

UNITED STATES MARINE CORPS
WESTERN JUDICIAL CIRCUIT

UNITED STATES)	GENERAL COURT-MARTIAL
)	
v.)	DEFENSE MOTION
)	TO DISMISS FOR UNLAWFUL
PIETRO SCARSELLI)	COMMAND INFLUENCE (III)
MAJOR)	
U.S. MARINE CORPS)	1 November 2010
)	
)	
)	

1. **Nature of Motion.**

The defense hereby moves this court, pursuant to Rule for Court-martial 907, to dismiss all charges and specifications with prejudice in this case on the basis of UCI in that the SJA, who should have been neutral and fair, was biased in that she had provided Maj Scarselli with confidential legal advice and then used confidential information obtained from Maj Scarselli during her representation of him to help the prosecution prosecute him. This same SJA then drafted the Article 34 advice letter in this case against the Accused, whom she previously gave legal advice and legal assistance to.

The defense also moves to dismiss all charges with prejudice on the basis of UCI in that the inspector general, Mr. Gill, influenced the convening authority, other commanders and junior witnesses in such away because of a biased investigation in that Maj Scarselli can no longer obtain fair and impartial pre and post trial review by his command or a fair trial at all.

The defense also moves to dismiss all charges with prejudice on the basis of UCI in that the trial counsel in this case initiated prosecution actions against a critical defense fact witness who gave favorable testimony at an Article 32 in a companion case in so far as that defense

witness has resultantly invoked his right to remain silent and then became unavailable to Maj Scarselli's defense.

The defense also moves to dismiss all charges with prejudice on the basis of UCI in that several military and civilian witnesses have been retaliated against and continue to be retaliated against by Headquarters Battalion and PMO officials because of their support as fact and character witnesses for Maj Scarselli's defense.

Dismissal with prejudice is the only remedy sought by the defense. This is because to date all lesser remedies attempted by the Government to repair verified UCI have failed.

2. Summary of Facts.

I. Capt Beck Continues to be unable to testify as freely as he would have for the defense.

- a. Previously, the defense proved that defense fact witness Capt Thomas Beck invoked his right to remain silent because the trial counsel Capt Gilinsky arranged for Capt Beck to be prosecuted by his command, Marine Forces Reserve, after Capt Beck testified (consistent with GySgt Jesus Montes's and Capt Kristopher Knobel's testimony) that a PFT ran by Maj Scarselli took place sometime in December 2008.
- b. On 22 April 2010, Capt Gilinsky had orchestrated the prosecution of Capt Beck following the defense team filing a prosecutorial misconduct motion against Capt Gilinsky (2 March 2010). That motion was filed in response to Capt Beck's report of being intimidated by Capt Gilinsky after Capt Gilinsky told Capt Beck that he could be prosecuted for false official statement when Capt Beck told Gilinsky over the phone that the December 2008 PFT had in fact occurred (February 2010).
- c. Instead of drafting a response to the defense motion, Capt Gilinsky arranged for a series of continuances in order to liaison with MARFORES regarding efforts to prosecute Capt

Beck. Gilinsky's oral threat of prosecution against Beck resulted in Capt Beck invoking his right to remain silent in this case and retaining civilian counsel.

- d. As a cure to the government's actions, Capt Beck was ordered by his Commanding General to testify via a testimonial immunity order (sometime after 15 June 2010). However, the testimonial immunity order gave Capt Beck no protection for being prosecuted for the alleged false official statement that confirmed a PFT has in fact taken place in December 2008.
- e. Because the Government continues to claim that the PFT of December 2008 did not occur, the Defense counsel are very concerned that Capt Beck and his attorney Bruce McClure will treat that testimonial immunity order as illusory and offering no protection to testify to Capt Beck in Maj Scarselli's case.
- f. Capt Beck's attorney Mr. McClure has very recently indicated that Mr. Beck would comply with all orders to testify, but then he has also said via telephone that Beck is concerned he could be prosecuted for perjury if he lies. Mr. McClure explained that the Government believes reciting the observation of the PFT by Beck is a lie.
- g. In other words, the trial counsel's actions that silenced Capt Beck have not been cured and Capt Beck is still unavailable as a true defense fact witness for Maj Scarselli.
- h. The defense is concerned that Capt Beck will still not testify in support of Maj Scarselli's innocence as a fact witness, as he wanted to do and would have because of Capt Gilinsky's successful efforts to silence him as an exculpatory witness.
- i. Capt Beck would have been a fact witness for Maj Scarselli for every single charge on the charge sheet as Capt Beck was Maj Scarselli's deputy at PMO.

