UNITED STATES MARINE CORPS
WESTERN JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	GENERAL COURT-MARTIAL
v.	)	1st AMENDED DEFENSE MOTION TO DISMISS
DOUGLAS WACKER CAPTAIN U.S. MARINE CORPS	)	(Unlawful Command Influence)
	)	26 October 2010

1. **Nature of Motion.** The defense hereby moves this court, pursuant to Rule for Court-martial 907, Article 37, UCMJ, and the 5th and 6th Amendments to the U.S. Constitution for dismissal of all charges and specifications with prejudice due to unlawful command influence.

2. **Summary of Facts.**

A. The charges in this case arose as a result of a trip taken by Capt Wacker and two of his accusers as well as several other people during their spring break from classes at the University of San Diego School of Law (USD) to New Orleans, Louisiana in April of 2007. Capt Wacker and over 20 other travelers were law students at USD. On April 3, 2007, following a night of drinking and partying, Capt Wacker and two of the women in the group, Ms. Jessica Brooder and Ms. Elizabeth Easley (maiden name, married name is Cook) decided to engage in sexual activity. They returned to the hotel, rented a room and together went to the room. Shortly after entering the room, but after having undressed herself, Ms. Easley decided that she did not want to participate. She got dressed, and departed. Ms. Brooder, on her own volition, remained. Several days later, after discussing this night with their boyfriends, the two women alleged that they were forced to engage in the complained of conduct. *Ms. Easley, Ms. Brooder*

B. USD undertook an investigation and convened an administrative board, consisting of an assistant dean as supervisor and a panel of an administrator, a faculty member, and a student, to look into the matter and provide due process to all parties. After receiving the testimony of the complainants and Capt Wacker, the disciplinary board determined by a *preponderance of the evidence that there was no misconduct on the part of Capt Wacker*. After having reported that they had already gone to civilian and military authorities without consequence, the two women, dissatisfied with the outcome, filed a police report with the New Orleans Police Department (NOPD). An arrest warrant was issued in late 2007. Capt Wacker had no knowledge of the arrest warrant until he was informed by his command that an NCIS agent (not Special Agent (SA) Burge) had found an existing warrant in the State of Louisiana for the accused in January 2008. Capt Wacker reported to the command (then consisting of Capt Nathan Woellhof, HQ Co Cmdr, and Col Helfrich, H&S Bn Cmdr) and timely turned himself into authorities in Louisiana. Capt Wacker was released on bond and returned to San Diego, California. Capt Wacker informed his command of his actions and that he would keep the command apprised of any and all developments in the case. Following up on the complaints, the New Orleans District Attorney investigated the matter, found insufficient evidence and a lack of credibility of the witnesses to support the allegations, refused the charges, and upon joint motion dismissed the case in July 2008. Upon a motion to expunge, the judge expunged the record of arrest. *Ms. Easley, Ms. Brooder, Ms. Cusack.*

C. In either late 2007 or early 2008, NCIS Special Agent (SA) John Burge was assigned to investigate the case. He received substantial assistance in his investigation from Col Stephanie Smith, then the Staff Judge Advocate (SJA) to the Commanding General (CG), BGen

Angela Salinas, of Marine Corps Recruit Depot, San Diego/Western Recruiting Region (MCRD). Col Smith relinquished her billet as the SJA of MCRD in June of 2009. *Col Smith, SA Burge.*

D. Col Smith is currently the Commanding Officer of the Headquarters and Services Battalion (H&S Bn), MCRD, and commander of Capt Wacker (before he was transferred to MCAS Miramar). While serving as the SJA she spearheaded the investigation and received reports from SA Burge in addition to acting in her primary function as legal advisor to the Commanding General. She also communicated with the SJA to the Commandant of the Marine Corps (SJA to CMC) [and many other persons] opinions as to Capt Wacker's guilt and advised that he should be dropped from the excess leave law program. And only now, in recently released emails by the trial counsel between Brooder and Easley does it become clear that Col Smith was the driving force behind this prosecution and interference in Capt Wacker's legal education and professional military education. Her statement to one of the accusers that we are going to keep him in a "broom closet" so that no one has to be around him; as well as statements to potential panel members, school officials, and other high ranking officers as to Capt Wacker's guilt, demonstrate how far from the standard of an objective advisor to the CG she fell. *Capt Liebenguth. BGen Walker. Col Smith. Dean Cole. SJA to CMC notice of consideration of disenrollment and disenrollment letter.*

D. On several occasions, while serving as the SJA to the GCMCA, Col Smith participated extensively in the investigation of this case (as she improperly did many other cases). One example of her participation is when she invited Capt Wacker's close friend and fellow excess leave law program student, Capt Blosser, to lunch under pretenses that Col Smith sought to give him guidance regarding a career as a judge advocate (Interestingly, Capt Wacker, a member of her command at MCRD, was never invited). She then, under false pretenses,

brought Capt Blosser to a conference room where NCIS Agent John Burge waited to interview him about Capt Wacker and used words such as "it's your duty" and "your loyalty to the Marine Corps" or words to that effect to coerce Capt Blosser into giving a statement against Capt Wacker and to strike fear that potential repercussions would happen if Capt Blosser didn't give a statement against Capt Wacker. Capt Blosser had already declined to be interviewed by NCIS regarding Capt Wacker. Capt Blosser did not belong to any of the commands at MCRD (he was attached to the USD ROTC Battalion) and was not under the command of the SJA or any other unit based at MCRD. *Capt Blosser. SA Burge.*

E. In a text message to Capt Wacker dated 15 October 2008, Capt Blosser wrote "I'm a little upset that the Colonel and Maj Jackson set me up like that today. They could have been up front w/ me and I would have still given a statement." *Capt Blosser.*

F. Col Smith, while working for and advising the GCMCA and during a period when she provided advice to the commander as the SJA, contacted the Dean of the USD School of Law and convinced him to bar Capt Wacker from the university 22 months after the incident and 18 months after the school had conducted its own investigation and found no misconduct. *Dean Cole, Col Smith.*

G. On January 9, 2009, Capt Wacker's Executive Officer, LtCol Bond (a person listed as a panel member on the convening order in this case), gave Capt Wacker an MPO that LtCol Bond explained to Capt Wacker prohibits any attorney representing Capt Wacker from contacting law school classmates (witnesses in this present case) without first contacting the command to ask for permission:

B. Capt. Wacker: "Can my lawyer talk with my classmates?"
LtCol Bond: "No, not without your lawyer first contacting the command to ask permission."

