

UNITED STATES MARINE CORPS  
WESTERN JUDICIAL CIRCUIT

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UNITED STATES	)	GENERAL COURT-MARTIAL
	)	
v.	)	DEFENSE MOTION
	)	TO EXCLUDE (REQUEST FOR
PIETRO P. SCARSELLI	)	RECONSIDERATION)
MAJOR	)	
U.S. MARINE CORPS	)	29 OCTOBER 2010
	)	
	)	
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**1. Nature of Motion.**

The defense hereby moves this court, pursuant to Rule for Court-martial 905(f) and 906, to exclude the 8 July 2009 statement made by the accused to Mr. David Gill, inspector general. This is a motion for reconsideration to the military judge to reverse his ruling on a previous motion concerning this same issue based on new evidence.

**2. Summary of Facts.**

**A. The Military Judge’s adopted facts, in making its decision to NOT suppress the 8 July 2009 statement, were incorrect based on what Mr. Gill had testified to before the Military Judge.**

- a. The 12 April 2010 order of the Military Judge said, “At the time of the 8 July 2009 interview, it is apparent that Mr. Gill was still gathering information, had not come to any determinations, or performed analysis on the raw information that he had gathered. The rights advisement presented to the Accused on 8 July 2009 supports the conclusion that Mr. Gill suspected the accused of general misconduct

that could best be described as dereliction of duty as the Provost Marshal at MCAGCC.”

**B. According to Gardner’s statement, in June 2009 and in months earlier, Mr. Gill ACTUALLY suspected Maj Scarselli of misconduct other than dereliction of duty (INCLUDING hazing, fraternization, borrowing money from subordinates) BEFORE he took that 8 July 2009 interview with Maj Scarselli.**

- b. Mr. David Gill (29 Palms IG) testified at the motions hearing that he did not suspect Maj Scarselli of any misconduct other than dereliction of duty on 8 July 2008, the date of the first interview of Maj Scarselli (the only interview of Maj Scarselli that has not been suppressed).
- c. On 23 April 2009, LtCol McGowan ordered Maj Cindy Blair to conduct a preliminary investigation into matters at PMO with specific allegations identified (that Maj Scarselli would later be directly questioned by Mr. Gill about): false official statements in official reports, threats, cruelty and maltreatment, unlawful detention, drunk on duty, perjury, adultery, false swearing, fraternization, gambling with subordinates, obstructing justice, submitting false training rosters, and retaliating against civilian employees for union issues. **This document was delivered to Mr. Gill prior to his investigation initiating.**
- d. On 30 April 2009, Maj Cindy Blair, a judge advocate, did a preliminary investigation into Major Scarselli and matters at PMO and concluded that Maj Scarselli may have committed fraternization with his subordinates as well as other offenses. In her report, she advised that Maj Scarselli would need to be read his

Article 31b rights. **This document was delivered to Mr. Gill prior to his investigation initiating.**

- e. Maj Blair in her report at p.5, reports Maj Scarselli of specific violations (fraternization, underage drinking) and on pp. 2-9 she reports specific violations for which Maj Scarselli would potentially be held responsible for (hazing, false training records, unfair hiring practices). **This document was delivered to Mr. Gill prior to his investigation initiating.**
- f. Contrary to Mr. Gill's Article 39a testimony that he did not suspect Maj Scarselli of any misconduct **prior to his 8 July 2009 interview**; Mr. Thomas Gardner, who worked for Mr. Gill has written a sworn statement that states **"June 2009: Mr. Gill stated that Major Scarselli had a gambling addiction and would prove the Major had borrowed money from a subordinate Marine within his charge."**
- g. From Gardner's statement:

June 2009: Mr. Gill stated that Major Scarselli had a gambling addiction and would prove the Major had borrowed money from a subordinate Marine within his charge.

