WESTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES	)	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
v.	)	**MOTION TO DISMISS FOR UNLAWFUL COMMAND INFLUENCE**
DOUGLAS S. WACKER **CAPT, USMC**	)	**7 APRIL 2011**

The defense moves that all charges against the accused be dismissed, with prejudice, based on unlawful command influence (UCI). In the alternative, the defense petitions the Court to abate the proceedings until an independent investigation into Col Smith's actions in the case is completed and a report is submitted to the Court and accessible to the defense.

The burdens of proof for the motion are as follows: 1) the defense has to show "some evidence" of UCI to shift the burden to the government; 2) to win the motion, the government must prove any one of the following beyond a reasonable doubt: a) disprove the predicate facts upon which the allegation of UCI is based; b) persuade the Court that the facts do not constitute UCI; or c) produce evidence that UCI will not affect the proceedings. The Findings of Fact are made based on a preponderance of the evidence.

The Court has considered the extensive documentary evidence presented, the testimonial evidence, the argument of counsel and has made all judgments of credibility of witnesses.

FINDINGS OF FACT

1. NCIS opened a case against the accused around June 2008. The Staff Judge Advocate (SJA) for the Commanding General of MCRD, San Diego, California (MCRD), was Col

Stephanie Smith. Col Smith served as the SJA from June 2008 to June 2009. The Commanding General and Convening Authority of MCRD in 2008 was BGen Angela Salinas.

2. Sometime in the fall of 2008, Major Budomo, who was the accused's immediate Commanding Officer at the time, was approached by Col Smith while she was the SJA and the investigation against the accused was ongoing. He was told by the SJA that the accused was guilty and that he was a rapist and sociopath. It was reasonable for his interaction with the SJA to give him the impression that she had already determined the accused's guilt and that she was "acting more like a prosecutor than an SJA."

3. On 9 January 2009, a Military Protective Order (MPO) was issued to the accused ordering him to not have any contact with his classmates from the University of San Diego (USD).

4. Charges were preferred in April 2009. Around May 2009, the accused was recalled to active duty on board MCRD San Diego. This was so he could work between his years of attending law school at USD. The accused was placed in the G-3 shop working for the Assistant Chief of Staff (AC/S) G-3, Col Christopher Conlin.

5. An Article 32 proceeding was held in June 2009. The Investigating Officer (IO) recommended all charges be taken to a general court-martial.

6. In June 2009, Col Smith became the Commanding Officer of Headquarters and Service Battalion at MCRD, thereby becoming the Commanding Officer (CO) of the accused.

7. Due to her former knowledge of the case as the SJA, Col Smith, now as the special court-martial convening authority of the accused, forwarded the charges with no comment, to the Commanding General. Major Samuel Jackson, the deputy SJA for

MCRD, wrote the Article 34, UCMJ, SJA recommendation letter. Charges were referred for trial by general court-martial on 14 July 2009 by BGen Salinas.

8. In late August or early September 2009, Col Smith contacted Col Conlin about the accused's responsibilities in the G-3. She was concerned about his active role in a tactical training exercise MCRD was conducting (Exercise Aztec Fury 2009). She was particularly concerned about the accused's access to sensitive information he may be privy to as an action officer for the exercise. On another occasion, she expressed this same concern to LtCol Thad Trapp.

9. During this time, Col Smith also approached Major Blalock and told him that the accused was a narcissist, whose ego had finally caught up with him. She also suggested that the accused not be assigned to any duties which may make him look good at his court-martial. LtCol Gregory F. Bond was the Executive Officer (XO) for Col Smith and, thereby, of the accused's command. Later, he also told Major Blalock that he should not place the accused in a position that might benefit him at his court-martial.

10. On 22 September 2009, MCRD conducted a safety stand-down for the Depot and the 12th Marine Corps District where at least one brief on sexual assault was addressed. This included a discussion by the new SJA, Col Michael Richardson, regarding being careful about "drunk sex." The SJA was very circumspect in his comments and explained to the audience that he was talking in general terms and not about any specific case. Nothing about this standard training resulted in the appearance of UCI.

11. On 24 September 2009, LtCol Bond sent out an email to Col Conlin, copying the General's Chief of Staff (Col Huenefeld), LtCol Trapp, Ms. Myers and Major Blalock. Col Conlin and LtCol Trapp were both court-martial panel members from the General's standing court-martial convening order.

