

UNITED STATES MARINE CORPS  
WESTERN JUDICIAL CIRCUIT

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UNITED STATES	)	GENERAL COURT-MARTIAL
	)	
v.	)	DEFENSE MOTION
	)	TO DISMISS FOR IMPROPER
DOUGLAS WACKER	)	WITHDRAWAL AND RE-REFERRAL
CAPTAIN	)	
U.S. MARINE CORPS	)	11 December 2010
	)	

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**1. Nature of Motion:** Capt Wacker now moves this Court to dismiss all charges against him with prejudice because the convening authority wrongfully withdrew the charges Capt Wacker faced at general court-martial and re-referred them to another court-martial at another command, without justification. The Government withdrew and re-referred the charges after the defense filed a motion alleging substantial, supported and high level unlawful command influence. As a result of the improper withdrawal and re-referral, Capt Wacker has been denied a constitutional right to a speedy trial and the right to due process due to Government interference with witnesses and members. He has also been denied a right to exercise his codal rights because the Government withdrew and re-referred his case to avoid having a court hear about the misconduct of a senior officer.

**2. Statement of Facts:**

- a) On 13 July 2009, Capt Wacker was preferred to a General Court Martial at MCRD, San Diego.
- b) On 14 July 2009, Capt Wacker was referred to a General Court Martial at MCRD, San Diego.

- c) On 24 September 2009 Capt Wacker's Battalion Executive Officer (and a person named on Capt Wacker's convening order), a LtCol Gregory F. Bond; sent a slanderous email to Capt Wacker's superior officers (his RS and RO for fitness report purposes at the time), as well as to Capt Wacker's potential panel members that had been named on the convening order for his case. The email spoke about Capt Wacker's guilt, made an analogy to Capt Wacker being a child molester, predicted Capt Wacker would be a lone shooter and kill people and also mentioned an intentional plan by Capt Wacker's command to interfere in the court martial process of other U.S. Marines facing trial at MCRD: "The next time we send a "body" to the G-3, we will stipulate and make recommendations/agreements before he is billeted."
- d) Following the email by LtCol Bond, Colonel Stephanie Smith, the former SJA on Capt Wacker's case, and also Capt Wacker's Battalion Commander at the time, wrote an email on 2 October 2010 purporting to admonish LtCol Bond for his email. She specifically wrote "I...do not in any manner condone or ascribe to his comments." This was not true however and Col Smith knew it was not true when she wrote that email because she had already expressed the same sentiment to panel members from the convening order, including Maj Blalock. Maj Blalock also happened to be a potential good character witness for the accused. Maj Blalock provided an affidavit in which he states:

I was approached by Col Smith, then the MCRD SD SJA, following a Wednesday Chief of Staff meeting. At that time she warned me to be careful in dealing with Capt Wacker and then proceeded to give me the background and nature of the case being brought against him. She referred to him as a narcissist whose ego is finally catching with him. The manner in which she briefed me on Capt Wacker left no doubt that she believed him guilty of the charges being brought against him. She also suggested the we not assign him to any duties that would benefit his case. I took this to mean that she did not want us to allow him the opportunity to bolster his credibility prior to the court date...After reading the statements made by LtCol Bond, I discussed the content with LtCol Trapp who had received

the same email. He stated to me that Col Smith had told him much the same thing that LtCol Bond had written in his e-mail.

Maj Blalock Affidavit

- e) Judge Advocate Instruction 5803.1B ( JAGINST 5803.1B) states that a covered attorney shall be “honest and truthful in all dealings.” Col Smith is a covered attorney. Col Smith’s statement “I...do not in any manner condone or ascribe to his comments” is directly contradicted by statements she made to LtCol Trapp and Maj Blalock.
- f) On 16 October 2010, the Defense filed a UCI motion alleging unlawful command influence.
- g) About a week after the Motion was filed the defense was contacted by the prosecutor, LtCol Sullivan, who requested additional time to investigate the allegations and respond to the motion. Mr. Faraj agreed to the request and any necessary delay to investigate and respond.
- h) Inexplicably, on 18 November 2009, Capt Wacker’s charges were withdrawn and dismissed. The Government provided no reason for the withdrawal and dismissal of the charges.
- i) Colonel M. Richardson was the SJA at the time of the Col Smith and LtCol Bond emails, and the withdrawal and dismissal of charges.
- j) Col Richardson is now the senior military judge for the Western Judicial Circuit.
- k) On 7 January 2010, Capt Wacker was preferred to a General Court-martial at MCAS Miramar.
- l) LtCol Sean Sullivan remained on the case after the dismissal at MCRD and continued to participate for the Government while the case was pending at Miramar, up to and including the second Article 32 hearing. Capt Evan Day was also detailed as a prosecutor.