- h. From Mr. Gill's 8 July 2009 right's advisement:

Place: IG office  
Time/Date: 1545 090708

I, Pietro P Scarselli

have been advised by MR DAVID GILL

that I am suspected of Dereliction of Duty

- i. Mr. Gardner also writes that from the very beginning of Mr. Gill's investigation (which Mr. Gill began doing interviews in early May 2009) Mr. Gill "was on a

- witch hunt and had already begun to manipulate the outcome of his assigned investigation. Gill was very interested in any information against Major Scarselli, MGySgt Humberston and Mr. James Daily.”
- j. Mr. Gardner wrote of Mr. Gill making a deal with SSgt Baker to testify against Maj Scarselli.
  - k. Mr. Gardner will testify that in “**June 2009:** Mr. Gill stepped out of his office, into the main passageway and in a loud tone stated, “**I got him, I’m going to sandpaper Scarselli’s ass.**”
  - l. According to this interview logs, Mr. Gill interviewed these key witnesses in May, June and early July 2009 (before the 8 July 09 interview with Maj Scarselli) whose witness summaries speak of the parenthetical misconduct at PMO: Buxton (dereliction of duty for not investigating adultery allegations), Bebe (hazing and maltreatment), Watkins (hazing), Barber-Phillips (hazing), Furlong (hazing), George (hazing), May (adultery investigations, underage drinking), Buchanan (obstruction of justice, witness tampering), Wells (falsifying PFT documents), Apsey (not maintaining training standards), Begg (borrowing money from subordinates), Puente (hazing), Andrews (fraternization).
  - m. Clearly, on June 2009, Mr. Gill (according to his own statements to Gardner) believed that he had specific, incriminating evidence against Maj Scarselli that superseded mere suspicions of “dereliction of duty.” Mr. Gill said “I got him, I’m going to sandpaper Scarselli’s ass” in June 2009, a month prior to the 8 July 2009 interview.

- n. Clearly, Mr. Gill misspoke on the stand when he said 1. He did not suspect Maj Scarselli of any misconduct before the 8 July 2009 interview and 2. He had not made a deal with SSgt Baker.

**C. According to Mr. Gill's interview summaries, and before he interviewed Maj Scarselli on 8 July 2009; he at a minimum also suspected Maj Scarselli of obstruction of justice, falsifying training documents, hazing Marines, and fraternization.**

- o. Beginning in early May 2009 until 8 July 2009, Mr. David Gill interviewed approximately 50 PMO witnesses as part of an IG investigation before he interviewed Maj Scarselli for the first time on 8 July 2009.
- p. During these 50 interviews, the witnesses were each asked by Mr. David Gill, inspector general, the same prepared questions under the same prepared categories: 1. False Official Statements or Reports, False Swearing, Obstructing Justice. 2. Cruelty and Maltreatment. 3. Unlawful detention. 4. Drunk on Duty/Alcohol related issues. 5. Adultery. 6. Gambling with subordinates. 7. False Training Rosters for HQ Bn. 8. Hostile Work Environment. 9. Unfair hiring practices. 10. Miscellaneous.
- q. On 24 April 2009 a statement was prepared as part of the IG investigation that purported to be from PMO Officer Jeremy Jolly.
- r. Jolly's 24 April 09 statement said: "(Baker, Humberston, Major Scarselli) they also golf every Friday and drink."
- s. That 24 April 09 statement of Officer Jeremy Jolly said under the category Fraternization: "Every Tuesday night Maj Scarselli makes all the Marines not on

duty come to what he calls family night. Family night takes place behind PMO where the Marines built a beer pong table. The night starts with beer pong and ends with poker. Civilians are sometimes present and Jolly has found them wandering around inside PMO looking lost before had to escort them out. Maj Scarselli provides most of the beer, SSgt Baker brings his Jack Daniels. Poker is played for money and all ranks are present for the family night. He believes some of the Marines drinking are underage.”