12. LtCol Bond's email began by him stating that he would speak for the CO (Col Smith) because she had to remain "impartial" (quotes in original). The purpose of the email was to get the accused removed from a billet and away from access to what LtCol Bond and Col Smith deemed sensitive information. LtCol Bond's email divulges that he presumed the accused guilty and that he was very upset that the accused had access to the ATF plans, giving him access to all of the emergency procedures of the base. But the email goes further than that. He called the accused a psychopath, a rapist, and someone likely to kill someone after he got out of jail. Further, he declared the accused's guilt in no uncertain terms, buttressing his argument with references that he had read the NCIS investigation and knew that the accused used a date rape drug against his victims. He finished his email by stating that next time they send someone to the G-3, they will stipulate exactly how the person will be "billeted" (used).

13. LtCol Bond's email was unprofessional in its tenor to senior officers. It was completely inappropriate to discuss with the accused's boss (and possible character witness) his firm convictions that the accused was guilty. It was completely inappropriate to copy the email to others. It was completely inappropriate that the email was to two potential members of the panel against the accused, Col Conlin and Major Blalock.

14. Upon learning of LtCol Bond's email, the new SJA, Col Richardson, immediately counseled the XO regarding the inappropriateness of his actions. Col Richardson then went to Col Conlin, LtCol Trapp and Major Blalock and told them that the XO's email was completely inappropriate and that the Commanding General expected all of them to discount the email and testify freely for the accused if they wished to. All three officers indicated to the SJA that they had already come to the conclusion that the email was inappropriate, that they would discount it, and that they understood their duties to testify as potential witnesses for the accused.

15. These officers were seasoned, experienced and not chilled from testifying for the accused as a result of the XO's email. Col Conlin even laughed off the email off as just the XO getting excited. Further, he interpreted Col Smith's concern over the accused knowing the Base Force Protection Plan as a legitimate concern for her as the CO. Lastly, he was perfectly willing to be a character witness for the accused. LtCol Trapp and Major Blalock also saw the email as completely inappropriate and were not biased against offering any character evidence in favor of the accused.

16. On 1 October 2009, Col Smith sent out an email to the officers who had received her XO's email. In it, she explains that she presumes the accused innocent, that all of the witnesses and persons should fully participate in the court-martial process, and that she wants a fair trial for the accused. She explained that her reason for moving the accused from his position at the G-3 shop back to the battalion was because of her concerns that the accused had access to the particulars of the Base's Force Protection Plan. She thought that untenable given the serious charges he faced. Lastly, Col Smith explained that she didn't want bad publicity for the Base if the accused discussed the exercise with the media and they realized that he was facing charges of a serious nature.

17. During her time as an SJA, and including her conduct during the accused's case, while it was at MCRD, Col Smith took an aggressive and active stance in pending courts-martial. She became intimately involved with the processing of the cases and had a very hands-on approach. She engaged in the following practices: 1) querying her prosecutors whether they could "flip" or change witnesses' testimony; 2) being overly concerned about the particular result of a court-martial (i.e. attending a court-martial and becoming involved with the actual litigation); 3) having contact with a defense witness during an ongoing court-martial; and 4) instructing her prosecutors to constantly remind witnesses (including victims) that they did not have to testify at Article 32 hearings.

18. In the accused's case specifically, Col Smith: 1) arranged a lunch date with a fellow law student of the accused, Capt Blosser, under the guise of mentoring, so that S.A.

Burge would be able to interview the potential witness; 2) discouraged the accused's supervisors from giving the accused a job that might make him look good at his court-martial; and 3) commented on the accused's guilt to possible witnesses.

19. All of Major Bueno's allegations of impropriety against Col Smith are viewed in light of him having received an adverse fitness report by Col Smith, being fired from his job as a prosecutor by Col Smith for speedy trial issues and general incompetence, and the obvious dislike Major Bueno demonstrated against Col Smith. In short, the Court finds him a very prejudiced witness. Further, the Court finds Major Jackson's testimony (the deputy SJA of MCRD) believable. His testimony and affidavit specifically refute some of the claims Major Bueno made against his former boss (i.e. that she would only let certain people favorable to the government be appointed as IOs).

