

Chapter 8 – CASE STUDY: Cross Examination I



Mention the court-martial of *United States v. Lt Col James Wilkerson*¹ and you are likely to generate strong opinions. This relatively straightforward, but high-profile, sexual-assault prosecution of an F-16 pilot and Chief of Safety at Aviano Air Base blew up the military-justice system.

From an error-filled, self-published book on Amazon ineptly attacking the *Wilkerson* prosecutors and prosecution, to Congress eviscerating convening authority clemency powers and substantially rewriting and rebalancing the military-justice system,² to the tumultuous retirement of the 3-star Third Air Force Commander,³ the collateral consequences of the successful prosecution of Lt Col Wilkerson, and eventual set aside of that conviction, reverberated far and wide. And the *Wilkerson* ripples continue to be felt as Congress and the Department of Defense work to further modernize the Uniform Code of Military Justice. Someday, undoubtedly, the whole sordid affair will birth a movie-of-the-week.

But lost in the political storm of post-trial *Wilkerson* is a focus on the trial tactics which secured the hard-fought sexual-assault conviction. Thus, to inaugurate a series of articles demonstrating how the theories of litigation can expertly be put into “battlefield” practice we start with a review of the key cross examination from *United States v. Lt Col James Wilkerson*—that of Beth Wilkerson, the Accused’s spouse.

Theory

Before the practice, the theory. I have mentioned it before but it deserves repeating, *ad nauseum*. Contrary to every briefing you have ever received at every

¹ *United States v. Lieutenant Colonel James H. Wilkerson*, ACM 38284 (tried October 26 to November 3, 2012 at Aviano Air Base, Italy).

² See National Defense Authorization Act of Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954–58 (2013).

³ See Nancy Montgomery, *Air Force general at center of sexual assault controversy to retire*, STRIPES.COM (8 January 2014), <http://www.stripes.com/news/air-force-general-at-center-of-sexual-assault-controversy-to-retire-1.261037>.

litigation-skills course, whatever aspect of trial practice the instructor is then briefing (from *voir dire*, to opening statement, to direct examinations) is not the key to victory. Trust me, *voir dire* is not the key to victory. And neither of the two glory moments for every litigator in every case (cross-examination and closing argument) is the key to victory. Mastery of the facts and evidence is the key victory. Let me repeat for effect: mastery of the facts and evidence is the key to victory.

If you do not know the facts and evidence better than every person in that courtroom, all your skills may enhance your ego and watercooler boasting but they will not win you a conviction or acquittal. If you know the facts and evidence better than every person in that courtroom, however, skillfully advancing your theory of the case through a pointed, controlled, and structured cross-examination is more likely to get you closer to conviction or acquittal than most other aspects of trial practice.

Now, every litigator has a different approach to constructing an effective cross-examination. Mine is right, of course, but take what works for you using as many examples as you can observe first hand or read in transcripts. But all “good” cross-examinations have commonality: They are short and to the point, they have a limited number of set goals (one almost always being to undermine the witness’s or another witness’s credibility), they control the witness without arguing, they in the end make the most sense during closing argument when the questions and answers are strung together in a narrative (aka theme and theory), they are structured and paced in a way that keeps the witness off balance, they are delivered with confidence, and they start and end strong. You will see all of that in the coming snippets.



I can judge the competence of my opponent by the first three questions of their first cross examination of my witness



And one other point most importantly to our young but, surprisingly, to some of our more seasoned litigators as well—do not repeat the direct. Again for emphasis—do not repeat the direct. Everyone says they know this novel idea, but my courtroom experience says otherwise. I

can judge the competence of my opponent by the first three questions of their first cross examination of my witness. If that cross-examination starts, “So on direct you testified that . . . , is that correct,” and then again, and then again, without an

impeachment punchline anywhere in sight—and about 70% of my opponents’ cross examinations in the many, many litigated cases I have prosecuted start this way—I know immediately that the verdict is not going to be the result of me having been out-lawyered by opposing counsel. So stop doing that.

And with that, on to the cross examination of Beth Wilkerson.