Despite LtCol Bond's sworn statement, at the time the MPO was issued, Capt Wacker was not represented by any counsel, military or civilian, and LtCol Bond knew this because Capt Wacker asked if he was to be given an attorney, to which he said that he did not know, but that Capt Wacker could talk to the Joint Law Center. In addition to his lack of knowledge in regards to a Marine's rights, LtCol Bond used his office and the office of the CO to abuse his authority by misstating the law and allowing an overly broad and improperly written MPO to be served on Capt Wacker.

H. On January 26, 2009, Col Helfrich, commander of Headquarters and Service Battalion, MCRD, San Diego, issued a modification to the MPO issued by LtCol Bond, which prohibited 'any and all contact' by Capt Wacker with any person listed on the MPO. Col Helfrich further stated that Capt Wacker could not have his attorney contact any of the persons named in the MPO without permission from the command. At this time, Capt Wacker had retained Mr. Faraj as civilian counsel in this matter, because the Government prevented Capt Wacker from his entitlement to military defense counsel and did not provide Capt Wacker with any counsel. *Col Helfrich. Maj Budomo.*

I. Also in January 2009, the SJA began to assist the NCIS agent and the DNA forensic examiners in rushing to develop evidence against Capt Wacker so that they could avoid sending Capt Wacker onto "expensive training." *Memo from Dr. Johnson.*

J. In February 2009, Capt Wacker requested mast to the Commanding General of MCRD, San Diego, BGen Angela Salinas, requesting a modification of the MPO in regard to four individuals listed, none of whom were among the complainants. The request mast was summarily denied by Col Helfrich on the grounds that the UCMJ provided sufficient protections

for Capt Wacker. Capt Wacker was never provided the opportunity to speak with the CG or given a written response as to Capt Wacker's request. *Col Helfrich. BGen Salinas.*

K. In March 2008, Capt Wacker received a FedEx package from Capt Jeff Liebenguth, which included a command request from Capt Wacker's command to have Capt Wacker disenrolled from the excess leave law program. In April 2009, Capt Wacker responded to the notice of disenrollment through counsel to the SJA to CMC, BGen Walker. Despite Capt Wacker's response and supporting documents, BGen Walker determined that based on the fact that the MPO was "clear and unambiguous" (the Article 32 Investigating Officer later found discrepancies between the original MPO and follow-on orders given by LtCol Bond and Col Helfrich) that Capt Wacker had violated the MPO and therefore would be disenrolled immediately from the excess leave law program and return to active duty pending further military proceedings. *Col Helfrich. Col Huenefeld. Capt Liebenguth. BGen Walker.*

L. In April 2009, the command preferred charges against Capt Wacker. *Preferral of Charges in the case of U.S. v. Wacker. Additional Charges in the case of U.S. v. Wacker.*

M. In April 2009, Capt Wacker was informed by USD Law School Assistant Dean for Student Affairs, Carrie Wilson, that Capt Wacker, based on the university's receipt of the charge sheet, would be "suspended" as soon as he completed his final exams in the spring semester of his third year of law school. The school would not grade Capt Wacker's final exams, and therefore not confer the degree of Juris Doctor upon Capt Wacker, thus preventing Capt Wacker from taking the bar exam timely after graduation. The school reserved the right to hold its own administrative hearing after all military proceedings were complete. *NCIS Agent Burge, Col Smith, Col Helfrich, Asst. Dean Wilson, Dean Cole.*

N. On June 2, 2009, an Article 32 hearing was administered at MCRD. Maj Ted Bonanno was appointed the Investigating Officer (IO). In a sworn affidavit attached to this motion, Maj Bueno describes a policy by the then-SJA Col Smith to pick 32 Officers that recommend referral as well as a policy of discouraging civilian witnesses from testifying at Article 32s. In Capt Wacker's case (and just as described by Maj Bueno), only three of the witnesses requested attended and those who did were compelled to attend, as they were members of the Marine Corps or NCIS. The Article 32 Hearing was recorded in this case. According to trial counsel the recording has been damaged or lost. Although at many points during the proceeding, which lasted over 8 hours, references to the recording of the proceeding had been announced by the IO and trial counsel, no recording now exists of the testimony given at the Article 32 Hearing. There is no record of the Article 32 Hearing except the IO's report. Witnesses were present in the gallery, including a reporter from the Marine Corps Times (although no subsequent media story was released at that time, or at any time before the press release by PAO). During the morning portion of the hearing, NCIS SA Burge testified to the fact that he had advised each of the civilian witnesses that "the Article 32 Hearing was adversarial in nature and that if he didn't have to go, he wouldn't[1]." Not one of the civilian witnesses appeared to testify or agreed to testify via telephone, particularly the accusers. Instead of the opportunity to hear testimony of the witnesses, and to observe the witnesses under cross-examination, the IO was only provided sworn statements by the trial counsel, over objections by the defense. *Maj Ted Bonanno. LtCol Sean Sullivan. Capt Zenon Keske. Capt Brooks Braden. LtCol Patricio*

[1] This is similar to a situation discussed in United States v. Edmond, 63 M.J. 343 (CAAF 2006) where the court discussed that after subpoenaing a witness on behalf of the defense, the trial counsel was not authorized to tell the witness that he could choose to either testify or not testify because the witness could not choose to leave without testifying unless the defense agreed to release him and the subpoena was quashed by the military judge.