20. Principally as a result of Col Smith and LtCol Bond's actions, the defense filed an UCI motion asking for dismissal of charges with prejudice on 15 October 2009. This motion was never litigated. In response, the charges that were referred on 14 July 2009 were withdrawn and dismissed without prejudice by the Convening Authority on 18 November 2009. Shortly after the dismissal of the charges, the accused was transferred to the Third Marine Air Wing (3^{d} MAW), at Miramar.

21. As a result of possible UCI at MCRD, MCRD's Commanding General, MGen Bailey, then decided to move the case to 3^{d} MAW for that Convening Authority to decide how to handle the case. The SJA of MCRD, Col Richardson, ensured a clean hand-off of the case from MCRD to 3^{d} MAW. Col Richardson went with his General to a meeting with MGen Conant, the Commanding General of 3^{d} MAW and Col K.J. Brubaker, the SJA for 3^{d} MAW. A copy of the NCIS investigation was given to MGen Conant. MGen Bailey told MGen Conant that the case had run into some problems at MCRD and that he thought it best to transfer the accused and let the investigation start over with a fresh set of eyes. The conversation between the Generals lasted only a very short time and no

specifics of the case were mentioned. There was absolutely no taint from the problems at MCRD to 3d MAW.

22. At no time was there any discussion regarding how to handle this case between the SJA of 3d MAW and Col Smith. Nor was there any other contact between Col Smith and anyone at Miramar regarding the case, other than Col Smith being interviewed as part of the pending motion.

23. On 7 January 2010, charges against the accused were preferred anew, this time under a new Convening Authority, the Commanding General of 3d MAW, at MCAS, Miramar. A second Article 32 hearing was held on 12 April 2010, with LtCol M.E. Sayegh, the SJA for MCAS, Yuma, Arizona, as the IO. At this hearing, five witnesses testified in person and three testified by telephone. These witnesses included everyone mentioned on the charge sheet. Several other witnesses requested by the defense were on stand-by to testify either in person or by telephone. In addition to the witnesses available, the IO also considered sworn statements of witnesses without objection from either party.

24. The IO recommended that some of the charges be referred to a general court-martial. Col Brubaker concurred in the IO's recommendation and forwarded the charges to the Convening Authority, MGen T. Conant. On 26 May 2010, charges against the accused were once again referred. A couple of the new charges were the same as the original charges preferred in April 2009.

25. At no time did any pretrial publicity affect the accused's court-martial. At no time was any character witness' testimony ever impacted by any actions of Col Smith or LtCol Bond. All favorable character witnesses for the accused were willing and able to testify on the accused's behalf. For tactical reasons, these witnesses were not called by the defense on either the merits or sentencing.

SUMMARY OF THE LAW

The law on this subject is relatively straightforward. To begin, the defense must first show "some evidence" of UCI. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999), quoting *United States v. Ayala*, 43 MJ 296, 300. See also, *United States v. Simpson*, 58 M.J. 368, 373 (C.A.A.F. 2003). Specifically, the defense has the initial burden to: 1) show facts, which if true, constitute UCI; 2) show that the proceedings were unfair; and 3) show that the UCI was the cause of the unfairness. *U.S. v. Biagase*, 50 MJ 143, 151.

This initial burden of proof, or showing, by the defense need not be proved beyond a reasonable doubt. The standard is merely that some evidence is presented. If the defense meets this initial hurdle, then the burden shifts to the government to show either that there was no UCI or that the UCI will not affect the proceedings. This is done by proving, beyond a reasonable doubt one of the following: 1) disproving the predicate facts upon which the allegation of UCI is based; or 2) persuading the military judge that the facts do not constitute UCI; or 3) producing evidence that UCI will not affect the proceedings.

ANALYSIS / CONCLUSIONS OF LAW

This Court takes seriously the concept of the judge being the last sentinel regarding issues of UCI. This Court takes seriously the philosophy that the judge must avoid even the appearance of evil (or UCI) in the courtroom by establishing the confidence of the general public in the fairness of the court-martial proceedings. The Court of Military Appeals, as far back as 1956, indicated that "any circumstance which gives even the appearance of improperly influencing the court-martial proceedings against the accused must be condemned." *U.S. v. Hawthorne*, 22 CMR 83, 87 (CMA 1956).