j. Finally, Capt Gilinsky provided contradictory testimony on the stand, under oath when he said on the record to the military judge that he did not seek prosecution of Capt Beck.

k. Capt Beck directed 1stLt Yuwynn Ho to write the following on 22 April 2010 to the

Marine Force Reserve Military Justice Office:

-----Original Message-----
From: Ho 1stLt Yuwynn E
Sent: Thursday, April 22, 2010 20:10
To: Thomas Maj Amy
Subject: Re Capt Thomas J. Beck

Good afternoon Ma'am,

I am writing on behalf of Capt Gilinsky who is on leave this week and wanted me to relay this information to you. Our office is prosecuting a case related to the Provost Marshall's Office at 29 palms. During an Article 32 hearing for this case, one of the witnesses, Capt Thomas J. Beck, made a false official statement that was directly contradicted by a co-defendant in a proffer offered in consideration for a PTA.

Capt Beck is now on I&I duty with Alpha Company MPs in Lexington, KY. We want to refer his case to your office for prosecution. We have all the supporting documents but I want to give you a heads-up.

Please give me a call at your convenience and I can fill you in on the details of the case. Thank you.

Respectfully,
1st Lt Ho

1st Lieutenant Yuwynn E. Ho
Military Justice
Office of the Staff Judge Advocate
Marine Corps Air Ground Combat Center
Twentynine Palms, CA
(760) 830-5262

l. When ordered by the Military Judge to produce all emails related to the prosecution of Capt Beck, Capt Gilinsky omitted the emails to the MARFORRES MOJO (Capt Sam Kim) which clearly reflected the Government's attempts to encourage prosecution of Capt Beck for allegedly making a false official statement about a fact that is corroborated by numerous witnesses who recollect the December 2008 PFT. The Defense obtained the email from MARFORRES and not from the Trial Counsel, as Capt Gilinsky had been directed to provide to Defense Counsel by the judge.

II. Mr. David Gill's Actions are the genesis of the UCI and created a poisonous command view of the allegations against Maj Scarselli.

- a. Mr. Gill was a Colonel serving in the USMCR at the time the investigation against Maj Scarselli began in early 2009. As such, his views and impressions carried great weight with the Maj Scarselli's chain of command, including the Convening Authority. As the IG he was required to undertake a fair and neutral investigation of the allegations. Instead, Mr. Gill formed opinions and then used his position to shape evidence and influence testimony to support those opinions. A comprehensive examination of the investigation indicates Mr. Gill began it with personal animus toward Maj Scarselli and perhaps even a vendetta. Mr. Gardner was employed in the IG office and was privy to conversations about Maj Scarselli by Mr. Gill. In a statement obtained by the defense from Mr. Gardner, Mr. Gardner indicates that Mr. Gill used his position and leverage as a Colonel to obtain statements consistent with his version of the facts rather than the actual facts during his interviews with witnesses.
- b. In his sworn statement, Mr. Gardner also detailed several derogatory statements made by Mr. Gill to others concerning Maj Scarselli as well as violations of regulations concerning the interview techniques of neutral IGs). The military judge has not yet made findings of fact on this matter. It remains an unresolved issue.
- c. Mr. Gardner described at length how during the investigation, Mr. Gill intimidated witnesses into making statements later used to charge Maj Scarselli.
- d. Mr. Gardner wrote in his statement, "excerpts only:"

Throughout his entire investigation, Gill spoke openly and with numerous parties of what he was discovering and how he could utilize such data in order to "Nail Scarselli" and "Sandpaper Major Scarselli's ass". At times he would ramble on how he as the Base Inspector General would be getting out the "Turpentine and sandpaper for PMO". On several occasions, and in a negative tone, Mr. Gill would comment that the Major was Italian, from New York City and that his days of being the "God Father" were about to end. Mr. Gill would sit back and in a raspy voice do a Marlon Brando (God Father) impersonation.

...

My perception from the beginning was that 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 Humbertson and Mr. James Daily.

...

Most of Gill's inappropriate comments were while his assigned investigation was ongoing; well before turning it in to our Staff Judge Advocate (SJA) for the purpose of legal review. Gill had a bias and bitter opinion throughout and his comments were a clear violation of the personnel's privacy.

...

