UNITED STATES MARINE CORPS
WESTERN JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	GENERAL COURT-MARTIAL
v.	)	DEFENSE MOTION TO DISMISS FOR UNREASONABLE MULTIPLICATION OF CHARGES
DOUGLAS WACKER CAPTAIN U.S. MARINE CORPS	)	1 September 2010

1. **Nature of Motion.**

The defense hereby moves this court pursuant to RCM 907(b)(3)(B), to dismiss certain charges and specifications because the charges constitute an unreasonable multiplication of charges on the charge sheet referred in this case.

2. **Facts**

a. According to the Government's theory, funded law program, University of San Diego, law school student Captain Douglas Wacker (an unmarried man) went to New Orleans, LA during the first week of April in 2007 along with unmarried fellow USD law school students Jessica Brooder, Elizabeth Easley and others.

b. On 3 April 2007, after a night of eating, dancing and drinking in the historic and famous French Corridor on Bourbon Street, Captain Wacker, Jessica Brooder and Elizabeth Easley agreed to have a three some in the hotel they were staying at.

c. The next day, the two women (whose boyfriends had by then learned of the incident and were less than pleased with Captain Wacker), said that they could not remember what happened the night before and that they must have been sexually assaulted or raped.

d. For this conduct, Capt Wacker is accused of rape, attempted rape and a few article 133 and 134 offenses concerning what was actually the beginning of a consensual threesome

between three unmarried adults in a hotel room located near the famous Bourbon Street in New Orleans, LA.

e. At charge I, Captain Wacker is charged with attempting to rape Elizabeth Easley.

f. At charge III, specification 1, Captain Wacker is charged with conduct unbecoming of an officer for the very same alleged attempted rape of Elizabeth Easley.

g. Charge III, specification 2 is another conduct unbecoming of an officer offense for the attempted sexual assault of Elizabeth Easley.

h. Charge II is an Article 120 charge for the rape of Jessica Brooder.

i. Charge III, specification 3 is a conduct unbecoming of an officer offense for the same rape of Jessica Brooder.

j. For the conduct with Elizabeth Easley, the Government has unnecessarily made 3 charges for what is essentially one alleged criminal transaction.

k. For the conduct with Jessica Brooder, the Government has unnecessarily made 2 charges for what is essentially one alleged criminal transaction.

l. Regarding, Charge III, Specification 4, the Government charged Capt Wacker with a conduct unbecoming of an officer offense for allegedly lying to nonmilitary persons about what had transpired the evening of 3 April 2007 with Jessica Brooder, Elizabeth Easley and himself.

3. **Discussion**.

A. Certain specifications faced by Capt Wacker constitute an unreasonable multiplication of charges and the multiplicious specifications must be dismissed.

Pursuant to RCM 907(b)(3)(B), multiplicious specifications should be dismissed. "A specification is multiplicious with another if it alleges the same offense, or an offense necessarily

included in the other. A specification may also be multiplicious with another if they describe substantially the same misconduct in two different ways. For example, assault and disorderly conduct may be multiplicious if the disorderly conduct consists solely of the assault." R.C.M. 907(b)(3)(B), Discussion, Manual for Courts-Martial, (2008 ed.).

The commentary in the discussion section of the R.C.M. 703 is not merely a suggestion. It has been endorsed by the CAAF and is binding law. "[A]lthough the concept of unreasonable multiplication has been placed in the non-binding Discussion, 'we do not believe that the action of the President in placing this long-standing principle in a discussion section of the Manual for Courts-Martial had the effect of repealing it, thereby enabling imaginative prosecutors to multiply charges without limit." United States v. Quiroz, 55 M.J. 334, 337 (C.A.A.F. 2001).

Further, United States v. Gladue, 67 M.J. 311 (CAAF 2008) noted that the policy against the unreasonable multiplication of charges, RCM 307(c)(4) addresses the danger of prosecutorial overreaching as well as placing the accused in double jeopardy. Gladue focuses on the danger to an accused before findings are announced, as opposed to sentencing.