Tafoya. Maj Robert Bueno. Maj Christopher Shaw Wk:(808) 477-8502. LaNita Wacker. Michael Story (619) 942-0203.

O. On August 14, 2009, MCRD PAO released a press release concerning Capt Wacker's case to the Los Angeles Times, the San Diego Union Tribune, the Marine Corps Times, and several other television and print media organizations about Capt Wacker's case. *Maj Logan Affidavit.*

P. On August 18, 2009, MCRD PAO released a media release to all or almost all of MCRD's officers and SNCO's about Capt Wacker's case. *Daily Media Release Email dated August 18, 2009.* Mr. Steve Liewer, a reporter with the San Diego Union Tribune, called the Marine Corps press release unprecedented and said "we've never received a press release for this type of case. Press releases normally come for high profile cases like war crime cases." It was subsequently released via the two major newswires, Associate Press (AP) and United Press International (UPI), and was printed in such newspapers as the San Diego Union Tribune, Los Angeles Times, Seattle Times, Seattle Post-Intelligencer, Tacoma News Tribune, San Jose Mercury-News, New York Times, Washington Post, Washington Times, Baltimore Sun, and Boston Globe, to name a few, as well as reported on several local television networks, one of whom sent a reporter to harass Capt Wacker and his neighbors at his residence. A Google search performed within two weeks of the press release using the words "Capt Wacker" and "rape" resulted in 7920 hits.

Q. On August 20, 2009, MCRD PAO released another media release to all or almost all MCRD officers and SNCO's about Capt Wacker's case. *Daily Media Release Email dated August 20, 2009.*

R. On or near those dates, BGen Salinas conducted three town hall meetings for all hands at MCRD where she said she felt that the biggest threat facing the Marine Corps was sexual assault. *BGen Salinas.*

S. Prior to these media releases, most people on MCRD were unaware that Capt Wacker was being accused of criminal misconduct. After those emails, every officer and SNCO stationed at MCRD was aware of Capt Wacker's case. *GySgt Schmidt Affidavit.*

T. On September 24, 2009, panel member LtCol Bond, also the executive officer of H&S Bn (Capt Wacker's command) wrote an email to the Chief of Staff (CoS) (Col Huenefeld) for BGen Bailey, the GCMCA, as well as two named panel members from the convening order (Col Conlin and Maj Blalock) stating as follows:

From: Bond LtCol GregoryF
Sent: Thursday, September 24, 2009 5:36 PM
To: Conlin Col Christopher C
Cc: Trapp LtCol Thad R; Huenefeld Col Carl F; Myers CIV Clifford O III; Blalock Major Christopher G
Subject: RE: CAPT WACKER

Sir:
Col Smith can't say it because she is the "impartial" CO. I the XO I can. Wacker is a psychopath who, if / when he is court martial , goes to prison and returns will be the type of individual who would be a Lone Shooter and get back at everyone who he thinks "wronged" him. Just like when he raped the 3 law students who refused to go out on a date with him. You did not read the NCIS investigation...I did. You did not interview or speak with the NCIS Investigators who sent lab results to Quantico [FBI] because of the nature of the drugs he used to "drug" his victims before he raped them. If Wacker is acquitted, it will be because of a slick lawyer or NCIS procedural problems.
He is a rapist. I am sure the Colonel would not want him to watch your kids. If we had a "suspected" DI Child Molester, and we gave him to MCCS to go work while his trial was going on, would it be right to put him in charge of the day care center. I think not.
Just wanted to clarify why I think he is a criminal and we should not be giving him access to ATF Plans.
I will come to the G-3 and work on the AAR in the time being if that is what it takes to remove Wacker from this position.
The next time we send a "body" to the G-3, we will stipulate and make recommendations/agreements before he is billeted.

SF
V/R
LtCol Bond

U. On October 1, 2009, Col Smith sent out an email in response to LtCol Bond's email:

-----Original Message-----
From: Smith Col Stephanie C
Sent: Thursday, October 01, 2009 14:45
To: Trapp LtCol Thad R; Blalock Major Christopher G; Conlin Col Christopher C; Myers CIV Clifford O III
Cc: Richardson Col Michael B
Subject: Important message

Gentlemen:
It just came to my attention that my XO spoke in an e-mail to all of you harshly regarding Captain Wacker and his pending legal action. To be clear, I was unaware of this e-mail until now and do not in any manner condone or ascribe to his comments. I am committed to ensuring that Captain Wacker gets a fair trial. Captain Wacker is innocent until proven guilty by a competent court of law. As some of you may know I made the decision to move Captain Wacker from the G3 and reassign him to duties within the battalion. I did this because I was concerned that the decision to task him as the "lead" G3 representative for the multi-agency exercise Aztec Fury that had considerable media coverage exposed the Depot to unnecessary risk. If Captain Wacker as the lead representative for the Depot were to speak to the media and the media made the connection that he is pending trial for alleged sexual misconduct, this had the potential to reap bad press for the Depot. I also was concerned that based solely on the seriousness of the charges to which he is accused, that Captain Wacker should not be privy to the specifics of the force protection plan for the Depot and/or the local authorities response plan in the event of an emergency aboard the Depot. This decision was mine and was made to ensure good order and discipline within my command and had nothing to do with Captain Wacker personally. I do not want my decision to move Captain Wacker to impact your decision to participate in any manner you deem appropriate regarding Captain Wacker's upcoming trial. In fact, I expect you to participate without any fear of repercussion or reprisal in any manner you deem appropriate. Once again, I do not agree with the XO's comments and want to make it completely clear that those comments were improper. That e-mail should not in any way prevent you from fulfilling your right and obligation to participate in any manner you deem appropriate for Captain Wacker's court proceedings.
Lastly, please do not forward LtCol Bond's unprofessional e-mail to anyone else.
Doing so will further jeopardize the potential jury pool for Captain Wacker and jeopardize his right and entitlement to a fair trial.