t. **In that 24 April 09 statement, Jolly went on to say: “PMO ran a PFT in December where the highest ranking person present was a Sgt. He heard through rumors that the major got a score when he was on leave.”** *This portion cited from Mr. Gill’s summary of interview was highlighted to focus the Military Judge’s attention on the fact that Mr. Gill suspected Maj Scarselli of much more than dereliction of duty on 8 July 2009.*

u. Similarly, the 25 April 09 summary of interview for PMO Officer Michelle Mills that is also part of the IG investigation states: “Fraternization: Major Scarselli was playing poker and drinking with the staff NCO’s to raise money for the ball. They often play poker on Thurs (she thinks) and they play for money...Major Scarselli drinks with jr. Marines and minors in the back of PMO. There is a K-9 tracker Marine just out of school who told Mills he was ordered to go to the family night and Maj Scarselli told him to have a drink...the Maj make it mandatory. ”

v. The 13 May 2009 summary of interview for the Corporal Steven C. Kidder interview by Mr. David Gill states: “Adultery: ...One night husband of the

- female spouse came home to find LCpl Beebe and the wife in bed with clothes on....LCpl Beebe was assigned to house mouse the next day at 0730.”
- w. As a result, Maj Scarselli has been charged with cruelty and maltreatment for LCpl Beebe being given extra duties following being caught in bed with another Marine’s wife (facts Mr. Gill learned of as early as 13 May 2009 before he interviewed Maj Scarselli in July 09).
  - x. The 13 May 2009 summary of interview for the LCpl Justin A. Richardo interview by Mr. David Gill states: “Drunk on Duty/Alcohol related issues: ...Possible underage drinking. LCpl Hopkins passed out in the shower flooded 3 BEQ rooms.”
  - y. As a result, Maj Scarselli has been charged with cruelty and maltreatment (see Charge Sheet, Charge IV) after LCpl’s Dixon and Russell were put on working parties because their roommate LCpl Hopkins flooded their barracks room.
  - z. In the 18 May 09 summary of interview for LCpl Robert T. Thompson, that document states: “Drunk on Duty/Alcohol related issues: ...Did see some junior Marines drink that looked underage. Major Scarselli and SSgt Baker in attendance, but no knowledge if anyone encouraged underage drinking.”
  - aa. In the 18 May 09 summary of interview for Mr. Charles V. Burkey, that document states: “False Training Rosters for HQ Bn: ...Have you seen Major Scarselli run a PFT? No. I have not seen SSgt Brookins, SSgt Puente, or SSgt Potter run a PFT. Rumor is that they have never run a PFT at PMO.”
  - bb. Mr. Burkey’s 18 May 09 summary of interview goes on to say: “Hostile Work Environment: ...SSgt Puente makes the Marines stand against the wall doing the

- chair. Repeated cleaning and loading of weapons, working parties; paint PMO, rake rocks, pull weeds, pick up dog droppings (Maj Scarselli's dog). Most junior Marines are singled out. I was taken off the road and put on the gate by SSgt Puente as a form of punishment. LCpl Beebe was accused of adultery. SSgt Brookins made LCpl Beebe stand up in front of the section and explain what he did. I heard LCpl Beebe have to say he was committing adultery.”
- cc. As a result of Mr. Burkey's 18 May 09 interview with Mr. Gill, Maj Scarselli was charged with Charge V, Specification 1 (lying to Mr. Gill about taking a PFT) and Charges III and IV regarding hazing junior Marines like LCpl Beebe.
- dd. The 18 May 09, summary of interview for Officer Kenneth S. Charles states:  
“Drunk on Duty/Alcohol related issues: Every Tuesday night at PMO. Beer Pong Night. Family Night. I never attended...Hostile Work Environment:...What forms of punishment are used to discipline PMO personnel when they make mistakes or question authority? Marines out of line spend time Monday through Sunday, 12 hours on EMI/EPD until PMO leadership chooses otherwise.”
- ee. Following this interview statement, Maj Scarselli was charged with Charge IV, Article 93 offenses related to hazing junior Marines at PMO.
- ff. The 18 May 2009 interview summary for LCpl Andrew Beebe discusses: There is underage drinking at PMO and that Maj Scarselli provided the alcohol. Also, PMO personnel are put on working parties for mistakes.
- gg. The 18 May 2009 interview summary for LCpl Joseph Hopkins discusses: PMO Marines who make mistakes are made to police call and work extra duties.



