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25 Oct 10

From: Accused
To: Judge Advocate General of the Navy (Code 20), Washington
Navy Yard, 716 Sicard Street SE, Suite 1000, Washington,
DC 20374-5047
Via: (1) Trial Counsel
(2) Commanding Officer, Supt Bn, RTR, MCRD San Diego
(3) Staff Judge Advocate, MCRD San Diego
Subj: APPLICATION FOR UCMJ ARTICLE 69(b) APPEAL OF SPECIAL
COURT MARTIAL CONVICTION ICO JOSHUA HAWK, SSGT, USMC
Ref: (a) Article 69(b), UCMJ
(b) JAGINST 5800.7C (JAGMAN), paragraphs 0104 and 0162
(c) Rule for Court-Martial 1201(b)(3)
(d) Article 37, UCMJ
(e) US v. Serriane
(f) US v. Chessani
Encl: (1) Complete record of trial ICO US v. Joshua Hawk, USMC
[the accused does not possess this entirely and is
requesting that the Government produce this document
to include with this Application for appeal]
(2) Article 32 Report and accompanying documents
(3) Article 34 advice letter
(4) Affidavit of Maj R. Bueno
(5) Affidavit of Capt D. Ahn
(6) Affidavit of Maj C. Blalock and accompanying
documents
(7) Affidavit of GySgt P. Navagonzalez and accompanying
documents
(8) Affidavit of Sgt S. King
(9) US v. Chessani
(10) US v. Serianne
(11) Motion to exclude
(12) Motion to dismiss
(13) Discovery motion

1. Pursuant to the references, SSgt Hawk, the Accused in a special court martial, through counsel; requests that his record of trial, transcripts and evidence be reviewed in accordance with Article 69(b), UCMJ, to determine if there was error during his trial that was prejudicial to the substantial rights of the accused.
2. Pursuant to the references and enclosures, the following basic information pertaining to this application is provided:
 - a. Name of applicant: JOSHUA HAWK
 - b. SSN and Branch of Service: 561578658, United States Marine Corps
 - c. Present Grade: Civilian, but formerly a Staff Sergeant, E6
 - d. Accused's address for purposes of this appeal [Attorney's Address]: Defense Section, Bldg 12, 1st Floor, 3700 Chosin Avenue, MCRD, San Diego, CA 92140
 - e. Date of Trial: 15 MARCH 2010
 - f. Place of Trial: Bldg 12, 2nd Floor, MCRD, San Diego, CA
 - g. Convening Authority: SUPTBN, RTR, MCRD, San Diego
 - h. Article 64 Review Officer's Title: Review Officer, MCRD, San Diego, CA
 - i. Type of Court-Martial and Sentence: SPECIAL Court-Martial, reduction from E-6 to E-3, CONFINEMENT for five months.
 - j. Offenses convicted for: 1x Specification of Article 128 and 4x Specifications of Article 92 (dereliction of duty), 2x Specifications of Article 134 (drunk and disorderly conduct).
 - k. Grounds for Relief: Unlawful Command Influence and Prosecutorial Misconduct.
 1. Specific Prejudice from Error Cited: Please see the paragraphs below.
3. Article 69b, UCMJ provides that SSgt Hawk's Special Court-Martial conviction may be modified or set aside, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