After Gill's outburst, Mt. Dunn turned about and returned to his office and I asked to speak with Mr. Gill. We entered his (Gill's) office, closed the door and I confronted him that he had just openly voiced a substantiated decision and their punishment before he had even completed his assigned investigation. He had also gone against our Inspector General of the Marine Corp Investigations and Assistance Manual by stating what should happen in terms of punishment to DOD Personnel.

...

That Inspector General Representatives are strictly prohibited in reference to recommending forms of reprimand/punishment; IG's simply report findings of fact by means of Unfounded, Substantiated or Not-substantiated. This policy is often reiterated at all Inspector General training and at our annual IGMC Symposiums. Not recommending punishment, being fair, objective and impartial is something Gill often reminded us of but did not practice what he preached. Gill often spoke of personnel aboard the base that he had "sandpapered".

...

After I confronted Mr. Gill, he stated that he did not make a written statement, nor did he place anything in the form of an e-mail thus the perception was that it never happened. I joked as if I tape recorded him by speaking into my shirt "Test 1-2" but Gill did not find that amusing. Also, I asked him, "What if personnel from the G-7 heard what he had just said?", "PMO falls under the G-7 and the Marines facing allegations would certainly use his comments in the defense." Our meeting ended on the note that it was simply my word against his. I opened the door, placed the latch down so it would remain open and exited Gill's office.

Mr. Gardner's statement.

- e. As described in great detail by Mr. Gardner, Mr. Gill directly violated DOD regulations that govern the conduct of the IG's office by involving himself in the adjudication

process and by recommending actions to the CG. This is verified by Gardner's statement, the IG regulations and the hotline summary report Mr. Gill himself submitted to the CG.

- f. Marine Corps Inspector General Program Investigations & Assistance Manual (IAM), p. 2-1 states that it is the policy of the DON that all IG investigations shall be conducted in an objective manner.
- g. IAM, 3-28 states that "An investigator should always consider asking the interviewee to provide a sworn or unsworn written statement. The accuracy of the information in such documents is less subject to dispute than is the investigator's report..."
- h. IAM, 4-19 states that an allegation should be investigated and described in neutral, non-emotional terms.
- i. IAM, 8-10 states that the ROI of IG is supposed to "reflect independence, impartiality and objectivity of the IO, is unbiased, diplomatic and professional. The report shall not contain any personal attacks on the complaint, subject, witnesses, IG Program, or the Service."
- j. Contrary to being neutral, objective and unbiased; Mr. Gill's investigation took on a prosecutorial air early on in the investigation. Instead of collecting information in an unbiased and objective matter, he formed and posed leading questions that sought to elicit either information leading to misconduct or no information. In other words, people who were interviewed for the investigation were not provided an opportunity to provide narrative answers. When certain Marines did provide exculpatory information or information that was not consistent with Mr. Gill's predetermined opinion of what the facts should be, Mr. Gill called them liars. GySgt Montes interview is an example of this conduct (previously provided to the military judge).

- k. GySgt Montes explained to Mr. Gill that he saw Maj Scarselli take the PFT. Mr. Gill determined in his investigation that he is a liar. The evidence the defense has in this case does not reveal when Mr. Gill became a lie detector or what formal training he received to enable him to detect the truth. Mr. Gill chose to believe facts that supported his theory and to attack those that did not.
- l. In a May 17, 2009, interview summary of Sergeant Moreau, Mr. Gill commented on Sergeant Moreau's statement that "Major Scarselli is the best officer I have ever seen in the Marine Corps. He looks out for his Marines, treats us all like family. Has an open door policy for PFC and up." Mr. Gill wrote "*this Marine is not truthful, he is arrogant, and believes that he can deceive me.*" Emphasis added.
- m. In a July 4, 2009 interview summary of Cpl Steven Andrews, Mr. Gill states "this Marine is lying, body language, covering up for senior leadership. Probably part of the inner sanctum of PMO. Will most definitely tell them what he told me during this interview and is holding the line in his responses." Mr. Gill determined that Cpl Andrews is lying after Cpl Andrews provided exculpatory information that clears Maj Scarselli of many of the offenses for which he is charged such as hazing, fraternization.
- n. Were the impact of Mr. Gill's conclusions limited to his personal beliefs, one could argue that the harm is limited or is capable of being ameliorated. But he did not limit his opinions to himself. Mr. Gill accused GySgt Montes of lying after his interview with GySgt Montes which is certain to affect the testimony of GySgt Montes. Since disclosing his exculpatory information to the detailed defense counsel, GySgt Montes has been accused of obstruction of justice and false official statement.