The specifications against Capt Wacker are clearly an unreasonable multiplication of charges because his charged offenses allege the same facts. Capt Wacker faces both a 120 offense and a 133 offense for his alleged rape of Jessica Brooder. Capt Wacker faces both a 120 offense and two 133 offenses for his alleged attempted rape of Elizabeth Easley. This double and triple charging is unnecessary. There are not two competing theories here, but instead an attempt by the Government to make Capt Wacker look twice or three times as bad as the prosecutor apparently believes he is.

"Ordinarily, a specification should not be dismissed for multiplicity before trial **unless it clearly alleges the same offense**, or one necessarily included therein, as is alleged in another

specification." United States v. Cherukuri, 53 M.J. 68, 73 (C.A.A.F. 2000), emphasis added. Here the specifications described above, clearly allege the same offense which leads to the conclusion the Court of Military Appeals counseled against in Hughes, the illegal shotgun approach to secure a maximum sentence by the Government. Hughes said:

> "To far too great a degree, however, **multiplicious charging appears to be used solely as a vehicle to encourage stiffer sentences. We unequivocally condemn this approach** to the administration of criminal justice as does paragraph 26b of the Manual for Courts-Martial, United States, 1969 (Rev.). **It is, or should be foreign to our judicial process to attempt to mold a jury's or judge's findings and sentence by resort to multiple charging of offenses which arise out of the same transaction.** *See* ABA Standards, Joinder and Severance § 2.2 (1968). Even though there may be instances, such as the present case, in which unnecessary multiple charging returns a premium for the prosecutor, **many such "victories" undoubtedly will be short-lived because of the very real risk of appellate attack which ultimately may deprive the Government and hence society of an "appropriate sentence."** Most judges as well as juries of the caliber found in the military justice system are perceptive enough to see through shotgun charge sheets and to adjudge what, to them, is an appropriate sentence nevertheless. Yet, an appellate court faced with a substantial disparity between the maximum penalty utilized during a jury's deliberations and the legally appropriate maximum punishment is duty bound to take further ameliorative steps to "cure" the error even though such action may merely retrace the jury's unrecorded deliberations. Due consideration of this Court's approach to multiplicity questions should alleviate the need to formulate specific rules for the myriad of multiplicity combinations. Stated more succinctly, sound legal judgment coupled with a measure of common sense often will eliminate the needless and costly judicial process of factually resolving matters of such questionable legal worth."

United States v. Hughes, 1 M.J. 346, 348 (C.M.A. 1976). Emphasis added.

There is no good reason to charge Capt Wacker with two specifications for the same criminal conduct (Brooder), or even three in the case of Easley, and thereby make Capt Wacker appear twice or three times as bad as the Government believes he is. An instruction cannot cure this defect as Capt Wacker will still be prejudiced before the members by looking two or three times as bad as he actually is according to the Government's theory.

B. Certain specifications faced by Capt Wacker are multiplicious with each other and one or both of the specifications must be dismissed.

U.S. v. Quiroz, 55 M.J. 334 (CAAF 2001) held that the concept of multiplicity is distinct from that of unreasonable multiplication of charges: whereas multiplicity is concept which derives from Double Jeopardy Clause, and that deals with statutes themselves, their elements, and Congressional intent, prohibition against unreasonable multiplication of charges promotes fairness considerations separate from an analysis of statutes, their elements, and intent of Congress.

"A motion to dismiss is appropriate if two offenses are multiplicious and there is no necessity to charge both offenses to enable the Government to meet the exigencies of proof." United States v. Kelson, 3 M.J. 139, 140 (C.M.A. 1977), footnotes. See also United States v. Forney, 12 MJ 987 (AFCMR 1982), (discussing the discretion of Courts to decline to dismiss where a genuine issue of proof exists).

United States v. Hudson, 59 MJ 357 (CAAF 2004) held that charges reflecting both an offense and a lesser-included offense are impermissibly multiplicious because a conviction for both violates the US fifth amendment protection against double jeopardy.