4. **FACTS**

5. The accused was represented at trial by Capt C. P. Hur and Capt M. McDonald, Defense counsel. Earlier in the case, the accused was also represented by Mr. David Green, civilian counsel, and Capt D. Ahn. The trial counsel was Maj B. Braden. The military justice officer (head trial counsel at the time of preferral and during the Article 32 of this case) was Maj R. Bueno. The staff judge advocate that wrote the Article 34 advice letter was Maj S. Jackson, the deputy SJA for Col S. Smith, the SJA at the time of preferral and the pretrial investigation. Col Smith had previously advised, and her advice was ultimately followed by the convening authority (BGen A. Salinas), that SSgt Hawk's charges be preferred and sent to an Article 32 hearing and ultimately a general court martial. The military judge was Col J. Ewers.
6. Originally, SSgt Hawk was charged with Article 80, attempted rape of Ms. Danielle Ligon (1x specification); Article 92, wrongfully filling out a security questionnaire (5x specifications); Article 107, false official statements regarding his disclosures on a security questionnaire and also in connection with statements he made about Ms. Ligon (5x specifications); Article 120, rape of Ms. Ligon (1x specification); Article 134, drunk and disorderly conduct and also not filling out a security questionnaire accurately (6x specifications).
7. Prior to US v. Hawk's adjudication in March 2010 (but after referral of charges), several motions were filed in the case, including a discovery motion for witnesses, experts and evidence; a motion to suppress statements of the accused; and a motion to dismiss charges on the basis of unreasonable multiplication of charges. The motions were granted in part and denied in part with the effect that for the discovery motion, the defense obtained most of the materials they requested, but not all; for the multiplicity motion many of the charges were dismissed, but not all; and the statements of the accused were not suppressed.
8. Ultimately (the defense now believes because of the previously undisclosed and unknown credibility issues with the alleged victim Ms. Danielle Ligon), the parties reached a pretrial agreement where the remaining Article 120 charge was dismissed and the false official statement charges were dismissed and SSgt Hawk went to a special court martial vice a general court martial, as the case had been

originally referred. Per his PTA, Hawk pled guilty at a special court martial to 1x Specification of Article 128 (assault consummated by a battery), 4x Specifications of Article 92 (dereliction of duty), and 2x Specifications of Article 134 (drunk and disorderly conduct).

9. Regarding the dereliction of duty offenses, SSgt Hawk pled guilty at a special court martial to negligently filling out a security questionnaire and negligently answering questions in an interview with a security investigator. The defense had asked for a security background expert, as a witness, in its discovery motion, but was denied.
10. Additionally, with regards to the motion to suppress SSgt Hawk's statements to a security background check investigator, the defense relied orally at the Article 39a hearing in part on US v. Serriane, which held that a service member was under no legal obligation to self report their own civilian misconduct. Prior to that hearing, the defense had filed a motion to exclude SSgt Hawk's statements made to the security background interviewer on the basis that SSgt Hawk was under no legal obligation to disclose civilian criminal misconduct to the civilian investigator (who also did not read SSgt Hawk any UCMJ Article 31b rights). Again, the military Judge denied the defense motion to exclude SSgt Hawk's statements to the security investigator.
11. The primary reason that this appeal is made however is because of a statement of the former military justice officer of MCRD San Diego, Maj Bueno made only very recently.
12. 20 October 2010, Maj Bueno wrote a sworn affidavit that is attached to this appeal. In the affidavit, Maj Bueno revealed gross criminal misconduct by Col Smith (the former SJA on US v. Hawk) on not only this case, but potentially for several cases while she had been the Staff Judge Advocate at MCRD San Diego in 2008 and 2009. Maj Bueno's affidavit (when analyzed with other evidence connected with this case) confirmed that in US v. Hawk the following events transpired:
 - a. Col Smith ordered Maj Bueno to change the testimony of the victim in the case, Ms. Danielle Ligon, in order to make Ms. Ligon's incredible testimony more credible.

- b. Col Smith then developed a litmus test to preclude Article 32 officers that would not recommend referral of an Accused to a GCM. This only left Maj Miner to be a 32 Officer suitable for Col Smith's criteria. Maj Miner was the 32 officer in Hawk's case and recommended referral exactly as Col Smith desired and intended from her orders.
- c. Then, Danielle Ligon said via email through her victim advocate that she did not want to cooperate in the prosecution against SSgt Hawk at all. Col Smith then ordered Maj Bueno to do whatever it took to get Ligon to cooperate. This email from Ligon was NEVER¹ given to the defense. The subsequent orders from the SJA to strong-arm Ligon into testifying against her stated will were never disclosed to the defense.
- d. Then, and again following Col Smith's orders, Maj Bueno convinced Danielle Ligon to not cooperate or testify at the Article 32 hearing in SSgt Hawk's case. She followed those instructions and did not testify. The defense was denied an opportunity to impeach Ms. Ligon and uncover the actual and intentional manipulation of her testimony by Col Smith.
- e. Maj Bueno convinced the other civilian witnesses in Hawk's case, some of them exculpatory (like Sybil Mitchell) to sign statements saying that they did not want to testify at Hawk's Article 32 hearing even though they originally did.
- f. As SJA, Col Smith personally investigated and brought all charges not related to Danielle Ligon (security clearance and drunk and disorderly charges) to Maj Bueno to be prosecuted by Maj Bueno. After the sexual assault charges regarding Ligon were dismissed, these were the primary charges Hawk pled guilty to.
- g. Col Smith then told Maj Bueno to convince the defense witnesses in Hawk's case to not testify for the defense. Col Smith admitted that she had engaged in that conduct herself. The Defense does not know how many fact witnesses were dissuaded from testifying because of Col Smith.
- h. There was a Marine by the name of SSgt Mora who was a defense fact witness in this case (Mora offered testimony exculpatory evidence to the Ligon charges), Col Smith succeeded in intimidating SSgt Mora by threatening Mora with criminal charges.