V/R
Col Smith

V. Despite Col Smith's email dated October 1, 2009, Maj Blalock will testify that this contradicts what Col Smith said to him. *Maj Blalock.*

W. From April 2009 to September 2009, Capt Wacker was assigned to work in the AC/S G-3 Mission Assurance Branch section at MCRD. *Maj Blalock. LtCol Trapp.*

X. Prior to LtCol Bond's email dated September 24, 2009, LtCol Trapp, Col Conlin, and Maj Blalock could have been requested as good military character witnesses for Capt Wacker. Some and probably all of these witnesses have either developed reservations about Capt Wacker or have been subtly been affected after learning the views of two of the commands most senior officers..

Y. As the MCRD SJA and during the time period Capt Wacker's case was investigated by trial counsel; Col Smith became a de facto trial counsel by actively involving herself in the prosecution of cases, including Capt Wacker's case. She had military justice meetings in the law center with the trial counsel that lasted, in some cases, over three hours. During these meetings, she would discuss tactics and witness testimony and give direction for trial counsel to take or refrain from certain actions. *Maj Keske. Maj Bueno. Capt Hart.*

Z. As SJA, and later as a convening authority, Col Smith often spoke with witnesses in order to influence them, as she did in Capt Wacker's case. *Maj Keske. Maj Bueno. Maj Blalock. Maj Budomo. Capt Hart. Capt Ahn. Capt Torsella. Sgt King. GySgt Navagonzalez.*

AA. On other occasions, as SJA, Col Smith advised her trial counsel to "flip witnesses" when their testimony was not favorable to the Government's cases. *Capt Ahn. Maj Bueno.*

BB. While serving as the SJA, she would attend courts-martial and instruct trial counsel when to object and what evidence to admit. *Maj Keske. Maj Bueno. Capt Ahn. Maj Bueno.*

CC. Maj Blalock will testify that Col Smith told him one week after Capt Wacker arrived in G-3 (in his capacity as Capt Wacker's supervising officer) that because Captain Wacker is a "narcissistic criminal" we need to ensure that he is not given anything of responsibility at G-3 because it could help his case. Ms. Desiree Bobie heard half of this conversation (i.e. Wacker is narcissistic). *Maj Blalock. Ms. Bobie.*

DD. While in G-3, Capt Wacker assumed responsibilities as the Assistant Operations Officer for the Mission Assurance Branch. His billet included the lead planning on Mission Assurance exercises. One such exercise, which involved nearly all subordinate commands aboard MCRD as well as several off-base agencies, titled: Exercise AZTEC FURY 2009, took place on September 24, 2009 and involved nearly 500 participants. LtCol Bond's Email regarding Col Smith's decision to transfer Capt Wacker back to the H&S Bn command post occurred within an hour of the end of the successfully executed exercise. *Col Conlin. LtCol Trapp.*

EE. MCRD's AC/S G-3 Mission Assurance Officer, LtCol Trapp, was told by Col Smith a week before September 24, 2009 (the day of LtCol Bond's Email), words that mirrored those communicated in the September 24, 2009 Email from LtCol Bond. Such statements are in direct contradiction to her October 1, 2009, "cleansing" email. *LtCol Trapp. Maj Blalock.*

FF. Maj Blalock will testify that prior to LtCol Bond's email, he had an open mind about the guilt or innocence of Capt Wacker. Before the email he held a favorable view about the military character of Capt Wacker. Following the email and other communications by Capt Wacker's command he became unsure and had reservations about the military character of Capt Wacker.

GG. Shortly after assuming command of H&S Bn, Col Smith had Capt Wacker moved from his billet in the G-3 to a billet as the H&S Bn S-3A (a position that did not exist prior to Capt Wacker's move) immediately subordinate to her, with LtCol Bond as his Reviewing Officer (Maj Goodpasture, H&S Bn S-3 Officer, was his Reporting Senior). While in the G-3 Capt Wacker was performing his duties well and was developing good character evidence through his performance that would be testified to by Maj Blacklock and Col Christpher Conlin - a highly

decorated combat experienced senior officer with extensive leadership experience and an unimpeachable reputation.

HH. Upon assuming command of MCRD, BGen Bailey held a series of sexual assault training sessions on September 22, 2009. In his remarks, BGen Bailey mentioned that there had been six sexual assaults by Marines at MCRD, but that "even one is too many." The sexual assault training was facilitated by a guest speaker who had presented a seminar at a conference hosted by the Commandant of the Marine Corps (thus representing sponsorship from the highest level), attended by all flag officers in July or August 2009. The guest speaker was Jackson Katz (www.jacksonkatz.com; www.endabuse.org). During Mr. Katz's presentation on September 22, 2009, he stated that rape is not a "women's issue" but rather is a "man's responsibility" to avoid. During the training sessions, attended by all Marines, SNCOs, and Officers aboard MCRD, the SJA, Col Richardson made a comment to the effect that as leaders we need to focus on preventing men from "scoring" and that sexual activity when any alcohol is involved is to be avoided by all Marines. In regard to the Mr. Katz's comments, SSgt Vecchia, a female Marine, asked a question to the effect of is it not the responsibility of both sexes to prevent situations of sexual assault? To which, Mr. Katz replied, "It's not equal responsibility, there is a greater male responsibility." *BGen Bailey. Mr. Katz. Col Richardson. SSgt Vecchia.*

II. Col Smith's cumulative unlawfully influential actions in Capt Wacker's case, supported by facts that she habitually interfered in cases as the SJA, shows that she became an investigator in cahoots with the trial counsel and NCIS agents when she attempted to trick Capt Blosser, by using false pretenses, into agreeing to be interviewed by NCIS agent John Burge. Commensurate to her actions, the Government, through NCIS Agent John R. Burge, interfered with the first Article 32 investigation by advising the alleged victims Ms. Cusack, Ms. Brooder,

and Ms. Easley, among others that if he were them, he would not go to the Article 32 to testify. None of the accusers or percipient witnesses appeared at the first Article 32 in this case. Finally, the Government interfered with potential witnesses by speaking to (Col Smith) and emailing (LtCol Bond) potential panel members as well as potential senior officer character witnesses for Capt Wacker. *Col Smith, LtCol Bond, Maj Blalock, Ms. Easley, Ms. Brooder, Ms. Cusack.*

JJ. On or about 15 October 2009, the defense filed an unlawful command influence motion setting forth many of the same factual allegation above. A few weeks later, charges were withdrawn and dismissed by the government. On 7 January 2010, charges were re-preferred anew, this time under a new Convening Authority –CG Third MAW at MCAS Miramar.