An element comparison of Charge I, Specification 1 (attempted rape of Easley) and Charge III, Spec 1 (conduct unbecoming for attempted rape of Easley) reveals that the elements of both specifications are exactly the same except for one element. The differing element is found in Charge III, Specification 1. See MCM, p. IV-111, Article 133: "That, under the circumstances, these acts or omissions constituted conduct unbecoming of an officer and gentlemen." The same holds true regarding the Brooder charges (see Charge II and Charge III, spec 3). Because the prohibition against multiplicity as outlined in Quiroz and Hudson has been violated with respect to the Article 133 charges relating to Brooder and Easley when the same

Article 120 offenses already exist; the Court must dismiss with prejudice either the Article 120 offenses at Charge I and Charge II or the Charge III, Spec 1 and Spec 2 offenses.

Again, merely instructing the members that they may find Wacker guilty of no offenses or one of the offenses, but not both; is not good enough because Capt Wacker still has the prejudice of looking twice as bad as the Government's theory holds him out to be.

C. Certain charges against Capt Wacker's should be dismissed, because as alleged, no violation of law took place or the Government has failed to state a legal claim.

RCM 907(b)(3) permits the court to dismiss a specification if it is so defective that it substantially misled the accused. The appellate courts have held that "(w)hether an act comports with law, that is, whether it is legal or illegal in relation to a constitutional or statutory right of an accused is a question of law, not an issue of fact for determination by the triers of fact." US v. Harvey, 67 M.J. 758, 763 (AFCCA 2009).

The appellate courts recognize that offenses must be dismissed where the Government has failed to state an offense. See U.S. v. Daly, 69 M.J. 549 (CGCCA 2010), where the Government's citing of customs of the service was not good enough to overcome a contrary service order governing the conduct at issue. See also U.S. v. Sutton, 68 M.J. 455 (CAAF 2010), where the Government's charging of indecent liberties (for a stepfather asking his step daughter to expose her breasts did not constitute a solicitation offense under the MCM).

Here, the Government charged Charge III, Specification IV as an Article 133 conduct unbecoming offense for Capt Wacker when he allegedly made a false statement to non military personnel in a purely civilian setting while on leave and not in his capacity as a commissioned officer. The closest analogous offense to this crime is Article 107, false official statement. An Article 107 charge was not charged, however because there was no official statement made.

Ignoring the fact that the Government has insufficient evidence that sexual intercourse in the biblical sense took place with Jessica Brooder or even that Capt Wacker intended to deceive anyone; as charged at Charge III, Spec 4, no offense has taken place per the MCM and the Government is simply inventing charges to craft a new/novel Article 133 offense. This is impermissible and Charge III, Spec 4 should be dismissed.

CAAF has held that "In all these instances, before a military member can be charged with an offense under Article 133 or Article 134, due process requires that the member have "fair notice" that the conduct at issue is forbidden and subject to criminal sanction." U.S. v. Anderson, 60 M.J. 548, 554 (AFCCA 2004), citing United States v. Vaughan, 58 M.J. 29, 31 (CAAF 2003). Even assuming for sake of argument that the government's allegations are correct, there is no notice here that Capt Wacker knew saying he didn't have sex with Jessica Brooder before a group of civilians could constitute a crime. This group of civilians was not a jury, a judge, nor any judicial body. Capt Wacker was not in a military setting or even acting in his capacity as a service member.

Additionally, it appears that the Government (at Charge III, Spec 1 and Charge III, Spec 3) has impermissibly grafted the Article 120 language from MCM 2008 edition (effective 1 October 2007) and transformed that language into the Article 133 specifications on the charge sheet. Capt Wacker's alleged criminal misconduct occurred early April 2007. MCM 2005 edition Article 120 language can be found at Charge I and Charge II. See U.S. v. Orzechowski, 65 M.J. 538, 539-540 (NMCCA 2006) for a discussion on what ex post facto laws are and why they are never allowed.

MCM 2005, p. IV-68 specification language states:

(1) *Rape.*

In that (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about 20 , rape , (a person under the age of 12) (a person who had attained the age of 12 but was under the age of 16).

Capt Wacker's Charge I and Charge II on the referred Charge Sheet state:

Charge I: Violation of the UCMJ, Article 80

Specification: In that Captain Douglas S. Wacker, United States Marine Corps, on active duty, did, at or near New Orleans, Louisiana, on or about 3 April 2007, attempt to rape Elizabeth Easley.