¹ Brady v. Maryland, 373 U.S. 83 (1963), was a United States Supreme Court case in which the prosecution had withheld from the criminal defendant certain evidence. The defendant challenged his conviction, arguing it had been contrary to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

13. If this information had been known at the time of the Article 39a hearing in this case, then the defense counsel of SSgt Hawk would have been obligated to have additionally filed a motion to dismiss the charges on the basis of unlawful command influence. The defense would have been able to have a fair Article 32 hearing. The defense would have been able to have interviewed Ms. Ligon under oath and impeached her credibility at the 32 because her testimony had been manipulated and she had already said she didn't want to cooperate or testify in this case. The damage done to the exculpatory defense fact witness like SSgt Mora and Ms. Mitchell and others is irreparable and the Defense may never know the extent of damage and manipulation by Col Smith in this case.
14. Maj Bueno's candid affidavit is especially revealing and credible when compared with the testimony of the sworn affidavits of Capt David Ahn, Maj C. Blalock, GySgt Navagonzalez and Sgt King.
15. The evidence shows that Col Smith has engaged in a systematic and widespread campaign of intimidation of defense witnesses and manipulation of the military justice and administrative processes in order to obtain the results she desires regardless of the evidence.
16. In connection with an unlawful command influence motion made against the same SJA in a different case, Capt David Ahn, a former prosecutor at MCRD San Diego (near the time of Maj Bueno's version of events) wrote an affidavit where Col Smith, as SJA, in June 2008 had directed Capt Ahn to "flip the witnesses and that the witnesses needed to know who they worked for, who was paying them, and who writes their fit reps. ...the SJA instructed me to interview the witnesses again." Capt Ahn went on to describe an event in January 2009 where Col Smith, as SJA, attempted to intimidate defense witnesses during the course of an ongoing trial. Maj Bueno's facts speak to 2009 too.
17. In yet another GCM case, it was revealed that as the MCRD SJA, Col Smith was contacting a panel member on a convening order to inform that member that an accused was guilty in her capacity as the SJA on that case. See affidavit of Maj Blalock and attached emails. That case of US v. Wacker was ultimately dismissed without prejudice and the case was sent to MCAS Miramar for adjudication by that GCMA.

18. The information provided by GySgt Navagonzales indicates that Col Smith is continuing to successfully manipulate the testimony of witnesses in other military hearings in that Col Smith intimidated GySgt Navagonzales as a convening authority to withdrawal his letter of recommendation for another SNCO that Col Smith was targeting for punishment.
19. The information provided by Sgt King indicates that Col Smith is continuing to intimidate attorneys at the MCRD San Diego law center with respect to the performance of their duties as judge advocates and representation of clients. Col Smith is also continuing to issue illegal orders as a convening authority, just as she had done as an SJA.
20. The information provided by Maj Bueno regarding US v. Hawk was not made known to SSgt Hawk's defense lawyers until 5 October 2010, when another judge advocate alerted SSgt Hawk's military lawyer and informed him about comments Maj Bueno had said in casual conversation.