- m) On 26 May 2010, Capt Wacker was referred to a general court-martial at MCAS Miramar.
- n) MajGen Bailey had been the GCMA when Capt Wacker was transferred to MCAS Miramar. MajGen Conant became the new GCMA for Capt Wacker's case at MCAS Miramar. Capt Wacker's case was not transferred to a higher convening authority (e.g. Marine Corps Recruiting Command (MCRC) or Training and Education Command (TECOM), but was instead transferred to 3d Marine Aircraft Wing, I Marine Expeditionary Force, Marine Forces Pacific.

### **3. Statement of Law:**

#### Withdrawal and re-referral of charges

R.C.M. 604, Manual for Courts-Martial (2008 ed.) governs the withdrawal and re-referral of charges in a case. Under R.C.M. 604 (a) the convening authority or a senior competent authority may for any reason and any time cause charges to be withdrawn from a court-martial before findings. *Id.* Withdrawn charges may not be referred to another court-martial if the withdrawal was for an improper purpose. R.C.M. 604(b). Improper reasons for a withdrawal include the intent to interfere with the free exercise by the accused of a constitutional or codal right. *Id.* discussion. *United States v. Smead*, 68 M.J. 44, 62 (C.A.A.F. 2009). In *Smead*, the court considered the propriety of referral of withdrawn charges following the lower court's finding of an improper plea. In analyzing the rule, the *Smead* court refers to Paragraph 56(c) of the 1969 manual and the analyses of that paragraph by the court in *United States v. Cook*, 12 M.J. 448 (C.A.A.F. 1982).

The *Cook* court analogized to Fed R. Crim. P. 48(a) in deciding how withdrawn charges should be referred to a new court-martial.

[T]he withdrawal of a charge on proper grounds before the commencement of trial does not preclude a later attempt by the Government to reinstitute prosecution on that charge. However, just as Fed. R. Crim. P. 48(a) requires that the Government secure leave of court to withdraw or dismiss an indictment to protect a defendant against arbitrariness and unfair treatment, the Manual's insistence that "good cause" for withdrawing a specification be "made a matter of record" safeguards the military accused.

*United States v. Cook*, 12 M.J. 448, 454 (C.M.A. 1982).

#### **4. Issue**

WHETHER REFERRAL OF CHARGES WITHDRAWN AFTER THE DEFENSE HAS FILED A UCI MOTION ALLEGING WITNESS AND MEMBER TAMPERING BY THE CONVENING AUTHORITY AND THE SJA SUPPORTED BY SUBSTANTIAL EVIDENCE OF INTERFERENCE BY THE SJA AND NCIS INVESTIGATORS WITH THE ACCUSED'S DUE PROCESS RIGHT TO AN ARTICLE 32 HEARING AND A FAIR TRIAL CONSTITUTES IMPROPER PURPOSE UNDER R.C.M. 604(B)?

Yes. The withdrawal and referral of charges to another court-martial in order to interfere with the accused's free exercise of his constitutional or codal rights constitutes an improper purpose. On November 18, 2009, Capt Wacker filed a UCI motion alleging serious and grave allegations of the Rules for Court-Martial and several violations of punitive Articles of the UCMJ against Col Smith who had at one point acted as the SJA in this case and later as the accused's Commanding Officer. A few weeks after the UCI motion was filed the Government, without seeking judicial approval, withdrew and dismissed the charges. No explanation for the withdrawal was offered on or off the record.

The dismissed charges were referred to another court martial under a new convening authority. No reason was provided as to why the original charges were withdrawn or why Captain Wacker was immediately transferred to 3d MAW at MCAS Miramar. Within the

absence of any legitimate purpose or explanation for the withdrawal of the original charges lays the strongest proof evidencing an improper purpose.

Convening authorities withdraw charges that get re-referred for all sorts of reasons. These include improvident pleas, the temporary unavailability of witnesses or evidence, military necessity, or simply a lack of evidence of a crime. Such re-referrals are proper under R.C.M. 604(a). A withdrawal and referral, on the other hand, to avoid a hearing by a judge of a constitutional and legal challenge to a proceeding raised by the accused falls squarely within the definition of improper purpose prohibited by R.C.M. 604(b).