Charge II: Violation of the UCMJ, Article 120

Specification 1: In that Captain Douglas S. Wacker, United States Marine Corps, on active duty, did, at or near New Orleans, Louisiana, on or about 3 April 2007, rape Jessica Brooder.

MCM 2008, p. IV-80, specification language states:

(c) *Aggravated sexual assault upon a person substantially incapacitated or substantially incapable of appraising the act, declining participation, or communicating unwillingness.* In that_____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20_____, engage in a sexual act, to wit: _____ with _____, who was (substantially incapacitated) [substantially incapable of (appraising the nature of the sexual act)(declining participation in the sexual act) (communicating unwillingness to engage in the sexual act)].

Capt Wacker's Charge III Specifications 1, 2 and 3 on the referred Charge Sheet state:

1 USB 100526
Specification 2: In that Captain Douglas S. Wacker, United States Marine Corps, on active duty, did, at or near New Orleans, Louisiana, on or about 3 April 2007, act in a manner unbecoming of an officer and gentlemen, to wit: by wrongfully attempting to engage in sexual intercourse with Ms. Elizabeth Easley while he knew or should have known that Ms. Easley was so significantly intoxicated and mentally and physically impaired as a result of said intoxication that a reasonable officer in the Naval service would have recognized that there was a substantial likelihood that she was incapable of knowingly and voluntarily consenting to sexual intercourse.

2 USB 100526
Specification 3: In that Captain Douglas S. Wacker, United States Marine Corps, on active duty, did, at or near New Orleans, Louisiana, on or about 3 April 2007, act in a manner unbecoming of an officer and gentlemen, to wit: committing an indecent assault upon Ms. Elizabeth Easley, a woman not his wife, by straddling the said Ms. Easley by placing his legs on either side of her body, while he knew or should have known that the said Ms. Easley was so significantly intoxicated and mentally and physically impaired as a result of said intoxication that a reasonable officer in the Naval service would have recognized that there was a substantial likelihood that she was incapable of knowingly and voluntarily consenting to any sexual contact.

3 USB 100526
Specification 4: In that Captain Douglas S. Wacker, United States Marine Corps, on active duty, did, at or near New Orleans, Louisiana, on or about 3 April 2007, act in a manner unbecoming of an officer and gentlemen, to wit: by wrongfully engaging in sexual intercourse with Ms. Jessica Brooder while he knew, or should have known that Ms. Brooder was so significantly intoxicated and mentally and physically impaired as a result of said intoxication that a reasonable officer in the Naval service would have recognized that there was a substantial likelihood that she was incapable of knowingly and voluntarily consenting to sexual intercourse.

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Here, it's clear that the MCM 2008 did not exist in April 2007 when Capt Wacker allegedly committed the offenses against Ms. Easley and Ms. Brooder. If the Government was going to charge Capt Wacker, it was required to charge only charges from the MCM 2005. The US Supreme court and other case law establish that ex post fact laws are not allowed. Therefore, the Government must not be permitted to take a 2008 law (effective 1 October 2007) and apply it to Capt Wacker's alleged conduct in April 2007. Simply put, the prosecution is using the catch all Article 133 as away to defeat the Fifth Amendment's prohibition on ex post facto laws. This is reversible error on appeal. The only solution to avoiding harmful error to Capt Wacker is to dismiss the Article 133 charges on the charge sheet.

4. **Relief requested**

That all charges at Charge III be dismissed because they are either an unreasonable multiplication of charges or they fail to state an offense.

5. **Evidence and Burden of Proof.**

a. The defense requests production of the following witnesses by the Government in support of its motion:

- Jessica Brooder

- Elizabeth Easley

b. The following defense exhibits are provided:

- Not applicable at present.

c. Burden of proof: As the moving party of this motion, the burden of proof in proving all facts alleged in support of this motion falls upon the accused by a preponderance of the evidence. See RCM 905(c).

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

I served this pleading on the parties and the court on this date: 1 September 2010.

/s/
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Christian P. Hur, Captain, USMC
Detailed Defense Counsel