Background⁴

In March 2012, Lt Col Wilkerson and other high ranking male members of the 31st Fighter Wing attended an on-base event where they met a group of women which included the Victim, a civilian physician’s assistant new to Aviano Air Base. Eventually, the two groups combined and drove to Lt Col Wilkerson’s home off the installation to continue socializing. Beth Wilkerson was home and for the next few hours the group mingled, ate, and drank. After a series of events, all visiting members of both groups left except for the Victim who was effectively abandoned at the Wilkersons’ home by her otherwise distracted friends. Late at night, without transportation back to the base, Beth Wilkerson offered to let the Victim sleep in an extra bedroom. Without another option, unable to get ahold of her friends, the Victim accepted that offer and went to sleep in that bedroom.

Early in the morning hours of March 24, 2012, Lt Col Wilkerson entered that bedroom, got into the bed, and digitally penetrated the Victim’s vagina. While this was occurring, Beth Wilkerson entered the room, turned on the lights, and reacted, telling the Victim to leave immediately. In the ensuing chaos, the Victim left the Wilkersons’ home on a chilly Italian night, on foot, without her shoes, unsure of where she was. Luckily she ran into a group of Americans who told her where she was, so she called a co-worker who came and gave her a ride back to the base. She arrived at her billeting room around four that morning and sought out medical care a couple hours later. She attempted to make a restricted report of sexual assault, but was unable to do as she was a civilian.

⁴ Information for this article comes from the Record of Trial (herein “R.”) in *United States v. Lt Col Wilkerson* (on file with the author; editorial revisions made for readability and to protect the personal identification of certain witnesses and individuals) and from interviews with the trial-counsel team of Major Ben Beliles, Major Vy Nguyen, and Colonel (ret) Don Christensen over various dates.

The Cross

Lt Col Wilkerson spoke to OSI agents and denied that he entered the bedroom, climbed into the bed, or sexually assaulted the Victim. At trial, he chose not to testify in his own defense but offered his wife who testified about the events of that night and the next day.

The defense theory was that the Victim was simply lying about what happened that morning; that Beth Wilkerson originally allowed the Victim to borrow a bedroom for the night; that later that morning, the Victim was being too noisy so at three in the morning Beth Wilkerson told her to go to sleep or leave; that the Victim left on her own volition; and that neither the Victim nor the Accused was drunk that night. This was essentially Beth Wilkerson's testimony on direct examination.

But this was something of a surprising defense theory. During the investigation prior to trial, the Wilkersons appear to have conspired to paint the Victim as intoxicated and confused. So, standing up to conduct his cross-examination, trial counsel had the following goal: undermine Beth Wilkerson's credibility (and by proxy that of the Accused's) by pointing out her various contradictions, implausibility, and motives to lie while demonstrating that the Victim had no such ulterior motives.

That effort started by pointedly noting that Beth Wilkerson's trial testimony was inconsistent with her statements to investigator about the level of the Victim's intoxication. Notice how trial counsel controls the examination, refusing to allow the witness to explain away her damaging answers:

Q. Now, the way you described [the Victim] – well, first, was she intoxicated that night?

A. When I first encountered her, when I spoke with her when she was sitting on the stairs, yes, I thought she was intoxicated. She slurred some of her words some, and so I could tell that she had been drinking.

Q. Well, in fact, you believed that she was very intoxicated, didn't you?

A. I did write in my statement that she was very drunk.

Q. Well, in fact, you went to great length in your statement, you described at the beginning, "These three women were very drunk," correct?

A. I did write that.

Q. And then at the end, you said, "One last thing is that she was very drunk," correct?

A. I did, but I also . . .

Q. Did you write that?

A. Yes, Sir.

Q. Because that's the question. Did you write that?

A. Yes, Sir.

Q. And you put that at the end of your statement to the OSI, correct?

A. Yes, Sir.

Q. And you wanted to make sure, I mean that was one last thing you said, "She was very drunk." Correct?

A. Yes, Sir.⁵

Next, an extended examination of why the Wilkersons canceled a barbeque they had planned to host at their house the day following the assault. Beth Wilkerson's testimony on direct examination was that the cancelation was the result of a particular couple not being able to attend. But the prosecution's theory was that Beth Wilkerson had caught her husband assaulting the Victim, was upset and traumatized by the same, and that was the more reasonable explanation for her actions the next day in cancelling the barbeque. Notice how trial counsel controls the pace (breaking up the questions over different topic areas), allows the witness to explain when the explanation is irrelevant or useful, and pointedly confronts the witness with contrary evidence:

Q. Now the next morning, what time did you wake up on the 24th?

A. At 9 o'clock.

Q. You woke up at 9 o'clock?

A. Yes, Sir.

Two pages later [after returning to the level-of-intoxication issue]:

Q. All right, so I just want to make it clear, okay, so you had a barbeque scheduled for that day, and because you had gone to bed about four...

