

UNITED STATES MARINE CORPS
WESTERN JUDICIAL CIRCUIT

UNITED STATES)	GENERAL COURT-MARTIAL
)	
v.)	DEFENSE MOTION
)	TO DISMISS FOR
DOUGLAS WACKER)	UNCONSTITUTIONALLY SHIFTING
CAPTAIN)	THE BURDEN OF PROOF IN VIOLATION
U.S. MARINE CORPS)	OF THE ACCUSED'S DUE PROCESS
)	RIGHTS

10 FEBRUARY 2011

1. **Nature of Motion.**

In light of the publishing of US v. Prather, the defense hereby moves this court pursuant to RCM 907(b)(3)(B), to reconsider the defense motion to dismiss certain charges and specifications because the charges constitute an unconstitutional shifting of the burden of proof in violation of the Accused's due process rights.

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 in 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 Quarter on Bourbon Street, Captain Wacker, Jessica Brooder and Elizabeth Easley agreed to have a three some in the hotel in which they were staying.
- 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 raped.

- d. For this conduct, Capt Wacker is accused of rape, attempted rape, and a few article 133 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. Quite simply, the Government's theory is that Jessica Brooder and Elizabeth Easley became substantially incapacitated and could not consent to sex with Capt Wacker who then either attempted or did have sex with them.
- f. At charge I, Captain Wacker is charged with attempting to rape Elizabeth Easley. Charge II concerns the alleged rape of Elizabeth Easley by Capt Wacker. Both charges use language from the MCM 2005 Article 120 statutes.
- g. 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. Charge III, spec 1 was a novel 133 specification that tracks the model sample specification for MCM 2008 Article 120(c)(2) language for rape by substantial incapacitation.

(c) Aggravated sexual assault upon a person substantially incapacitated or substantially incapable of appraising the act, declining participation, or communicating unwillingness. In that_____ (p-ersonal 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)].

- h. Charge III, specification 2 is another conduct unbecoming of an officer offense for the attempted sexual assault of Elizabeth Easley. The language of Charge III, specification 2 also tracks the language of the MCM 2008 Art 120 offense for rape by substantial incapacitation.
- i. At Charge III, specification 3, Captain Wacker is charged with conduct unbecoming of an officer offense for the same rape of Jessica Brooder, tracking the substantially incapacitated language from MCM 2008, Article 120(c)(2).
- j. On 8 February 2011, CAAF published a case titled US v. Prather where they wrote of the Article 120(c)(2) rape by substantial incapacitation offense (the same offense charged here in US v. Wacker under the cover of Article 133 at Charge III, specifications 1 to 3) “we do not believe that any instruction could have cured the error where the members already had been instructed in a manner consistent with the text of Article 120. No plausible instruction has been identified by the Government that would resolve the constitutional and textual difficulties of having to prove an affirmative defense that incorporates the core requirements of an element of the offense.”

3. **Discussion.**

A. Charge III specifications 1 to 3 faced by Capt Wacker constitute a violation of his constitutional rights under the CAAF opinion in Prather and must be dismissed.

The first three specifications faced by Capt Wacker under Article 133, UCMJ, regarding “attempted rape”, “attempted sexual assault”, and “rape”, are unconstitutional facially and as applied to Capt Wacker because they use the language, specifically concerning “substantial incapacitation” from the Article 80 and Article 120 language (post-2007), that the Court of

Appeals for the Armed Forces found was unconstitutional and violated an accused's due process rights in a case involving the allegation of rape of a substantially incapacitated woman.¹

United States v. Ashby, 68 M.J. 108 (CAAF 2008) held that where the government chooses to incorporate separate offenses into a Article 133, UCMJ, charge and where the military judge has instructed on the elements of those offenses, as an appellate court CAAF will analyze the legal sufficiency of the Article 133, UCMJ, offense by determining whether there was legally sufficient evidence supporting all of the elements instructed upon by the military judge. In other words, because the Article 133 specs at issue in Wacker track the language from the MCM 2008 Article 120 substantially incapacitated offenses, the military judge must as a matter of law instruct using the same instructions for the MCM 2008 Article 120 substantially incapacitated offenses that were found to be unconstitutional as applied to the facts in US v. Prather.

Pursuant to the holding of U.S. v. Prather, this Court should dismiss the specifications 1 to 3 of Charge III that use the language found in the new Article 120, because it creates an unconstitutional burden shift upon the accused and therefore violates his due process rights.

The Prather Court held:

We conclude that the statutory interplay between the relevant provisions of Article 120, UCMJ, under these circumstances, results in an unconstitutional burden shift to the accused. In addition, we conclude that the second burden shift in Article 120(t)(16), UCMJ, which purports to shift the burden to the government once an accused proves an affirmative defense by a preponderance of the evidence, constitutes a legal impossibility.

Prather, 10-0345/AF, 3 (CAAF 2011).

Whether using the language under the application where it is found in the new Article 120 or alternatively under Article 80 (Attempts) or Article 133 (Conduct unbecoming an officer

¹ The Defense has already raised the issue of multiplicity in regard to the substantive charges of Article 80 and Article 120 (using the language from MCM 2005) in comparison with the Article 133 charges, which artfully uses the language from the MCM 2008 (which otherwise would not be applicable to the charged conduct in 2007).

and a gentlemen); all applications as applied in Wacker's case as were used in Prather's case are unconstitutional because it requires the accused to carry the burden of proving a lack of consent as an affirmative defense, an element of the substantive crimes of rape and sexual assault.

In Prather, the Court accepted Prather's argument that proving lack of consent by the victim was akin to disproving substantial incapacitation of the victim (an element of the offense with the burden of proof falling on the prosecution).

Prather argues that “[b]y placing the burden on the accused to prove consent when raising an affirmative defense, [Congress] shifted the burden to the accused to disprove what is an implied element or a fact that is essential to the offense of aggravated sexual assault.” In Prather's view, “substantial incapacity,” and “consent” are “two sides of the same coin” because the statutory definition provides that “[a] person cannot consent to sexual activity if . . . substantially incapable of . . . appraising the nature of the sexual conduct at issue due to . . . mental impairment or unconsciousness resulting from consumption of alcohol . . .” Article 120(t)(14)(B)(i)(I), UCMJ. Thus, according to Prather, an accused cannot prove the affirmative defense by a preponderance of the evidence without also disproving an essential element of the offense of aggravated sexual assault.

Prather, 10-0345/AF, 8 (CAAF 2011).

The Court further addressed the issue of whether a curative instruction to the members, such as the one found in the Army Judge's Benchbook, could remedy the unconstitutionality of statutory language that was also incorporated into Charge III, Specs 1 to 3 of Wacker's case. It found that “There are simply no instructions that could guide members through this quagmire, save an instruction that disregards the provision.” Prather, 10-0345/AF, 18 (CAAF 2011). The Court recognized more fully than the Army Judge's Benchbook that the statutory language created not a legal hurdle, but a legal impossibility, and therefore was unconstitutional. At this time there are simply no cures to the new Article 120 language absent a revision by Congress.

Capt Wacker respectfully requests that specifications 1-3, of Charge III (Article 133) be dismissed with prejudice. The allegations of substantially incapacitated victims in the Wacker case are materially identical to the allegations in Prather.

4. **Relief requested**

That Charge III, Specifications 1 to 3 be dismissed with prejudice because CAAF has found that the statutory language used to charge those offenses constitutes an unconstitutional burden shifting to the accused in a rape by substantially incapacitated case as is found here in US v. Wacker.

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

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

- Not applicable at present.

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: 10 February 2011

/s/

Christian P. Hur, Captain, USMC
Detailed Defense Counsel