- o. Mr. Gill acted unprofessionally. He undertook this investigation with preconceived conclusions about Maj Scarselli based on Maj Scarselli's Italian heritage. His bias and racist views are evidenced in his own words in the investigation and chronicled independently by Mr. Gardner's statement). Commenting on his interview with Cpl Timothy Watkins, he wrote: "Often told to keep within the family and we'll take care of it. Maj Scarselli- keep it in the family sounds like Mafia type words." Maj Scarselli is of obvious Italian origin. Mr. Gill's conclusion that because Maj Scarselli is of Italian origin, his use of the term "family" is indicative of Mafia like activity is troubling. His obvious bias is further demonstrated in his reference to Capt Knobel as "a mini Scarselli and just as dirty." Mafiosos are dirty. Maj Scarselli is an honorable upstanding Marine Corps officer with a distinguished record of service whose use of the term family is consistent with the majority of Marine Corps commanders who desire to take care of problems within their units. Why Maj Scarselli is not worthy of that same presumption is unclear.
- p. Mr. Gill poisoned the CG, the Chief of Staff, the BnCO and the G-7 (Maj Scarselli's RS). This cannot be undone. The CG relieved Maj Scarselli and convened a court martial. The Chief indicated in his comments as the RO in Maj Scarselli's Fitness Report that the allegations are currently substantiated and are *such until proven otherwise*. (Emphasis added). The Chief of Staff has unfettered access to the CA. Every commander selects, trusts, and heavily relies on the advice provided by his Chief. If the CoS believes that the accusations are substantiated and that Maj Scarselli must prove them otherwise, then it also stands to reason that the CA holds the same view of the charges and the burden in

this case. Even if the CA is not aware of his Chief's opinion, that opinion will certainly be shared in the normal course of the trial and post-trial review process

- q. LtCol McGowan (former BnCO) and Col Green (former G-7) made disparaging comments about Major Scarselli and both admitted their opinions of him changed after Mr. Gill briefed them.
- r. Because of Mr. Gill's brief, LtCol McGowan had Maj Scarselli's MCMAP belt changed in MOL. However, Maj Scarselli hasn't been found guilty of having a false MCMAP belt. The defense is not required to prove the allegations false. The Government is required to prove them true beyond a reasonable doubt. Nonetheless, the defense offers evidence through Sgt Samuel Corns, Cpl Arturo Vela and Sgt Milazzo all of whom will testify that they saw Maj Scarselli train for and earn that belt. They may all be a part of grand conspiracy to cover up for Maj Scarselli, but it is more likely and reasonable that they are testifying to events they observed. That evidence was buried by Gill. He did not share it with the commanders. He did not conduct a fair investigation. He did not divorce his emotions and personal animus from his professional obligations to undertake a fair and dispassionate investigation. He instead endeavored to destroy Maj Scarselli through his formal investigation and through his informal briefings to commanders who had a right to know all the truth not merely the truth according to Gill. In any case, Gill has a record of false statements. Pleading and being found guilty at NJP for Article 107, Mr. Gill was forced out of active duty service because he had problems with being truthful that cast doubt on his integrity.
- s. LtCol McGowan's actions of removing Maj Scarselli's grey belt from his OMPF will result in proving the Government's case is not based in evidence, but based on conjecture

when the members connect the change to MCMAP status in Maj Scarselli's OMPF with the solicitation offense at Charge VI, Spec 5 of allegedly telling SSgt Baker to give him a false MCMAP certificate.

- t. Mr. Gill also told Col Green that Maj Scarselli violated Col Green's order to not debrief Marines following IG interviews. Maj Scarselli is now charged with an orders violation solely because of Mr. Gill's brief to Col Green.
- u. Additionally, Col Green wrote an adverse FitRep on Maj Scarselli indicating that he lost trust and confidence in Maj Scarselli and that Maj Scarselli failed in setting the example and in leading his Marines. These comments by Col Green were based 100% on what Mr. Gill reported to Col Green via his summaries of interviews. Otherwise, it would have been a positive fitness report. The defense interviewed Col Green. Col Green had no negative observations of Maj Scarselli's performance prior to being briefed by Mr. Gill about Mr. Gill's investigation's findings. Col Green's adverse comments are based on false reports provided by Mr. Gill regarding Maj Scarselli's performance, not personal observation.
- v. The entire GCM is predicated on this UCI from Mr. Gill. It has not been and cannot be remedied.

III. Retaliation Against Exculpatory Witness Continues Despite Court Orders Alerting the Government To Ensure It Does Not Occur.