A. Yes, Sir.

Q. . . . and awakened around nine . . .

A. Yes, Sir.

Q. . . . you were tired, right?

A. Yes, Sir.

Q. And because the [Smith's] canceled, you didn't want to go through with this?

A. Yes.

Another short diversion to a different topic and then return to this line of questioning:

⁵ R. at 740-41.

Q. All right. And so we've talked about what he was doing that day, what did you do after you woke up?

A. I cleaned the kitchen. I made all the beds. I organized the house and the [visiting] children's stuff. [Joan] was to be coming by that evening to pick the kids up, so I got their book bags together, I packed up their suitcase, made sure that I went through the house and that I had all of the [visiting] children's belongings so that when their mother came, I would have everything ready for her.

Q. Sounds like you had a full day, too?

A. Well, no – well, [Alexa] came over and we actually sat outside and talked.

Q. All right, so you had a friend over; you took care of the house; you took care of the children; a full, typical Saturday for you?

A. Yes.

Q. And other than being tired, you felt fine?

A. Yes, I did.

Q. Do you remember sending a text to [AR] on the morning of 24 March?

A. I did.

Q. And in that text, you told [AR], "Hey, I'm sorry, but we have to cancel today," correct?

A. I did.

Q. And you said, "I am very sick this morning," didn't you? Is that true?

A. Uh-huh.

Q. "And not getting any better." Isn't that what the text says?

A. Yes, it does.

Q. "Not sure what is wrong, but I was up to 5 AM." That's what the text says, correct?

A. Yes, that's correct.

Q. "And I can't keep anything down," is what the text says, correct?

A. Uh-huh.

Q. "Sorry, we'll have to try again soon." Is that what it says?

A. Yes, Sir.

Q. Was that a lie?

A. It was a story just to cancel . . .

Q. Was that a lie?

A. . . . the barbeque.

Q. Was that a lie?

A. Yes, Sir.

Q. So you lied to your friend, and you told her details about being very sick, correct?

A. I did.

Q. You lied to your friend and said you couldn't keep food down, correct?

A. Yes, Sir.

Q. You lied to your friend and said you were up until five in the morning, correct?

A. Correct.⁶

⁶ R. at 743, 745, 747-48.

Trial counsel exemplifies knowing the facts and evidence better than every person in the courtroom and using one witness to undermine not only their credibility but the credibility of another “witness.” Counsel uses Beth Wilkerson to demonstrate that either the Accused lied during his interview with OSI or she was lying during her direct examination, or more likely a bit of both.

Q. Now, how was your husband feeling that day?

A. He was—he said he was hung over.

Q. Okay, hung over. Did he describe anything else?

A. No, he was hung over and but for being hung over, he did an awful lot that day.

Q. Yeah, what did he do that day?

A. He got up early with the children, when they first woke up, and he went down and he made a big breakfast for them. And when I came down at 9 o’clock, he was preparing for the barbeque. We had not decided at that point we were going to cancel it. I had not talked to [Alexa]. And he went ahead and prepared the ribs to go into the smoker, and the brisket, and then he went to—he took the kids to Burger King to have lunch.

Q. All right. So they are going to JW’s end-of-the-season basketball gathering, and they’re going to have lunch there, correct?

A. Correct.

Q. All right, so go on. Sounds like Colonel Wilkerson is a busy little bee, but go on. What else is going on?

A. After they had lunch and the end-of-the-season basketball party, he met up with Major [Jones] and his children, and they went and played baseball.

Q. Okay, and then after they played baseball, what did he do?

A. He came home.

Q. And what did he do when he came home?

A. [Alexa] was over at the house, and her and I were sitting outside. It was a beautiful day, and he came in and he sat down next to me, and the three of us talked.