KK. A new Article 32 hearing was held on 12 April 2010. At this hearing most or all of the requested witnesses showed up. These are the same witnesses that, as the argument maintains, decided without any encouragement from NCIS SA Burge to not to come to the first Article 32 hearing.

LL. On 26 May 2010, charges were again referred in this case. Many of the initial charges brought in late 2008 had been dropped but two of the most serious charges remained.

3. **Discussion.**

A. WHETHER DISMISSING AND RE-PREFERRING CHARGES UNDER A NEW CONVENING AUTHORITY IS SUFFICIENT TO AMELIORATE UCI CREATED BY THE MISCONDUCT OF A SENIOR OFFICER IN THE BILLET OF SJA AND THEN COMMANDING OFFICER WHO COMMUNICATED PERSONAL OPINIONS ABOUT THE ACCUSED'S GUILT AND BAD CHARACTER, WHO BECAME AN INVESTIGATOR AND USED HER AUTHORITY TO TRICK WITNESSES INTO MEETING WITH INVESTIGATORS, AND WHO COMMUNICATED HER OPINIONS OF GUILT TO SENIOR LEVELS OF COMMAND TO EFFECT ADMINISTRATIVE ACTIONS AGAINST THE ACCUSED THAT ARE TANTAMOUNT TO PUNISHMENT.

Yes. UCI cannot be ameliorated by merely unfairly withdrawing and re-preferring charges under a new CA[2]. Col Smith's conduct in this case sought not only to assure a conviction of the accused by influencing witnesses, she also sought to destroy his career and deny him the benefit of three years of a legal education by communicating half truths, fabrications, and opinions as to the accused's guilt with the intent to inflict punishment and deny him a fair trial. Once the government achieves a desired improper objective dismissal is merited. *See United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006). Col Stephanie Smith acted unprofessionally. She failed at every level of her responsibility as the legal advisor in this case. She became an investigator by assisting the NCIS agent and lying to a witness to trick him into testifying. She communicated opinions of guilt to a senior member of the command who simply parroted what she said. Then to distance herself from the UCI of her XO, she sent out an email admonishment to create a paper trail. The email doesn't save her, however, because she used the same language LtCol Bond used in his September 24, 2009, email during a conversation with LtCol Trapp a week before. The same language was overheard by Maj Blalock and Ms. Desiree Bobie. Finally, even LtCol Bond's email betrays her. He states the Co can't say it because she is the "impartial CO." What LtCol Bond is saying is she can't say it in an email. But there is no doubt she said it to him and who knows how many others. The affidavits of GySgt Navagonzalez, Sgt King, and Maj Bueno establish a pattern by Col Smith to deny the rights of accuseds like Capt Wacker.

The military justice system lives a precarious existence when those with authority and power use that power in a nefarious manner. That is why UCI has been referred to as the mortal

[2] RCM 604, discussion, clearly states that the convening authority should not withdraw charges from a court-martial unfairly or abrbitrarily to an accused. "Improper reasons for withdrawal include an intent to interfere with the free exercise by the accused of constituitional or codal rights." Withdrawal ONLY occurred in this case because the UCI from Col Smith was disclosed in a motion filed pre-39a before the former case was dismissed. The trial counsel

enemy of military justice. *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998). Col Smith sought to influence this proceeding (as she did in several others) and she did. When the defense pointed out her misconduct, the Government unfairly and arbitrarily withdrew the charges and re-preferred…in violation of RCM 604. The reason they can do that is because they **CAN** without any concern for the accused's right to due process a speedy trial or a fair trial. Even if there were no other factors as to prejudice, the delay as a result of the withdrawal and re-preferal are prejudicial because the Government improperly denied the accused the right to a speedy trial.

The UCI in this case is palpable and prejudicial. Col Smith 1) contacted witnesses before trial, 2) communicated her belief in Capt Wacker's guilt to potential members and witnesses, 3) actively worked to have Capt Wacker dropped from the law education program, and 4) provided advice that prohibited defense counsel from contacting witnesses without first coordinating with the command. *See United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986). Article 37, UCMJ, states that no convening authority or commanding officer "may attempt to coerce, or by any unauthorized means, influence the action of a court-martial . . . in reaching the findings or sentence in any case . . . ." The prohibition contained in Article 37 is also known as the prohibition against unlawful command influence. *See United States v. Baldwin*, 54 M.J. 308, 310 (C.A.A.F. 2001); *United States v. Stombaugh*, 40 M.J. 208 (C.O.M.A. 1994); *United States v. Levite*, 25 M.J. 334 (C.O.M.A. 1987).

The defense bears the initial burden to raise the issue by a quantum of evidence "the same as that required to submit a factual issue to the trier of fact." *Baldwin* at 311; *see also United States v. Jameson*, 33 M.J. 669, 672 (N.M.C.M.R. 1991)(quantum of evidence needed is "some evidence sufficient to render reasonable a conclusion in favor of the allegation asserted.").