One of the ways to test for the propriety of a decision to withdraw with the intention of referring again is to consider the prejudice to the accused.<sup>1</sup> For example a re-referral of withdrawn charges that resulted in a previous evidentiary decision by a judge to be overturned is prejudicial. *United States v. Vanover*, 27 M.J. 345, 347-8 (C.A.A.F. 1988). Despite government argument that the admitted evidence in the second court-martial that was previously excluded in the first court-martial was merely a consequence of legitimate government action, the court found the purpose to be improper because of the absence of an obvious legitimate purpose. *Id.* The practical effect resulted in prejudice to the accused.

Likewise, the government in this case can state no legitimate purpose for the decision to withdraw and dismiss, except perhaps to protect a senior officer from public scrutiny<sup>2</sup>. The practical effect of the decision to withdraw and refer charges to another court-martial at another Base resulted in palpable, substantial, and ongoing prejudice to the accused. It served the

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<sup>1</sup> While analyzing the Government's actions for prejudice is one way that court's look to determine whether a withdrawal is proper, it is not dispositive. A proper withdrawal could substantially prejudice the accused. For example, plea that becomes improvident may cause a delay that then results in witnesses for the defense becoming unavailable. Such prejudice does not make a re-referral improper.

<sup>2</sup> Courts-martial and hearings are public events and are therefore become public records. See RCM 806. See also *United States v. Ortiz*, 66 M.J. 334, 336 (C.A.A.F. 2008)

purpose of the command to protect a senior officer from public scrutiny and criticism for her underhanded and nefarious acts to interfere with a judicial proceeding and denied the accused an opportunity to have a speedy and fair trial and to present strong evidence of his professionalism and character.

a. Capt Wacker suffered prejudice as a result of the re-referral of the charges.

At the time he was initially charged Capt Wacker worked for the Assistant Chief of Staff G-3, under the Mission Assurance section of the Marine Corps Recruit Depot at San Diego. He was tasked with several responsibilities that tested his abilities as a Marine Corps Captain and would allow him to demonstrate his organizational, leadership, team building, administrative, and analytical skills. His duties would also allow his OIC, other seniors and colleagues to observe his character traits and to form an opinion about his military character and professionalism. His duties included working on Emergency Action Plans to respond to terrorism threats and attacks, coordinating and participating in contingency exercises that test the contingency plans, and working as part of robust staff section of the Operations division of the base.

Col Smith did not want Capt Wacker to be in such a demanding billet because she wanted to deny him the opportunity to prove that he is innocent of the charges; she therefore directed that he not be given any serious duties or responsibilities. She orchestrated the transfer of Capt Wacker from the AC/S G-3 Mission Assurance section to a novel creation of a billet where she had direct supervision, H&S Bn, S-3A. When the defense filed a UCI motion to challenge her unlawful influence and exposing potentially criminal conduct by her as an SJA and a convening authority<sup>3</sup>; the Government withdrew and dismissed the charges. Capt Wacker was then transferred to another command and the charges were re-referred. The practical effect of the

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<sup>3</sup> See affidavits of Maj Bueno and Capt Ahn.

Government's actions effectuated the intent of Col Smith. He was moved from a billet of substantial responsibility in the most important staff section on his former Base to his current job. In his current duties he helped coordinate a party –the Marine Corps Ball. The resultant effect on development of character evidence from the transfer may appear to be a mere coincidence of the transfer. But as the court stated in *Vanover* “coincident or not, the failure...to dispel appearances of evil in this context warrants extraordinary action on our part.” *Vanover*, 27 M.J. 348.<sup>4</sup>

- b. The appearance of evil demands attention in this case. But to really understand it, the historical posture of the case must be considered. This case began in the city of New Orleans in the Spring of 2007. In June 2007, the University of San Diego conducted its own investigation and held a Critical Issues Board (administrative) hearing regarding the allegations against Capt Wacker. The Board found by a preponderance of the evidence that he was “not responsible” for any misconduct. At the conclusion of the USD hearing the University considered the matter final. Unsatisfied with that outcome, the alleged victims made their allegations to the New Orleans Police Department. An arrest warrant was issued in October 2007 that Capt Wacker only became aware of through his chain of command at MCRD. He voluntarily flew to New Orleans and turned himself in to the authorities. The New Orleans District Attorney filed charges against Capt Wacker. Upon considerations of the available evidence by the New Orleans Parrish Court, a judge dismissed the charges and the entire record, including the arrest warrant, was expunged. *Capt Wacker suffered prejudice because he lost good character evidence and witnesses.*