21. **LAW AND ANALYSIS**

22. Article 37, UCMJ states in part: (a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.
23. From US v. Chessani, (NMCCA 2009): "Unlawful command influence is the mortal enemy of military justice." Gore, 60 M.J. at 178 (quoting United States v. Thomas, 22 M.J. 388, 393 (C.M.A.1986)).
24. "Congress and this court are concerned not only with eliminating actual unlawful command influence, but also with 'eliminating even the appearance of unlawful command

influence at courts-martial.' United States v. Lewis, 63 M.J. 405, 415 (C.A.A.F.2006) (quoting United States v. Rosser, 6 M.J. 267, 271 (C.M.A.1979)). "Once unlawful command influence is raised, we believe it incumbent on the military judge to act in the spirit of the Code by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings." United States v. Stoneman, 57 M.J. 35, 42 (C.A.A.F.2002) (quoting Rosser, 6 M.J. at 271).

25. This call to maintain the public's confidence that military justice is free from unlawful command influence follows from the fact that even the "'appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.'" Simpson, 58 M.J. at 374 (quoting Stoneman, 57 M.J. at 42-43).
26. Regarding UCI alleged after trial, "Post-trial or on appeal we are no longer dealing with the potential for future unfairness but rather with whether unfairness actually occurred. In this scenario, the appellant must (1) allege sufficient facts which, if true, constitute unlawful command influence; (2) show the proceedings were unfair; and (3) show that unlawful command influence was the proximate cause of that unfairness. Stombaugh, 40 M.J. at 213. Only by presenting evidence on all three factors does the defense raise the issue of unlawful command influence. The threshold for raising the issue of unlawful command influence is low, but must be more than mere allegation or speculation." U.S. v. Harris, 65 M.J. 594, 597-598 (NMCCA 2007).
27. RCM 1106 states "No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, associate or assistant defense counsel, or investigating officer in any case may later act as a staff judge advocate or legal officer to any reviewing or convening authority in the same case." Col Smith wore all these hats: trial counsel, SJA and investigating officer.
28. The discussion comment for RCM 1106 states "The staff judge advocate or legal officer may also be ineligible when, for example, the staff judge advocate or legal officer; served as the defense counsel in a companion case;

testified as to a contested matter (unless the testimony is clearly uncontroverted); has other than an official interest in the same case; or must review that officer's own pretrial action (such as the pretrial advice under Article 34; see R.C.M. 406) when the sufficiency or correctness of the earlier action has been placed in issue."

29. CAAF in United States v. Taylor, 60 MJ 190 (CAAF 2004) has held that an SJA must remain neutral when advising a convening authority. In Taylor, the convening authority's action was set aside because the SJA had approved of a negative article published regarding the accused to other service members during the post trial review process.
30. Article 34, UCMJ, discusses that it is mandatory that a neutral SJA give a convening authority legal advice concerning and before any charge is referred to a general court martial (GCM) against an accused.
31. Finally, this body should consider the case of US v. Chessani, 2009 WL 690110 (NMCCA 2009), another western judicial circuit case (coincidentally also involving Col J. Ewers as the SJA in that case). In Chessani, UCI occurred merely because an SJA provided very limited investigation earlier in the case of an accused and then participated in giving some legal advice to a convening authority later in the case.
32. For US v. Hawk, the pieces of the puzzle now fit together. What before appeared to be a sequence of random events is now revealed to be part of a larger pattern. Capt Ahn tried to report what had occurred when he wrote his affidavit for a UCI motion. He spoke of Col Smith as an SJA ordering prosecutors to flip witnesses and intimidating defense witnesses to recant their favorable testimony in multiple cases before and during trial. Then, Maj Blalock spoke of Col Smith as an SJA contacting panel members in a General Courts-Martial and attempting to bias those panel members before a case could be adjudicated. Maj Blalock also spoke of Col Smith as an SJA attempting to manipulate an accused's ability to obtain good military character so as to not benefit his case. Now, the former and fallen head prosecutor of Col Smith as SJA, Maj Bueno the former MOJO of MCRD San Diego (and the primary prosecutor on Hawk's case), admits the truth: Col Smith as

SJA contacted the witnesses in US v. Hawk, just as she had done in US v. Wacker and an unknown number of other cases. Col Smith as SJA (and as a convening authority) directs her prosecutors to alter the testimony of witnesses, just as done with Capt Ahn and as done with Maj Bueno.