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feared the case against Capt Wacker would be dismissed with prejudice and so withdrew before the defense motion

The burden then shifts to the government to prove **beyond a reasonable doubt** that (1) the predicate facts which the allegation of unlawful command influence is based do not exist; or (2) by persuading the military judge that the facts do not constitute unlawful command influence; or (3) if at trial producing evidence proving that the unlawful command influence will not affect the proceedings *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999). If the Government fails to meet its burden, then:

> the military judge must find that command influence exists and must take whatever measures are necessary and appropriate to ensure that the findings and sentence, if any, are so far unaffected by any command influence that a reviewing court would find them to be so beyond a reasonable doubt. If and only if the trial judge finds that command influence exists (because the defense successfully raised it, and the Government failed to disprove it by clear and positive evidence) and finds, further, that there is no way to prevent it from adversely affecting the findings or sentence beyond a reasonable doubt should the case be dismissed.

Jameson, 33 M.J. at 672 (quoting *United States v. Jones*, 30 M.J. 849, 854 (N.M.C.M.R. 1990)); *see also Stombaugh*, 40 M.J.at 214; *United States v. Thomas*, 22 M.J. 388 (C.O.M.A. 1986).

"Unlawful command influence is the mortal enemy of military justice. If the target of command influence is a court member or the military judge, then it violates Capt Wacker's right to an impartial forum." *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998). The test for apparent unlawful command influence is "whether a reasonable member of the public, if aware of all the facts, would have a loss of confidence in the military justice system and believe it to be unfair." *United States v. Allen*, 31 M.J. 572, 590 (N.M.C.M.R. 1990), aff'd, 33 M.J. 209 (C.M.A. 1991).

In this case, the former SJA in the case participated in the investigation by assisting the NCIS in investigation and actively working to persuade at least one witness through deceit and subterfuge to submit to an interview. Curiously, the same investigation dissuaded the very

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could be heard.

people who have raised the allegations that form the central charges in this case from appearing at the initial Article 32 hearing and testifying. Maj Bueno's affidavit explains how and why this was done.

The depot SJA's communications to the SJA to CMC to have Capt Wacker disenrolled from the Law Education Program along with her communications to the University of San Diego Law School to effectuate his debarment clearly indicate that she formed an opinion as to Capt Wacker's guilt and could no longer act as a neutral legal advisor to the CA. Her actions continued to unlawfully influence the court-martial even after she was relieved of her duties as the SJA when she communicated her belief regarding Capt Wacker's guilt to LtCol Bond and to Maj Blalok, a conversation that was overheard by Ms. Bobie. LtCol Bond than drafted and sent an outrageous email to the Chief of Staff and the G3 along with other officers. The email, on its face can easily be construed as a proxy communication from his boss, Col Smith. He states in his email "Col Smith can't say it because she is the impartial C.O." The implication in that statement is that she has said it to him but cannot publish it to the list. LtCol Bond's email went to some of the most senior officers on the relatively small Marine Corps Recruit Depot, to include the chief of staff to the convening authority. The officers on the list included officers who were good character witnesses for Capt Wacker. At least one of these witnesses, Maj Blalock, has indicated that he has reservations. It is unclear how that email has affected the testimony of the other witnesses. But even if these witnesses were not influenced by the email, the mere fact that the defense must offer an explanation to remedy the taint irreparably harms Capt Wacker and denies him a right to a fair trial. Moreover, I, as his defense lawyer, do not feel confident that I can undo the harm resulting from a statement from the immediate representative of Capt Wacker's commanding officer saying "when he…goes to prison and returns will be the

type of individual who would be a lone shooter and get back to everyone who he thinks "wronged" him….If Wacker is acquitted it will be because of a slick lawyer or NCIS procedural problems [sic]. He is a rapist. I am sure the Colonel would not want him to watch your kids." The meaning here is clear that "the Colonel" (Col Smith) agrees and that LtCol Bond is assisting her by communicating her intent. The reference to the slick lawyer is offensive, disrespectful, and casts serious doubts on the Marine Corps' ability to give Capt Wacker a fair trial. Capt Wacker had one lawyer. His detailed defense counsel was not yet engaged in the case. I had several communications with Col Smith to persuade her reduce the extraordinary number of people listed on the MPO, the majority of whom were of no relevance. I also communicated with her regarding Capt Wacker's disenrollment. I did not communicate with LtCol Bond. Any impression LtCol Bond has of me as an attorney is undoubtedly the result of communication between him and Col Smith. A reasonable extension of that conclusion is that she shared those same views with the CA. Such conduct is an outrageous abuse of power and casts serious doubt on the propriety and fairness of the military justice system.

B. WOULD AN OBJECTIVE MEMBER OF THE PUBLIC WITH KNOWLEDGE OF ALL THE FACTS BELIEVE THAT CAPTAIN WACKER COULD RECEIVE A FAIR TRIAL FREE FROM THE EFFECTS OF UCI EVEN IF THE GOVERNMENT WERE TO SHOW THAT THERE WAS NO ACTUAL UCI OR THAT THE UCI WAS HARMLESS?

No. An objective member of the public with knowledge of all the facts in this case could not be convinced that Capt Wacker could receive a fair trial. And simply shifting the trial from MCRD, San Diego to Miramar is a pro forma measure that changed nothing. Col Smith got exactly what she wanted: the move to MCAS Miramar denied Capt Wacker of the very good military character witnesses he was developing in the G3.

The move is also irrelevant in this case because the witnesses are the same, the lead prosecutor (LtCol Sean Sullivan [now acting in a dual role as SJA at MCRD and lead prosecutor in this case against a former MCRD officer]) is the same and Col Smith is now vested with greater authority and more influence by virtue of her position and senior rank. Col Richardson who was the MCRD- San Diego base SJA at the time Capt Wacker was moved to Miramar Air Station a few miles away so that no military judge would learn the facts of Col Stephanie Smith's abuses of authority and unlawful influence over this case and who was among the senior officers to have seen and read Col Stephanie Smith's email; is now also tainted. Col Richardson is now the Chief Military Judge of Western Judicial Circuit. His taint is presumed to trickle down to all other judges in the circuit. And although the defense is aware that Col Richardson sought to ameliorate the UCI by moving Capt Wacker and then assigning a military judge from Okinawa, Japan; we have no independent assurances that Col Smith's actions and words did not negatively affect Col Richardson's opinion of Capt Wacker's case.