“Character evidence may itself generate reasonable doubt in the fact finder’s mind.” *United States v. Vandelinder*, 20 M.J. 41, 47 (C.M.A. 1985), citing *Michelson v. United States*, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948); *Edgington v. United States*, 164 U.S. 361, 17 S. Ct. 72, 41 L. Ed. 467 (1896). Good Military Character evidence on its own is sufficient to raise reasonable doubt as to an accused’s guilt. Military Judge’s Benchbook, DA PAM 27-9, instruction 7-8-1. Realizing that Capt

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<sup>4</sup> *United States v. Vanover* is a decision based on an extraordinary writ filed by the defense with Court of Military Appeals following a denial of a similar petition by the Navy-Marine Court of Military Review challenging the trial judge’s denial of the motion to dismiss for an improper withdrawal and re-referral.



Wacker held an important billet within the G-3 office and worked for the AC/S G-3 officer who would give the accused the benefit of the assumption of innocence and assigned him tasks and responsibilities commensurate with his rank, experience, education and training, Col Smith decided to undermine Capt Wacker's ability to be gainfully employed and to develop good character evidence and witnesses. She undertook to unlawfully influence the witnesses and his immediate chain of command. When her improper action were challenged by defense' UCI motion, the command moved Capt Wacker to another unit. Without a genuine billet to fill at his new command, Capt Wacker was relegated to a place holder thus effectuating that which Col Smith sought to achieve. Government argument that withdrawal and re-referral were to address even the appearance of UCI, are not legally persuasive as held in *Vanover, supra*. The practical effect achieved that which Smith sought to all along, undermining Capt Wacker's ability to defend himself. Members will wonder why he has been moved around. They will make negative assumptions about his effectiveness and his character based on the history of his many billet changes. Members' knowledge and experience will replace testimony of character witnesses called by Capt Wacker because no matter how much an officer is praised by colleagues, when your commanders reject you and transfer you, members conclude that the officer is undesirable and unprofessional.

- c. *Capt Wacker suffered prejudice because he was denied character evidence and potential witnesses from an office and a billet that is qualitatively better than his current billet.*

The putative character evidence from the MCRD G-3 office stands distinct from other possible character evidence. Any Marine performing a job well will be able to call upon good

character evidence. But not all character evidence is equal. Character evidence resulting from undertaking duties that challenge an officer with observation from an OIC who is a highly decorated ground combat officer with substantial command and combat experience stands in distinct contrast from being in a billet where the accused performs random duties such as coordination of the Marine Corps Ball as he awaits trial. The qualitative difference between the two is substantial. Col Smith understood that if Capt Wacker continued to work in the G-3 it could undermine her objective of obtaining a conviction at any price, regardless of the truth. *See Maj Bueno Affidavit*. Accordingly she improperly moved him from the G-3 and when she was caught, the command moved him off the base entirely and re-referred the new charges against him at the new command.

The Government will of course argue that the decision to move is not subterfuge as prosecutors similarly argued in *Vanover*, 27 M.J. at 348. But if it is not subterfuge, then what is it? If it sought to remedy the UCI, the actions to remedy achieved the very thing that Col Smith intended at the outset.<sup>5</sup> In either case, nothing in the record evidences any reason that supports holding that the withdrawal with the intent to re-refer was for a proper reason. Even ascribing a non-nefarious purpose for the withdrawal, this court must look into the prejudice suffered by Capt Wacker as a result of delays in the trial schedule when all the witnesses and evidence are available.

d. Capt

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<sup>5</sup> The UCI motion was never heard. We anticipate that the Government will argue that the move was to prevent even the appearance of UCI. If the Government adopts this position, this court should hear all the evidence of UCI at MCRD to consider the genuineness of the defense' original UCI claim. If the UCI is actual then any action by the government to remedy the UCI but that obtains for the Government the same benefit resultant from the UCI demands decisive action to remedy by this Court. *See United States v. Lewis*, 63 M.J. 405 (C.A.A.F 2006); *U.S. v. Vanover*, 27 M.J. 345 (C.A.A.F. 1988).