Q. All right.

A. And the kids were running around, playing.

Q. The kids ran around and played, and about what time did you go to bed?

A. That night?

Q. Yeah.

A. I went to bed at like 9:15-9:25.

Q. And how about you husband?

A. He was minutes behind me.⁷

⁷ R. 745-47.

Unfortunately for her diminishing credibility, Beth Wilkerson did not seem to know what the Accused had told OSI about how he felt that day—the Accused’s statements were recorded during the OSI interview and the prosecution presented clips of them to the members. According to the Accused, he felt “horrible” and Beth Wilkerson knew that: “What I will tell you is I felt unbelievably F’d up the next day.” . . . “I don’t, but I know I mentioned to my wife that, ‘I feel horrible, horrible.’” . . . “I remember—I’ll tell you what I remember that first set me off was that morning, the pancake mix was under the lower cabinet, and I almost fell over—forward as I went to get it out of the cabinet. I was having trouble focusing.” Whether true or concocted, the cross-examination highlighted these inconsistencies and contradictions and undermined the credibility of both, and certainly the defense’s theory of the case.⁸

This impeaching by contradiction continued, with trial counsel continuing to control the witness when necessary.

Q. Ah, now then—the next morning, you weren’t mad at your husband?

A. I was mad at my husband. I was mad—I wasn’t mad at my husband; I was mad that I was up all night.

Q. Yeah, but you didn’t ask him to help, right?

A. Help what?

Q. With [the Victim]; you didn’t ask him to help with that situation.

A. No.

Q. Okay, so you, on your own, were the one who stayed up, right?

A. I did.

Q. And it wasn’t your husband’s fault that those people came home, right? I mean you blame Colonel [DO], right?

A. I don’t blame Colonel [DO]. [Accused] asked him to take them and go and it somehow came about that they were going to come in for one drink.

Q. Ma’am, I really need you to listen to the question I ask. Okay?

A. Yes.

Q. That’s a simple yes or no; do you blame Colonel [DO] for the women coming over there?

A. It’s his fault that the women came to our house that night.

Q. Yes, so your husband had done nothing wrong on Friday night, right?

⁸ R. 431, 449.

A. No, he did not.

Q. So there would be absolutely no reason for you to be angry with him on Saturday morning, correct?

A. Correct.⁹

Unfortunately, again, this was different from what the Accused had told OSI about Beth Wilkerson's feelings that next day: "my wife, I know for a fact that night, because she was pissed off at me the next day . . . for bringing them home—pissed off at me."¹⁰

At another point, it was important for the prosecution to highlight discrepancies between Beth Wilkerson and the Accused about when and why the Accused went to bed the night of the assault. According to the Accused's self-serving statements to OSI during his interview, his wife told him to go to bed and he did so before Victim went to her borrowed bedroom: "My wife asked me to go to bed, and I go to bed." . . . "My wife said, 'You need to go to bed.' And I said, 'You got it.' . . . "[Victim] is not there when my wife says, 'Time for you to go to bed.' I think I walk in and let the other girl outside, whatever—the Captain, she is—I don't know her name. I go back in and she (wife) said, 'You need to go to bed.'" . . . "My wife tells me, 'Hey you've had enough to drink. It's time to go to bed.'" . . . "She said, 'You go to bed.' And I said, 'I'm going to bed.'"¹¹ Again, it appears Beth Wilkerson was unaware of these facts (the following just part of a longer discussion on this topic):

Q. Do you often send your husband up to bed? I mean are you the one that tells him when it's time for him to go to bed?

A. Ah, no.¹²

That the Victim left the Wilkersons' home on a chilly Italian night, at three in the morning, on foot, without her shoes, not knowing where she was, generated another textbook example of impeachment by contradiction. The prosecution theory, supported by the Victim's testimony, was that the Victim's sudden departure from the home during the chaos of Beth Wilkerson walking in on the Accused sexually assaulting her was the reason she left without her shoes (that is, she could not find

⁹ R. 761-62.

¹⁰ R. 412.

¹¹ R. 396, 429, 468.

