYSIS

3. A Defense motion to compel production of the mental health records is essentially a two-step process. First, the Court must determine if the requested records are discoverable. This ruling is limited to that issue. The second step is whether the information in those records may be discussed in court.
4. RCM 701 generally governs discovery. Although not without limits, RCM 701 mandates a liberal discovery standard that captures information, to include reports of mental examinations, which are material to the preparation of the Defense. RCM 701, of course, does not override M.R.E. 513. (See Discussion following RCM 701(2)(B).) MRE 613 and/or 801(d) cover prior statements of witnesses, and MRE 607 discusses the impeachment of witnesses.
5. According to RCM 701, the Government must provide the Defense information within its possession, which is material to the preparation of the Defense; or reasonably tends to negate the guilt of the accused, reduce the degree of guilt of the accused, or reduce the punishment. Moreover, the Government's independent obligation to disclose evidence favorable to the

Defense under *Brady* captures not only exculpatory evidence, but also evidence that might be used to impeach Government witnesses. *Strickler v. Greene*, 119 S.Ct. 1936 (1999). Impeachment evidence may include specific instances of conduct of a witness indicative of credibility or character for truthfulness; evidence in the form of opinion or reputation as to the witness' character for truthfulness; prior inconsistent statements; information which suggests bias; and evidence which goes to a witness's ability to perceive, remember, and accurately relate events. *U.S. v. Bagley*, 473 U.S. 667 (1985); *U.S. v. Romano*, 46 M.J. 269 (1997); and *U.S. v. Reece*, 25 M.J. 93, 95 (C.M.A. 1987). There exists a preference in the military for liberal discovery and attendant low threshold triggers for production. *Reece*, at 95. When information requested implicates M.R.E. 513, production at the discovery stage must involve one of the exceptions to the privilege enumerated under M.R.E. 513(d), to include implication of an accused's Constitutional rights under M.R.E. 513(d)(8). The request for the documents at the discovery stage implicates the Constitutional Confrontation right afforded by the Sixth Amendment. *Reece*, at 95.

6. Government acknowledges that those records may contain discoverable information, such as the credibility of the alleged victim, evidence of bias, or prior inconsistent statements, a motive to fabricate, or victim impact.

CONCLUSION

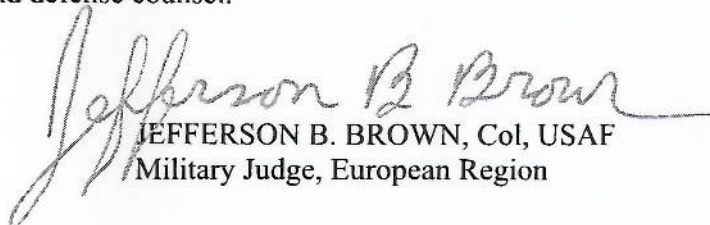
7. All of the mental health records of the alleged victim – not previously released, to include the OQ-45, are discoverable and are releasable to both trial counsel and defense counsel under the conditions contained in the court's protective order.

8. In making this ruling, the Court carefully considered the interests of the Defense in full discovery, and ultimately, the 6th Amendment confrontation right.

9. I make no ruling at this point as to whether any portion of the record is admissible at trial – only that it is discoverable.

RULING

WHEREFORE, any portion of the alleged victim's mental health records not previously provided shall be provided to both trial and defense counsel.


JEFFERSON B. BROWN, Col, USAF
Military Judge, European Region

UNITED STATES AIR FORCE TRIAL JUDICIARY
IN THE EUROPEAN REGION

UNITED STATES OF AMERICA

v.

LT COL JAMES H. WILKERSON
31st Operations Group (USAFE)
Aviano Air Base, Italy

ORDER FOR PSYCHOLOGICAL
RECORDS RELEASED PURSUANT TO
MRE 513

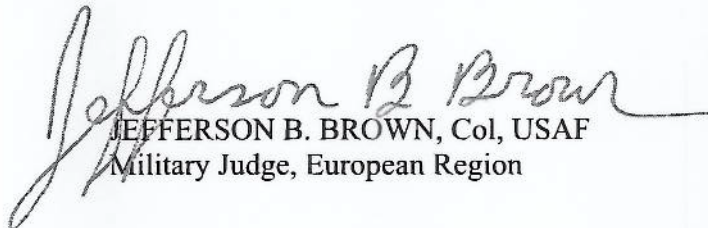
26 Oct 12

THIS MATTER coming before the Court,

IT IS HEREBY ORDERED:

1. That the government and defense shall be provided all psychological/mental health records from Ms. (b)(6) not previously provided, to include the OQ-45. This order is in accordance with the court's 26 Oct 12 ruling regarding release of these records.
2. The records disclosed shall be maintained by the government and the defense and shall be used by counsel and/or their experts solely and exclusively in connection with this case (including trial preparation, trial, and appeals or other related legal proceedings) and for no other purposes;

ORDERED this 26th day of October 2012.


JEFFERSON B. BROWN, Col, USAF
Military Judge, European Region

Appellate Exhibit XIII
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