Col Smith is a senior officer and served as the SJA to the Commanding General. MCRD-San Diego is a small base. It is reasonable to assume that officers assigned to the base communicate among one another. And, in fact, there is evidence that they have about this case. Communications by Col Smith or senior officers cloaked with the mantle of Col Smith's authority clearly indicate that a determination of Capt Wacker's guilt is a foregone conclusion. Accordingly, even if the Government were to make a colorable argument that there was no actual UCI or that it was harmless, it is doubtless that a reasonable member of the public with knowledge of the all the facts and circumstances would certainly harbor a significant doubt about the fairness of the proceeding. To ameliorate the harm beyond a reasonable doubt the government must take actions to show, convincingly, that the disinterested public would believe

Capt Wacker would receive a trial free from the effects of unlawful command influence. *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006). The *Lewis* court decided that whatever remedies are available would be insufficient because the government's objective of unseating the military judge had been achieved. *Id*. at 416. In this case, the government's objective was to ensure a conviction of Capt Wacker. To that end, the SJA participated in the investigation, tricked witnesses, attempted to bar defense counsel from contacting witnesses, denied Capt Wacker the right to a fair Article 32 hearing and most outrageously, unfairly communicated with potential witnesses her belief that Capt Wacker is a rapist, psychopath, and potential killer of those who cross him. Moving Capt Wacker to another base down the street is in no way ameliorative. In fact a reasonable argument can be made that it was prejudicial.

At MCRD, Capt Wacker was assigned to work for a highly decorated infantry officer with an exceptional reputation, doing substantive work that reflected Capt Wacker's excellent military character. Col Smith's actions successfully removed him from that environment, delayed his trial, changed the opinions of good character witnesses and created a dilemma that may disqualify all the judges in the Western Judicial Circuit.

This court may avail itself of several remedies to ameliorate the harm. But where the harm cannot be rendered harmless, dismissal with prejudice, as drastic as it may appear, is the only appropriate remedy. *Id*. This is just such a case: Capt Wacker has already suffered the character assassination and defamation incurred by the venomous wrath of officials abusing discretion and attempting to create a something out of nothing. Col Smith, through the influence of different levels of command has sullied the high level of honor and discretion that is known, respected, and expected from Marine judge advocates. At no time was Col Smith a trial counsel in this case. Her role was to maintain objectivity and advise the GCMCA. But even as a

prosecutor she fails. Prosecutors zealously advocate, but are also expected to exercise prosecutorial discretion and to refrain from improperly influencing the proceeding. She did not even grasp that duty. Her abject conduct demonstrates a willful disregard for the law and the military justice process. Her conduct is further exacerbated by the virtue of her billet at the time. The harm was not undone by Capt Wacker's move.

The SJA is a staff officer too, and legal representative for the convening authority. Col Smith actively participated in the investigation. When she became an assistant to the NCIS agent, an agency relationship formed. Accordingly, when NCIS Agent John Burge told witnesses that "if I were being called to testify at the Article 32, I wouldn't go," he and Col Smith directly or indirectly hindered the initial Article 32 investigation. Maj Bueno's affidavit discusses Col Smith's policy of civilian witnesses and defense witnesses not testifying at Article 32 hearings. Her conduct turned her into an investigator and a prosecutorial arm in the case. She did this while she continued to give advice to the convening authority in the case. To add fuel to the unlawful command influence fire, she communicated her biased views to her Executive officer after assuming command of Headquarters and Services Battalion who then communicated those views to some of the most senior officers on the base, including the chief of staff and her predecessor as an SJA- Col Richardson. At least two of those officers were good character witnesses in the case.

When Congress acted to eliminate unlawful command influence, it was "not only concerned with eliminating actual unlawful command influence, but also with 'eliminating even the *appearance* of unlawful command at court-martial'" *United States v. Lewis*, 65 M.J. 405, 415 (2006) (Emphasis added) (Internal quotations omitted). One of the central issues the *Lewis* Court grabbled with after unlawful command influence was established is whether the military judge's

actions were sufficient to remedy the harm. The Court considered the Government's actions in the case in effecting the removal of the military judge and determined that no remedy short, perhaps, of a disciplinary investigation or sanctions against the government could restore the public's confidence in the military justice system. *See Id*.

In this case the government has achieved its objective of influencing the testimony of senior good character witnesses. That taint cannot be undone through a change of venue nor a new convening order. A disinterested member of the public presented with the facts of Col Smith's participation in the investigation would not believe that Capt Wacker would receive a fair trial. To compound the harm, the former SJA, as Capt Wacker's Commanding Officer, continued to exert a devastating and unlawful influence over the proceedings by communicating through her XO to witnesses and named panel members, her belief in Capt Wacker's guilt and that he is a psychopath and rapist.

To the trial counsel's credit, the Government recognized the UCI alleged. To ameliorate the UCI, they transferred Capt Wacker to another base which delayed his trial for another year, robbed him from continued development of outstanding good character evidence and witnesses, but left Col Smith in place. What the Government did not accomplish with the transfer is rehabilitation of the good character witnesses, reversing of the pretrial punishment meted out by Smith through her invidious influence over USD in denying Capt Wacker his rightfully earned degree, his disenrollment from Excess Leave Program, the removal of his basic lawyer designation and the harm his reputation suffered through unnecessary media releases and offensive emails to senior officers.

C. WHETHER A MEDIA RELEASE BY THE PAO TO THE CA REGARDING THE CASE ALONG WITH AN EMAIL NEWS ROUNDUP TO A BASE LIST OF OFFICERS AND SNCOS, WHICH INCLUDED A STORY CARRIED BY A LOCAL PAPER, CONSTITUTES UCI?