¹² R. at 760.

them in the rush to leave the house and escape the Accused). The Victim leaving without her shoes, leaving into an area of Italy she was unfamiliar with, when according to the defense theory of the case she was not intoxicated, undermined the argument that her leaving was voluntary or uneventful. If the next day Beth Wilkerson did not know that the Victim's shoes were still at her house, she would not have known that fact would undermine the story she and the Accused concocted about the Victim's departure. She did not know.

Q. Now your testimony is, and I want to make sure you're one hundred percent clear on this, your testimony is the OSI came to your house, correct?

A. Yes, they did.

Q. You offered the shoes to the OSI, correct?

A. I did.

Q. And they refused to take them into evidence, correct?

A. Yes, they did—or they did not take them.¹³

Juxtapose that testimony with the contradictory rebuttal testimony from an OSI agent:

Q. Do you ever remember her offering you a pair of shoes that would have been owned by [Victim]?

A. No, Sir.

Q. Did she ever offer you a pair of shoes?

A. No, Sir.

Q. Do you have any doubt in your mind?

A. No.

Q. Did you, in fact, ask her if she had those shoes?

A. Yes we did.

Q. Did you, in fact, ask her if she knew where those shoes were?

A. Yes, Sir, we did.

Q. And, did she express any knowledge of those shoes?

A. No, Sir she didn't.

Q. Do you typically decline evidence at any point in your career as an OSI agent?

A. No, Sir.¹⁴

While there are many other examples of pointed, controlled, and structured cross-examination, the foregoing gives a sense of the practical application of the various litigation theories on how to conduct an effective cross-examination. With one more—finish strong:

¹³ R. at 758.

¹⁴ R. at 818-19.

Q. You treated [the Victim] with nothing but hospitality that night, correct?

A. Yes, I was hospitable.

Q. You were friendly to her, correct?

A. Yes, I was.

Q. You didn't try to steal from her?

A. No.

Q. You didn't in any way yell at her?

A. No.

Q. [Approaching witness.] You did absolutely nothing to give her a reason to falsely accuse your husband of putting his finger in her vagina?

CIV DC: Your Honor, I object to him approaching the witness like this. I think it's intimidating and improper. He can step back, but I believe that this is an improper use of the courtroom.

MJ: I'll overrule the objection, and you may continue.

Q. Did you hear the question?

A. My husband did not do that.

Q. That was not the question. The question was do you know of any reason why she would falsely accuse your husband of putting his finger in her vagina?

A. Ah, no, I don't know of any reason.

TC: Nothing further.¹⁵

Closing Argument

There was no “Perry Mason” moment when the witness confesses to the crime—that rarely happens. That would be cool, but the pointed, controlled, and structured cross-examination of Beth Wilkerson fed a persuasive closing argument. Over 53 minutes, trial counsel persuasively argued from that cross examination and the rest of the evidence presentation that the Victim was the most credible witness at that trial, that she had no motive to lie, that the Wilkersons concocted a story of events that night to cover the Accused's assault, that the Wilkersons' actions (and contradictory words) the days after the assault demonstrate the falsity of their cover story, that Beth Wilkerson had a motive to lie, and that she acted on that motive over and over again.

So where did all of this lead? To trial counsel's last words to the members before they deliberated, the encapsulation of the prosecution's theme and theory:

Now, when you go back and deliberate, I know you will return a verdict of guilty. And the reason I know that is because as you sit here now,

¹⁵ R.766-67.

you know in your minds, you know in your hearts, and you know in your very soul that the Wilkersons' lied. And you know in your hearts, and you know in your minds, and your very soul that [the Victim] told you the truth.¹⁶

Three hours later the members convicted Lt Col Wilkerson of sexual assault and later sentenced him to one year of confinement and a dismissal. The rest is history, but in that history the litigation skills which secured an all-too-rare sexual-assault conviction of an Air Force senior officer should not be forgotten.

“GOOD” CROSS-EXAMINATIONS

... they are short and to the point

... they have a limited number of set goals (one almost always being to undermine the witness's or another witness's credibility)

... they control the witness without arguing

... they in the end make the most sense during closing argument when the questions and answers are strung together in a narrative (aka theme and theory)

... they are structured and paced in a way that keeps the witness off balance

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... they start and end strong



¹⁶ R. at 1023.