33. Applying the above mentioned post trial Harris factors, the defense has provided evidence of facts that constitute unlawful command influence. The SJA that was supposed to provide impartial legal advice to the GCMA, was instead contacting witnesses and had directed the MOJO (head prosecutor) to get the alleged victim to wrongfully change the victim's testimony to make it falsely appear more credible. The SJA then manipulated the Article 32 system to keep SSgt Hawk from getting a fair 32 officer. The SJA (as in Chessani, except much worse) then personally investigated and drafted all of the non-Ligon charges that Hawk ultimately pled guilty to. The SJA then arranged for no favorable defense witnesses to attend the 32 hearing. The SJA then covered up the fact that the victim said she didn't want to cooperate in the case. The SJA then intimidated an exculpatory defense witness by the name of SSgt Mora with the threat of prosecuting Mora.
34. Harris then requires that the defense show that the proceedings were unfair. Here, Hawk didn't obtain the expert witness he needed for the security background check charges (instigated by and investigated by the SJA, Col Smith). Nor were Hawk's statements to the security personnel suppressed. More importantly, SSgt Hawk was denied an Article 34 advice letter and legal advice to the GCMA from a disinterested and fair SJA that was not contacting witnesses and ordering the MOJO to change witness testimony. That wasn't fair. Nor, was it fair that the SJA had denied Hawk a fair Article 32 hearing, 32 Officer, or defense exculpatory witnesses who had not been intimidated or convinced not to testify for Hawk. Additionally, the main witness against Hawk (Danielle Ligon) as well as other witnesses had been contacted by this same SJA as implied by Maj Bueno. This same SJA had directed Maj Bueno to change the testimony of Danielle Ligon. That wasn't fair. Had the SJA's and prosecution's tampering with witnesses been known, the defense not only would have filed a UCI motion to dismiss but also would have impeached the credibility of Ms. Ligon at court and at the Article 32 if she hadn't been convinced to not testify.

This wasn't able to happen though because this information was not known until after conviction.

35. Finally, Harris requires that the Defense show that the unlawful command influence was the proximate cause of that unfairness. But for the actions of the SJA in this case, SSgt Hawk would have received a fair Article 32 hearing, a fair Article 34 advice letter and perhaps not been sent to a court martial at all because of the credibility issues surrounding Ms. Danielle Ligon and the intentional manipulation of the other defense witnesses. But for the actions of the SJA in this case (i.e. had this information been known), it's very likely that SSgt Hawk would not have been referred to a GCM for his alleged conduct against Ms. Danielle Ligon at all. Its certain based on case law that had this information been brought up at the Article 39a session that Col Ewers would have been required to dismiss this case without prejudice (if not for prejudice) because the Article 34 advice letter and advice to the GCMA from the SJA, Col Smith, was now flawed and the testimony of the fact and character witnesses was corrupted. The Article 32 hearing was corrupt too and had this information been known, a new Article 32 hearing was required by law.
36. It's important to remember that Harris only requires that some evidence of UCI be raised and then the burden shifts to the government to show that no UCI occurred beyond a reasonable doubt.
37. No member of the public could possibly look at these proceedings and enclosures and believe that SSgt Hawk received a fair trial (nor did the unknown number of other Marines whose cases Col Smith was SJA and convening authority for). The SJA that advised the GCMA to refer charges against SSgt Hawk not only contacted witnesses in this case as a neutral SJA, but also ordered the head prosecutor to get the key-witness to change her testimony and then intimidate defense fact witnesses to not testify and to modify their testimony because they were intimidated.
38. These actions are unexplainable and wrong. They must not be buried as they were perpetuated for years. They must be investigated and there must be real accountability for this injustice. The conviction of US v. Hawk must be overturned because of unlawful command influence.

39. **RELIEF REQUESTED:** I respectfully request that the Judge Advocate General or other officials order a verbatim transcript and record produced of the entire trial, that the enclosures attached to this petition be reviewed for prejudicial error that denied the Accused a fair trial. Once prejudicial error is found, I request that the Accused's conviction be vacated and that he be restored to the rank of Staff Sergeant.
40. I respectfully request that I be notified in writing of the Judge Advocate General's decision on this application. Any correspondence may be sent to me at the address listed above in paragraph 1d. Thank you. I swear that the contents of this letter are true and correct to the best of my knowledge, so help me God.

CDC
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DC
FILE

J. HAWK

James Hawk
25 Oct 10