- a. This court found UCI in this case after the Defense claimed that MSgt Brian Scamman intimidated several civilian and military fact and character witnesses to not testify for the defense in the case of US v. Maj Scarselli.

- b. LtCol Rubin, the military judge, did not craft any remedy for the UCI per se but did say that dismissal with prejudice was an extreme option and that he wanted to see if lesser remedies could work first.
- c. Since that June 2010 motion hearing until present, the effect of those remedies has not been assessed by the court.
- d. Around 22 June 2010, the Government, and without feedback from the defense as ordered by the military judge; drafted a letter for the base commanding general to sign essentially telling witnesses to not be intimidated.
- e. On 23 June 2010, Capt Gilinsky wrote via email:

MSgt Scamman, as indicated previously, is currently on PTAD away from the Provost Marshal's Office. (On the East Coast.) There is an MPO in place directing him to refrain from contacting any member of PMO except Major Jones, and he is set to go on leave from 28 June to 28 July without checking back into PMO. (The MPO will remain in effect.)

In regards to the letter itself, I understood your instructions on the contents of the letter, potential movement of MSgt Scamman, and input by the defense counsel to be suggestions. As such, I felt that it was more important to have the remedial action taken as soon as possible rather than risk delay over the actual terminology of the letter.

- f. If the purpose of the letter was to undo the effects of the UCI that already occurred, then the letter completely failed in its purpose.
- g. At the 16 to 17 June 2010 UCI motion's hearing in this case, Civilian Officer Cornelius Blyther was so terrified to testify in this case that he refused to testify at the UCI motion hearing when asked to do so by the military judge.
- h. Mr. Blyther emailed Capt Hur on 2 October 2010 and wrote:

Good evening sir, I'm not sure, but I think I may be in trouble with the higher ups, and it may have something to do with things from the past about me wanting to testify, however I'm not positive. For the past couple of months it has been a

hostile working environment for me here at PMO, and I don't understand why. I would like to know if it would be ok if I can come and speak with you. My contact number is: 760-289-9886

- i. Mr. Blyther when contacted, further explained that he had been retaliated against by his superiors for months following his support of Maj Scarselli and his belief in Maj Scarselli's innocence. This occurred despite the Government's attempted remedy in the form of a letter from the Base Commanding General and the removal of MSgt Scamman from PMO. Mr. Blyther said he has been fired in retaliation for his willingness to provide testimony that exculpates Maj Scarselli. He had worked at PMO since 2005. Mr. Blyther has retained Mr. Ronald P. Ackerman, Esq. to represent him in suing the Government for the retaliatory firing. As Capt Beck did following Capt Gilinsky's retaliation, Mr. Blyther also now refuses to cooperate with the defense and refuses to give any statements except through counsel.
- j. At the 16-17 June 2010 motion hearing, another civilian officer (Matt Buckley) took the stand and said that he too was fearful of retaliation after he said that the new provost marshal Maj David Jones spoke derisively of Maj Scarselli to all hands.
- k. Maj Jones is still the provost marshal at PMO despite Officer Bucklye's concerns and despite Maj Jones's brief to all hands.
- l. GySgt Montes received NJP for a minor incident that occurred over a year ago immediately following his testimony at the June 2010 motion's hearing in this case where he claimed that PMO Marines were instructed to not help the defense team of Maj Scarselli.
- m. Then, GySgt Montes was threatened by a trial counsel named Maj Chantell Higgins, also after he testified regarding UCI at the June 2010 motion's hearing in this case. GySgt

Montes reports that Maj Higgins told him, "Look, I think you are covering up for Major Scarselli. There are some Marines going down here and I wouldn't want to see you included with them. They have gotten themselves in trouble and thrown themselves in the fire and I don't want to see you do the same thing."

- n. To date, the Government has failed to comply with the Military Judge's order compelling the discovery of the tapes of Maj Higgins's interviews.
- o. Additionally, the command and PMO (MGySgt Reginald Jones, the Provost Sergeant) have recently continued their efforts against GySgt Montes by submitting MOS revocation paperwork.
- p. Another Maj Scarselli fact witness, Capt Knobel, continues to believe that he was retaliated against and fired because of his support of Maj Scarselli. He has testified that his opinion of Maj Scarselli has changed for the slight negative after the battalion commander of both Capt Knobel and Maj Scarselli (LtCol McGowan) told Capt Knobel that Maj Scarselli was a bad leader (based on what Mr. Gill told LtCol McGowan).
- q. Specifically, on 13 June 2010, Capt Knobel wrote the defense in the following email excerpt, emphasis added:

I finally got a copy of the investigation that CID did against me and was very surprised by the content and think it is very applicable to the UCI motion. The biggest thing, and I can't believe I didn't remember this, but the first questions they asked me when being interviewed/interrogated was in regard to my relationship with Major Scarselli, this is written in the investigation, but Major Scarselli's name is blacked out. **I now definitely think the investigation and me being removed from PMO was based upon being perceived as "pro-Scarselli" by the G-7 staff.** I put together some notes on the attached word document, and will attach the investigation documents in the next email.