The adjudication of this matter by two other competent jurisdictions that found no misconduct is not being raised to challenge the jurisdiction of this court but to point to the level of malevolent action undertaken by an SJA who, based on evidence that has been uncovered since this case was re-referred, appears to thumb her nose at the military justice system and uses it to advance a personal agenda disconnected from the objectives of the military justice system to maintain good order and discipline.

When Col Smith heard about the allegations in this case she conspired with NCIS Agent John Burge to coerce and intimidate witnesses; to undermine Capt Wacker's rights to a fair and impartial Article 32 hearing and trial; to fabricate evidence; and to punish Capt Wacker without due process. Thus, despite the USD matter being concluded, Col Smith communicated with the law school and influenced them through the use of her office and the NCIS agent to withhold conferring of a degree that Capt Wacker earned and paid for. Additionally, Col Smith encouraged Col Helfrich, a previous H&S Bn Commanding Officer, to petition the SJA to the Commandant of the Marine Corps at the time, BGen Walker, for Capt Wacker's disenrollment from the law education program. He was subsequently disenrolled in May 2009 based on the allegations that he disobeyed a direct lawful order, a charge that was later determined to be unfounded at the first Article 32 hearing and withdrawn by the acting SJA. In other words he was disenrolled from a program that he worked very hard to join and succeed in based on unfounded allegations. She also contacted members and witnesses and made statements that clearly violate the ethics rules and undermined the court-martial process. As a result of her unlawful actions, the defense filed a motion alleging unlawful command influence. Shortly after the defense filed its motion, the charges were withdrawn, Capt Wacker was transferred and the charges were re-referred.

To a member of the public aware of these facts, the actions appear to be calculated by the Marine Corps and senior officers to protect one of their own. Such arrogant abuse of the Military Justice process demands extraordinary action by this court. But even if the Government were to concede that their actions were motivated by a desire to cure the UCI, the re-referral would continue to be improper because a court-martial had already convened and no leave of court was obtained before the charges were withdrawn. *See U.S. v. Cook, supra*. Moreover, the re-referral itself served to effectuate that which Col Smith desired to achieve. By causing Capt Wacker to be transferred to another command, Col Smith denied Capt Wacker the opportunity to develop good character evidence and witnesses, caused delays in the adjudication of his case, created a trail of transfers that will certainly raise doubts in the member's minds about his professionalism, and delayed his ability to sit for a Bar exam despite his having completed the requirements for a J.D. and passing all the exams. He cannot sit for an exam because the University refuses to confer a law degree. The University refuses to confer a law degree because Col Smith abused her authority and that of the command she represents to intimidate the University into believing that granting the law degree would expose them to some sort of liability because their Board got it wrong.

The delays as a result of the re-referral have also prejudiced Capt Wacker by denying him the ability to remain in the legal field. He was removed from the law program pursuant to recommendations by Col Smith to the SJA to CMC. That removal cannot be challenged until these proceedings are complete. These proceedings have taken this long because Capt Wacker was transferred from his command and had charges re-referred to cover up the misconduct of a senior officer, Col Stephanie Smith.

**5. Relief Requested:** The defense requests that the charges and specifications be dismissed with prejudice.

**6. Evidence and Burden of Proof:**

a. Witnesses: 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 are expected to testify regarding the facts alleged in this motion, as indicated in the facts section):

1. Maj Z. Keske
2. Col Christopher Conlin LtCol Trapp (testify to coordination of transfer and activities of the former SJA on this case)
3. Col S. Smith (testify to coordination of transfer and activities of the former SJA on this case)
4. Col Helfrich
5. LtCol Bond Maj Armando C. Budomo
6. Maj Bueno
7. Maj Blalock
8. Miss Desiree Bobie

b. The following defense exhibits are attached (in arguing this motion, the defense will additionally rely upon the exhibits submitted as part of the record for the pending UCI motion in this case too):

1. First charge sheet and convening order

2. Second charge sheet and convening order
  3. Withdrawal and dismissal of charges letter
  4. Filing of defense UCI motion
- c. Burden of Proof: Pursuant to R.C.M. 905(c) the burden of proof is on the Defense

by a preponderance of the evidence.

**7. Argument:** Respectfully requested.

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 13, 2010, I electronically filed the foregoing paper with the Clerk of Court and with the Government at the following: Capt Douglas Hatch at [douglas.hatch@usmc.mil](mailto:douglas.hatch@usmc.mil), and Capt Evan Day at [evan.s.day@usmc.mil](mailto:evan.s.day@usmc.mil).

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