For all of the proceedings that occurred at MCRD, the defense has met their initial burden to show that there was UCI in this case at MCRD, that the proceedings were unfair and that the UCI was the cause of that unfairness.

The defense has raised the specter of UCI in this case with regards to actions of Col Smith and LtCol Bond at MCRD, San Diego. This is evident from the email of LtCol Bond and the testimony of various witnesses, to include Major Bueno and Capt Ahn, as well as other documentary evidence, including affidavits. Actions or perceived actions of Col Smith also raise the specter of UCI.

It is true that the officers receiving LtCol Bond's email would have, almost without a doubt, been challenged off of the standing court-martial panel due to their close working relationship to the accused. It is also true that none of the officers were affected by the email so as to change their testimony, etc., but the actions of LtCol Bond were clearly impermissible and UCI.

During her time as an SJA, the Court found that Col Smith took an aggressive and active stance in pending courts-martial. She became intimately involved with the processing of the cases and had a very hands-on approach. She engaged in the following practices: 1) querying her prosecutors whether they could "flip" or change witnesses' testimony; 2) being overly concerned about the particular result of a court-martial (i.e. attending a court-martial and becoming involved with the actual litigation); 3) having contact with a witness during an ongoing court-martial; and 4) instructing her prosecutors to constantly remind witnesses (including victims) that they did not have to testify at Article 32 hearings.

Having an aggressive and active stance, as an SJA, concerning courts-martial is not illegal. Each of the four areas above, standing alone does not necessarily create UCI. However, in this case, two inexperienced litigants, Major Bueno and Capt Ahn, both interpreted Col Smith's actions as attempting to manipulate the system for the government. So, these actions, at a minimum, create the appearance of UCI.

In the accused's case specifically, Col Smith: 1) arranged a lunch date with a fellow law student of the accused, Capt Blosser, under the guise of mentoring, so that S.A. Burge would be able to interview the potential witness; 2) discouraged the accused's supervisors from giving the accused a job that might make him look good at his court-martial; and 3) commented on the accused's guilt to possible witnesses.

It cannot be seriously disputed that the fact that NCIS was waiting to interview Capt Blosser after his lunch with Col Smith was mere serendipity. It isn't, per se, impermissible for an SJA to arrange a meeting between NCIS and a witness who is the accused's good friend. But, it appears to an outsider that Col Smith was attempting something sneaky based on her actions and her denial on the stand that the meeting was planned out. When an outsider looks at the environment then present in the trial shop, Col Smith's discouraging of the accused's bosses to give him a place to shine while he waited for his court-martial, her repeated assertions of the accused's guilt and the letter of LtCol Bond, it is troubling.

Having established that there was actual or apparent UCI at MCRD, the burden now shifts to the government to establish, beyond a reasonable doubt, that the actual or apparent UCI established by the predicate facts has not, or will not, affect the proceedings.

For all of the allegations of UCI raised by the defense during the motions session, the Court specifically finds that either: 1) the facts posited do not constitute UCI (i.e. pretrial publicity), or 2) where there was actual or apparent UCI, there is no logical connection between the facts and the present court-martial, in terms of any potential to cause unfairness in the proceedings on either findings or the sentence.

The major question is: Was the UCI taint from MCRD removed or ameliorated due to moving the case to 3^{d} MAW? In other words, assuming some or all of the actions of LtCol Bond and Col Smith resulted in UCI, has the removal of the case from MCRD, to

Miramar removed all the taint, when a new Article 32 was conducted, and a new SJA and convening authority handled the case from scratch? Or is the taint so severe from the original case, that the government cannot, or has not ameliorated any possible effects of UCI by moving the case to Miramar and starting over?

The accused has suffered no prejudice from the removal of the case to 3^{d} MAW. All possible taint has been removed by the government's almost surgical removal of the case from one jurisdiction to another. The defense has NOT shown a concrete and logical connection of the issues involving MCRD, San Diego, to the case NOW at trial. No potential witness' testimony has been altered or changed as a result of any possible UCI. No witness has declined to testify regarding the military character of the accused.