- r. Similarly, SSGT Reyna Puente (a PMO watch commander) testified for the defense at the 16 to 17 June 2010 motion's hearing. She testified then about MSgt Scamman constantly

disseminating negative comments about Maj Scarselli and she also testified about the potential for retaliation.

- s. Now, SSgt Puente has been recently relieved and fired from PMO.
- t. Obviously, BGen Clardy's 22 June 2010 letter to all hands has had no impact on the retaliatory action against exculpatory witnesses. Either BGen Clardy's letter is a farcical ploy at remedying the UCI or the current commander at PMO is disobeying a lawful General order and is derelict in his duties. In either case, the consequence of the Government's action is retaliation against or loss of SSgt Puente, Mr. Blyther, Capt Beck, GySgt Montes and Capt Knobel as exculpatory defense witnesses. These are only the witnesses whose loss defense has become aware of.
- u. It's clear that a systematic purging at PMO is taking place where all perceived Maj Scarselli supporters and loyalists are being fired, prosecuted or worse, one Marine and civilian at a time.
- v. Further, the letter from the Commanding General has no effect on the other fact and character witnesses who have been adversely influenced by the command and PCS'd or EAS'd from 29 Palms.
- w. Clearly the court's remedies have not cured or mitigated the affects of the UCI at all.

IV. LtCol Ashbacher, the former SJA who drafted the Article 34 advice letter to the GCMCA in this case, engaged in prohibited conduct amounting to UCI where she took her former client's -Maj Scarselli-confidential attorney client information and provided her client's confidential information to prosecutors who used the information against Maj Scarselli.

- x. Maj Scarselli received an adverse fitness report from a Col Rickey Grabowski in 2006 when he was Maj Scarselli's reporting senior.

- y. At the time of his report, Maj Scarselli had been the commanding officer of RS New York. Col Grabowski had been the district commanding officer of 1st Marine Corps District.
- z. Maj Scarselli received an adverse report from Col Grabowski because his recruiting station was not making mission in 2006 at the levels that Col Grabowski demanded.
- aa. There were many factual inaccuracies in that fitness report which is why the Marine Corps ultimately removed the report from Maj Scarselli's OMPF.
- bb. Maj Scarselli considered, and still does, this matter of him receiving an adverse fitness report an intensely private and confidential matter.
- cc. To get that fitness report removed, Maj Scarselli sought the assistance LtCol Rhesa J. Ashbacher, whom he knew to be a judge advocate. She is also a licensed attorney of the State of Pennsylvania.
- dd. Maj Scarselli came to LtCol Ashbacher several times for legal advice because he did not want to discuss this private matter with Judge Advocates lower in rank than himself.
- ee. Maj Scarselli also believed that as a Lieutenant Colonel and as a lawyer of several years, LtCol Ashbacher would be most capable of properly advising him on the matter of removing the adverse fitness report from his record.
- ff. LtCol Ashbacher received confidential and privileged information while acting in the capacity of an attorney for Maj Scarselli. In person and in numerous emails, she then advised Maj Scarselli on how to go about getting that fitness report removed and helped him prepare documents.
- gg. She provided legal advice on the laws and regulations concerning officer evaluations and appeals processes, as well as on the Article 138 Complaint process to Maj Scarselli.