The pretrial publicity in this case also constitutes UCI. "When those with the mantle of command authority deliberately orchestrate pretrial publicity with the intent to influence the results in a particular case or series of cases, the pretrial publicity itself may constitute unlawful command influence. Even the perception that pretrial publicity has been engineered to achieve a prohibited end - regardless of the intent of those generating the media attention - may lead to the appearance of unlawful command influence." *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003). Capt Wacker's former command –both former and current commands are located in the San Diego area within a few miles of each other- released details of Capt Wacker's case to all significant local media organizations before his arraignment. Following that, the former command engaged in a series of town hall meetings and base wide press releases practically guaranteeing that every potential member or good military character witness in the case would get the message that supporting Capt Wacker at his court-martial is tantamount to harming the Marine Corps and goes against the intent of the Commander.

The media release alone may arguably be dismissed as not rising to the level of UCI. This media release, however, was different. It is not standard practice for the PAO on this base to comment on cases of this sort. Mr. Steve Liewer of the San Diego Union Tribune called it unprecedented. Mr. Rick Rogers, formerly of the San Diego Union Tribune and now a syndicated columnist, said he has never seen a press release on a case of this sort. The press release was followed up with a base wide distribution of the news stories published by the local papers. Command influence may assume many forms, may be difficult to uncover, and affects

court members in unsuspecting ways. *United States v. Johnson*, 54 M.J. 32, 36 (C.A.A.F. 2000). It is difficult to evince how the press releases and the subsequent distribution of the media release to base email distribution list has affected or will affect this court-martial. At its least serious it exposed potential members and witnesses to the facts of the case who were then told by their Commander that sexual assaults are a serious challenge in the Marine Corps. At worst, the Command's press releases have influenced or appear intended to influence the proceeding and interfere with Capt Wacker's right to obtain a fair trial. As Justice Ferguson observed in *United states v. Olson*, "the scales always become loaded against justice when lectures attended by court members involve extended discussion of offenses identical or closely related to those for which as accused is shortly to be tried. 11 U.S.C.M.A. 286, 289, 29 C.M.R. 102, 105 (1960).

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

a. That all charges in this case be dismissed with prejudice.

b. That if all charges in this case are not dismissed with prejudice, the case be abated until an independent investigation into Col Smith's actions into this case be completed and a report submitted to the court and accessible to the defense.

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

a. The defense requests physical production of the following witnesses by the Government in support of its motion (all contact information for witnesses is in the possession of the Government. Further, all witnesses will testify regarding the facts alleged in this motion, as indicated):

- Capt David Ahn
- BGen R.L. Bailey
- Maj R. Bueno

- Maj C. Blalock
- Capt Christopher Blosser
- Ms. Jessica Brooder
- Col C.C. Conlin
- Ms. Desiree Bobie (MCRD, G3)
- Maj Ted Bonanno
- LtCol G.F. Bond
- Capt B. Braden
- Maj A. C. Budomo
- SA John Burge, NCIS
- Dean Kevin Cole, USD
- Col C.C. Conlin
- Capt David Cote
- Ms. Nicole Cusack
- Ms. Elizabeth Easley
- Maj M.C. Goodpasture
- Capt Tyler J. Hart
- Col K.S. Helfrich
- Col C.F. Huenefeld, MCRD
- Mr. Steve Liewer, San Diego Union Tribune, 619-542-4572
- Maj S.E. Jackson

- Mr. Jackson Katz (the gentlemen present at MCRD that gave a series of sexual assault briefs)
- Capt Z. Keske
- Capt J. R. Liebenguth
- Maj Christopher B. Logan (MCRD, PAO)
- Mr. Clifford Meyers, MCRD
- Capt Christian Pappas
- Col Michael Richardson
- Mr. Rick Rogers
- BGen A. Salinas
- Maj Christopher Shaw
- Col Stephanie Smith
- Mr. Michael Story
- LtCol Sean Sullivan
- Capt J. Toressela
- LtCol Thad Trapp
- SSgt Heather D. Vecchia
- Ms. LaNita Wacker, Seattle, WA
- BGen J.C. Walker
- Col Bruce White (Ret.)
- Assistant Dean Carrie Wilson, USD
- Capt Woellhoff

- GySgt Pedro Navagonzalez
- Sgt Sidney King

b. The following defense exhibits are provided:

Exhibit A- Email dated 24 September 2009 by LtCol Bond

Exhibit B- Email dated 1 October 2009 by Col Smith

Exhibit C- Affidavit of Maj Logan

Exhibit D- Affidavit of Maj Blalock

Exhibit E- Affidavit of GySgt Schmiddt

Exhibit F- Bonds MPO stmt no contact by lawyers

Exhibit G- Sample of base wide media releases in this case

Exhibit H - google search screen shot

Exhibit I- Article 34 letter

Exhibit J- Capt Chris Blosser Email showing damage to Capt Wacker reputation

Exhibit K- Capt Ahn affidavit

Exhibit L - NO charges expungement order

Exhibit M - 10 Things Flyer Jackson Katz

Exhibit N- email from SA Burge to Ms. Johnson

Exhibit O- memo by Johnson regarding SJA

Exhibit P- Emails from the account of Jessica Brooder

Exhibit Q- Maj Bueno affidavit

Exhibit R- GySgt Navagonzalez Affidavit

Exhibit S- Sgt King Affidavit

c. Once the defense properly raises the issue of unlawful command influence at trial, "the Government must persuade the military judge . . .beyond a reasonable doubt that there was no unlawful command influence . . ." *Biagase* 50 M.J. at 151. Specifically, once the issue of unlawful command influence is raised by the defense, "the Government must prove beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings . . ." *Biagase* 50 M.J. at 151. This is an exception to MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 905(c)(1) (2000) as set forth in *United States v. Stombaugh*, 40 M.J. 208 (1994). The threshold for the defense to properly raise the issue of unlawful command influence at trial is low, but must be more than mere allegation or speculation. *Biagase* 50 M.J. at 150.

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

26 October 2010 /s/

Date Haytham Faraj
Civilian Defense Counsel