- hh. The 19 May 09 telephone interview summary for Mr. Douglas P. Di Stefano also discusses PMO Marines being given extra duties not as a result of NJP.
- ii. The 28 May 09 interview summary of Cpl Timothy W. Watkins also discusses alleged hazing at PMO and underage drinking.
- jj. The 29 May 09 interview summary of Cpl Thomas R. Hammond also discusses underage drinking parties at PMO and inquires into Maj Scarselli's lack of attendance at the December 08 PFT.
- kk. The 1 Jun 09 interview summary of LCpl Andrew Barber discusses in depth alleged hazing and maltreatment at PMO under Maj Scarselli's watch.
- ll. The 3 Jun 09 interview summary of Mr. Jason W. Kupka discusses in depth that Maj Scarselli was not observed to take a PFT and how Marines at PMO under Maj Scarselli's watch are hazed.
- mm. The 4 Jun 09 interview summary of Cpl Joshua K. Martin discusses how working parties are used as a form of punishment at Maj Scarselli's PMO.
- nn. The 4 June 09 interview summary of LCpl Matthew L. York also claims that Major Scarselli did not take the December 2008 PFT.
- oo. The 9 June 09 interview summary of Sgt Justin R. Wells explains that per MGySgt Humberston and SSgt Baker, Sgt Wells was told to combine a PFT roster that included Maj Scarselli and others running a 12 December 08 PFT also on that day even though Sgt Wells did not personally monitor the PFT.
- pp. On 19 June 09, LCpl Leonido Cabal told Mr. Gill in his interview "I never see SNCO's or Officers run a PFT or a CFT."

- qq. On 6 July 09 GySgt Jesus Montes told Mr. Gill that Maj Scarselli ran a PFT in December 2008, but Mr. Gill wrote in his summary of statement “NOTE: This response concerning the PFT is not the truth.”
- rr. On 6 July 09, GySgt Buchannan allegedly told Mr. Gill that Maj Scarselli had given the SNCO’s of PMO a loyalty oath and told them to keep him off the skyline in reference to the IG investigation.
- ss. On 8 July 09, Maj Scarselli was simply given a blank rights advisement form and told to fill it out. **Only** after Maj Scarselli asked Mr. Gill what he should write in the blank space for what he’s suspected of, that Mr. Gill told Maj Scarselli “Just put dereliction of duty for now.”
- tt. Maj Scarselli never would have given any interviews if Mr. Gill had adequately told Maj Scarselli he was actually suspected of obstruction of justice, **borrowing money from junior Marines**, conspiracy, hazing, fraternization, wrongfully impeding and the other charges on the charge sheet.
- uu. If Maj Scarselli had been adequately informed what he was suspected of by Mr. Gill, Maj Scarselli would have immediately invoked his right to remain silent and would have sought counsel right away.

### 3. **Discussion.**

**A. The 8 July 2009 statement Maj Scarselli gave to Mr. Gill should be excluded because Maj Scarselli was not informed of the crimes he was suspected of before waiving his right to remain silent.**

RCM 305(a) states that a statement obtained in violation of this rule is involuntary and shall be treated under MRE 304.

“No person subject to this chapter may interrogate, or request any statement from an accused or person suspected of an offense **without first informing him of the nature of the accusation** and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.” United States v. Seay, 60 M.J. 73, 77 (C.A.A.F. 2004), citing Article 31b, UCMJ. Emphasis added.

“Voluntariness of a confession is a question of law that an appellate court independently reviews, de novo. The necessary inquiry is whether the confession is the product of an essentially free and unconstrained choice by its maker. If, instead, the maker's will was overborne and his capacity for self-determination [\*\*7] was critically impaired, use of his confession would offend due process.” United States v. Cuento, 60 M.J. 106, 108 (C.A.A.F. 2004).

United States v. Simpson, 54 MJ 281 (CAAF 2001) held that before a waiver of rights can be knowingly waived, an Accused must first be informed of the general nature of the offense for which he is truly suspected of by the interrogator, enough so that the Accused is oriented as to what misconduct he is actually suspected of.