- hh. At all times they were working together, Maj Scarselli believed she was giving him legal advice and that everything Maj Scarselli told her was strictly confidential because she was acting as his attorney for this limited purpose.
- ii. Maj Scarselli's fitness report was removed because of LtCol Ashbacher's good legal advice and assistance to Maj Scarselli.
- jj. Then, in 2010, Maj Scarselli was surprised and disappointed when he learned that LtCol Ashbacher in her capacity as SJA wrote an Article 34 advice letter recommending that charges against Maj Scarselli go to trial.
- kk. Maj Scarselli felt betrayed because of the close relationship he thought LtCol Ashbacher and he had and the fact that he had disclosed very personal and confidential information related to the facts contained within the adverse fitness report to her as his lawyer.
- ll. LtCol Ashbacher took the confidential information he provided to her regarding his conduct, Col Grabowski and his adverse fitness report; and gave it to trial counsel. The trial counsel that received this confidential information included Capt Gilinsky, the prosecutor in the case against him.
- mm. Capt Gilinsky only added Col Grabowski to the witness list of the witnesses he intends to call against Maj Scarselli, after the June 2010 UCI motion hearings. Nothing in Maj Scarselli's OMPF in June of 2010 indicated that he had received an adverse fitness report.
- nn. Maj Scarselli believed that when LtCol Ashbacher represented him in the challenge to the accuracy of the fitness report she was acting as his attorney, that she had to keep that information confidential and that she could not disclose it to others without Maj Scarselli's permission.

3. Discussion.

A. SJA LtCol Ashbacher committed actual UCI in this case when she provided legal advice to Maj Scarselli in a prior matter, obtained confidential information from Maj Scarselli and then (1) used that confidential information against the interests of Maj Scarselli in this case and (2) drafted an Article 34 advice letter against the interests of her former client Maj Scarselli.

Under R.C.M. 406 a staff judge advocate is disqualified, among of other reasons, if he or she has acted as an investigator or defense counsel. Manual for Courts-Martial (2008 ed.). *See also* R.C.M. 1106 prohibiting post-trial action by an SJA “who has acted as...defense counsel, associate or assistant defense counsel, or investigating officer...” Manual for Courts-Martial (2008 ed.). *Id.* LtCol Ashbacher’s past legal representation of Maj Scarselli and confidential information she obtained under that legal representation disqualified her from acting in any official legal capacity in this case. Her previous legal representation of Maj Scarselli imposes a confidence upon her that has not been waived. But even if a waiver is obtained, the use of any privileged information she obtained may not be shared with prosecutors. LtCol Ashbacher’s representation of Maj Scarselli, disqualified her from acting in any capacity in the case. Her representation of him disqualifies her unless she obtains a voluntary waiver. Moreover, her representation of him made her privy to privileged information that appears to have been shared with prosecutors. That makes her an investigator in the case and likewise disqualifies her.

An investigator is disqualified from acting as a legal advisor and from providing legal advice regarding referral of charges to the convening authority . Rule for Court-Martial 406, Manual for Courts-Martial (2008 ed.). An SJA is presumed to act with the mantle of command authority. *United States v. Lewis*, 63 M.J. 405 (2006).

LtCol Ashbacher provided legal assistance and advice to Maj Scarselli as a defense counsel. She then provided pretrial advice to the CA to refer charges against her former client.

In her role as the SJA, based on information and belief, it appears that LtCol Ashbacher also assisted the trial counsel by providing privileged information she obtained during the course of her representation of Maj Scarselli to the trial counsel.

R.C.M. 406 requires that the Article 34 advice letter be prepared by an SJA who is not disqualified. The SJA providing the advice must not have acted or participated in the case in any manner. This requirement ensures that the CA receives neutral and competent advice from his SJA regarding the allegations. Such a requirement preserves the fairness of the court-martial process by guaranteeing to the CA advice from his legal advisor uninfluenced by anything but the facts underlying the allegations. The CA in this case did not receive the benefit of neutral advice because LtCol Ashbacher was disqualified *ab initio*. Regardless of the actual advice she may have provided to the CA, LtCol Ashbacher could not perform the duties as SJA in this case because she had represented Maj Scarselli and was aware of information that could be used by an adversary to impeach Maj Scarselli's good military character witnesses regardless of the information's veracity. *See* M.R.E. 608(b) (extrinsic evidence may not be used to support or attack a witnesses credibility). LtCol Ashbacher had a legal and professional duty to excuse herself from this case.

LtCol Ashbacher is a licensed attorney in the Commonwealth of Pennsylvania. Based on rules governing the practice of law, she was required to treat Maj Scarselli as a client regardless even if she does not believe that ACR formed. Rule 1.18 "Duties to Prospective Clients" of the Pennsylvania Rules of Professional Conduct, states

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client. (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information which may be significantly harmful to that person learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client. (c) A lawyer subject to

paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d).