Although not argued during the motions session, the Court notes that there has been no proof that any pretrial publicity or press release has influenced this case in any way. Even assuming, *arguendo*, that there was some issue regarding this point, removing the case from San Diego and moving it to Miramar has removed any possible taint. The defense was free to ask any potential jury members regarding their knowledge of this case via the media or otherwise. In fact, the military judge did ask each juror what he or she knew of the case during the voir dire of this case. Not one member had even heard of this case. Not one member had any idea what case was about. There was no connection between what occurred at MCRD and this trial.

It is true that UCI is the mortal enemy of military justice. The Court of Appeals for the Armed Forces, in *United States v. Lewis*, at 63, MJ 405, 414-5 (C.A.A.F. 2006), stated that when looking at apparent UCI, the query becomes whether an "objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceedings." The answer to this question is, NO, there would not be a significant doubt about the fairness of the proceedings.

The government withdrew and dismissed the charges against the accused after learning of possible UCI at MCRD. The government moved the case to Miramar where there was a brief handoff of the case between convening authorities and no spread of any possible taint from MCRD. Although the government possibly could have relied on the result of the prior Article 32 hearing, they, wisely, chose not to. Instead, the government went through a new, extensive, compete and impartial Article 32 hearing. An independent investigating officer, LtCol Sayegh, recommended the charges be referred to a general court-martial.

An impartial and completely uninvolved SJA recommended to the Convening Authority that the charges be taken to a general court-martial. An independent Convening Authority, Major General Conant, after receiving all of the advice on this case, elected to refer the charges against the accused to a general court-martial. Ameliorative actions to cure UCI may include transfers of responsibility for disposition of charges to commanders not subject to the alleged influence and change of venue. See *United States v. Simpson*, 58 M.J. 368, 373-74 (C.A.A.F. 2003) citing *United States v. Biagase*, 50 M.J. at 152, *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998).

There is no fact, or percipient witness, or character witness, who has been rendered unavailable, by lack of memory or other reasons, from testifying on behalf of the accused given any delay in this case by moving it from MCRD, San Diego to Miramar. The accused has all of his character witnesses that he would have had, absent any possible UCI in the case at MCRD, San Diego. Not one witness has indicated that he or she will not testify or that their testimony will be changed in some meaningful way.

The accused's billet at the time of trial was roughly the same as before. Being removed from one's normal course of duty, and having one's security clearance pulled, delays in the commencement of trial, impacts on career and schooling, adverse impact on one's reputation--all of these are unfortunate but common and accepted collateral circumstances for one accused of a crime.

Assuming that there was UCI in this case, the government, through its procedural processes, has now eliminated even the appearance of UCI at this present court-martial. Anything that might have occurred at MCRD, San Diego, now has absolutely no bearing on the issues in front of the court and whether the accused can receive a fair trial. Evidence proving this includes the affidavits of Major Hatch, the Military Justice Officer and Colonel Brubaker, the SJA. It is unfortunate that some of the events occurred as they did at MCRD, but the remedy for the accused is what the government has already done, namely, remove all taint from the proceedings and ensure the accused gets a fair trial. Dismissal of the charges with or without prejudice is neither required nor appropriate.

This Court is convinced, beyond a reasonable doubt, that any appellate court would find, beyond a reasonable doubt, that the procedural measures that the government has taken, and the procedural measures the Court took during trial have ameliorated any possibility that either the findings or sentence in this case were affected by UCI.

There was no improper withdrawal and re-referral of charges. The government's actions of moving the case to a new situs, or in seeking a new venue to remove any possible taint of UCI, is entirely appropriate. The government's actions were not intended to interfere with, nor did they have the affect of interfering with, the accused's constitutional or statutory rights. To the contrary, the government's actions in dismissing the original charges and re-preferring, and then re-referring them to this general court-martial served to protect the accused's right to a completely fair trial, not to interfere with that right. RCM 604 allows what the government has done in this case. Unlike the *Lewis* case, the government has not taken any action in an attempt to forum shop for a judge or tamper with the system. The accused is entitled to a fundamentally fair trial, not a procedurally perfect one.

RULING

For any facts which lead to the appearance of UCI at MCRD, the government has proven beyond a reasonable doubt that those facts did not prejudice the proceedings of *United States v. Wacker* in any way.

The defense MOTION, in its entirety, is DENIED.

//s//
D. M. JONES
LtCol, USMC
Military Judge