Regarding this motion to exclude evidence, Inspector General David Gill told Maj Scarselli on 8 July 2009 that he was suspected only of "dereliction of duty" before he interviewed him. This was inadequate and not a true statement of what Maj Scarselli was actually suspected of. On 8 July 2009, Maj Scarselli signed a rights waiver that said Maj Scarselli was only being charged with “dereliction of duty.” However, the Mr. Gill interview statement for Maj Scarselli, just like the over 50 other interviews Mr. Gill conducted in this case before Maj Scarselli’s interview; is broken down into these

categories with questions previously prepared: 1. False official statements or Reports, False Swearing, Obstruction of Justice. 2. Cruelty and Maltreatment. 3. Drunk on duty/ Alcohol related issues. 4. Adultery. 5. Gambling with subordinates. 6. False training routers through HQ Bn.

Most importantly for this reconsideration motion, the sworn statement of Mr. Gardner indicates in June 2009, a month before Mr. Gill's first interview with Maj Scarselli, Mr. Gill had already come to the conclusion that Maj Scarselli was guilty of serious misconduct. Mr. Gill revealed to his subordinates at the IG office that he was going to "sandpaper Maj Scarselli's ass," that Mr. Gill had evidence against Maj Scarselli to say "I got him!" and that Mr. Gill suspected that Maj Scarselli had borrowed money from subordinates **BEFORE** the 8 July 2009 interview.

Clearly, on 8 July 2009, Mr. Gill truly suspected Maj Scarselli of misconduct other than dereliction of duty: at the very least conduct unbecoming of an officer and fraternization for borrowing money from subordinates. Maj Scarselli was warned of neither of these offenses. **The findings of fact for the original order denying the suppression of the 8 July 2009 statement were incorrect in that Mr. Gill CLEARLY suspected Maj Scarselli of specific misconduct prior to that 8 July 2009 interview.**

Also key in determining that Maj Scarselli was not given a sufficient rights warning (i.e. being told what he was actually suspected of); is the fact that Mr. Gill had already interviewed many case witnesses since May 2009 prior to his interviewing Maj Scarselli on 8 July 2009, approximately 50 (including GySgt Buchanan whose statement provided the basis of the obstruction of justice charges). Those 50 witnesses (as only briefly discussed in the fact section above) were asked questions that touched on such

subjects as Maj Scarselli promoting hazing, not taking a PFT, obstructing justice, tampering with the IG investigation, giving loyalty oaths, promoting underage drinking, gambling with subordinates, and other misconduct.

Maj Scarselli is adamant that he would never have given that 8 July 2009 interview to Mr. Gill and would have immediately invoked and requested a lawyer if he knew he was suspected of borrowing money from subordinates, obstruction of justice, and lying about PFTs/MCMAP training. That he was only told "just put dereliction of duty," when Mr. Gill truly suspected otherwise; means that Maj Scarselli did not truly consent to that interview and the statement derived from that interview should be suppressed.

4. **Relief Requested.** The defense respectfully requests the following relief:

a. That court exclude the 8 July 09 interview.

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

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

- Mr. Thomas Gardner

b. **The following defense exhibits are provided:**

- Exhibit A: IG interview and exhibit list
- Exhibit B: Gardner signed statement
- Exhibit C: Scarselli full 8 July 2009 statement
- Exhibit D: Suppression Ruling
- Exhibit E: Full IG Investigation (already in the possession of the Military Judge)

- Exhibit F LtCol McGowan and Maj Blair Documents [**The Government is requested to provide a legible copy**]

c. **Burden of proof:** “The burden in this regard is on the Government, as the proponent of admission of the evidence, to prove by a preponderance of the evidence that the confession was voluntary.” U.S. v. Bubonics, 45 M.J. 93, 95 (CAAF 1996).

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

The foregoing pleading was served via electronic means on the opposing counsel and court on this date: 29 October 2010

/s/

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C. P. HUR  
Defense Counsel