Pennsylvania Rules of Professional Conduct, 1.16

LtCol Ashbacher was also disqualified because she became an investigator when she provided information to prosecutors regarding events that were the subject of an adverse fitness report on Maj Scarselli. In US v. Chessani, UCI occurred when an SJA participated in a very limited manner in an investigation early in the case of an accused and then merely sat in on legal advisor meetings even though he did not provide legal advice. The appearance of impropriety by his very presence in the meeting and potential for influence, even though it may have been remote, resulted in the trial court finding UCI and dismissing the charges. NMCCA affirmed the ruling. 2009 WL 690110 (NMCCA 2009). Maj Scarselli's UCI claim is significantly more blatant than that in Chessani. In this case, the accused's former attorney who assisted him in a legal matter later used privileged information obtained during the course of her representation, to assist the trial counsel and provided pretrial advice to the CA pursuant to Article 34, advocating for prosecution of her former or prospective client.

A disinterested person aware of all the facts could not conclude that a Maj Scarselli will receive a fair trial when informed of the Col Grabowski facts, his sudden listing as a government witness and LtCol Ashbacher's role as an SJA after her representation of Maj Scarselli.

B. Maj Scarselli's exculpatory fact witnesses continue to suffer retaliatory action for their continued participation in this case.

To raise unlawful command influence on appeal, the appellant must show (1) facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that unlawful command influence was the cause of the unfairness. United States v. Richter, 51 MJ 213, 225-226 (CAAF 1999).

Officer Blyther, Capt Beck, GySgt Montes, Capt Knobel and SSgt Puente have all been retaliated against for their continued factual and character support of Maj Scarselli's defense. Every single one of these Marines has been fired or is threatened with being fired after giving favorable statements or testimony in support of Maj Scarselli's case. Additionally, the trial counsel's work towards silencing Capt Beck was so effective that Capt Beck still is not available as a true defense fact witness. Like Knobel, even if he does testify the threat of perjury charges against Beck for merely reciting his belief that Maj Scarselli took a PFT has irrevocably damaged Beck's ability to speak the truth in this case...as he would have otherwise absent actions by the Trial Counsel. Officer Blyther is likewise no longer available because the Government's actions have caused Blyther to retain counsel and not testify.

No disinterested member of the public aware of all the facts of this case could possibly believe that Maj Scarselli is ever going to get a fair trial. Mr. Gill, Capt Gilinsky and the new command structure over at the 29 Palms PMO office is directly responsible for these defense fact witnesses being silenced or retaliated against. Even if some of these witnesses, unlike Beck or Blyther; are willing to testify; their testimony for Maj Scarselli will no longer be as effective because they have been fired from their former positions which eviscerates the efficacy of their testimony. They are no longer upstanding military police officers with honor and integrity beyond reproach. Because they provided exculpatory testimony in support of Maj Scarselli, they have been fired, retaliated against, intimidated and harassed. By losing their jobs, they have

become subject to impeachment and no longer carry the gravitas of responsible law enforcement officials. This is precisely the type of conduct Congress sought to proscribe through Article 37. This court has undertaken to remedy other UCI raised by the defense by directing the Government to draft and publish a Douglas letter. United States v. Douglas 63 M.J. 349 (C.A.A.F 2010). The command's letter telling people to not be afraid, failed. Members of the command fear retaliation. The defense regularly observes it. We have attempted to present that evidence in spite of the difficulty in convincing witnesses to participate. What cannot and will not come into evidence are those witnesses that have been so influenced by the command's actions that they are no longer available.

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

a. That all charges against Maj Scarselli be dismissed with prejudice.

5. Evidence and Burden of Proof.

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

- a) Lt Col Rhesa J Ashbacher
- b) GySgt Jesus Montes
- c) Capt Kris Knobel
- d) Mr. Cornelius Blyther
- e) Mr. Thomas Gardner
- f) SSgt Rayna Puente
- g) Capt Thomas Beck

b. The following defense exhibits are provided:

- a) Testimonial immunity ICO Capt Beck

- b) GySgt Montes emails
- c) Article 34 advice letter ICO Maj Scarselli
- d) Government witness list
- e) UCI correction letter from CG
- f) Mr. Gardner signed statement
- g) Mr. Gill recommendations from IG report
- h) US v. Chessani case
- i) Affidavit of Maj Scarselli

c. **Burden of proof:** Once the defense establishes UCI by some evidence, the burden to prove UCI did not occur shifts to the government to prove UCI did not occur beyond a reasonable doubt.

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

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1 November 2010
Date

CERTIFICATE OF SERVICE

I certify that an electronic copy of this document was served upon government counsel on

1 November 2010.

By: /S/

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