

UNITED STATES MARINE CORPS
WESTERN JUDICIAL CIRCUIT

UNITED STATES)	SPECIAL COURT-MARTIAL
)	
v.)	DEFENSE MOTION
)	TO DISMISS (UNLAWFUL PRETRIAL
JOSE BRITO)	PUNISHMENT MOTION)
SERGEANT)	
U.S. MARINE CORPS)	26 September 2010
)	
)	
)	

1. Nature of Motion.

Pursuant to Rule for Courts-Martial (R.C.M.) 907, Article 37 of the Uniform Code of Military Justice (UCMJ), and the Due Process Clause of the Fifth Amendment to the United States Constitution, the Defense moves the court to dismiss all charges and specifications on the grounds that the actions of officers and Staff Non-Commissioned Officers in Sgt Brito's command constituted unlawful command influence.

2. Facts.

The defense incorporates by reference that facts set forth in its motion to dismiss for violation of Article 13.

3. Discussion.

B. WHETHER UNLAWFUL COMMAND INFLUENCE OCCURRED WHEN SENIOR MEMBERS OF AN ACCUSED'S IMMEDIATE COMMAND DECLARE THEIR BELIEF IN AN ACCUSED'S GUILT, CHASTISE AND HARASS THE ACCUSED BEFORE POTENTIAL WITNESSES AND MOVE HIM, WITHOUT OFFICIAL ORDERS, FROM COMMAND TO COMMAND WITH A WARNING TO RECEIVING COMMANDS THAT HE IS A BAD MARINE?

a. Statement of the law.

Article 37, UCMJ states in part “(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.”

Unlawful command influence is “the mortal enemy of military justice.” *Gore*, 60 M.J. at 178 (quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A.1986)). “Congress and this court are concerned not only with eliminating actual unlawful command influence, but also with ‘eliminating even the appearance of unlawful command influence at courts-martial.’” *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F.2006) (quoting *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A.1979)). “[O]nce unlawful command influence is raised, ‘we believe it incumbent on the military judge to act in the spirit of the Code by avoiding even the appearance of evil in his courtroom and by establishing the confidence of the general public in the fairness of the court-martial proceedings.’” *United States v. Stoneman*, 57 M.J. 35, 42 (C.A.A.F.2002) (quoting *Rosser*, 6 M.J. at 271). This call to maintain the public's confidence that military justice is free from unlawful command influence follows from the fact that even the “appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.” *Simpson*, 58 M.J. at 374 (quoting *Stoneman*, 57 M.J. at 42-43).

To prove UCI at trial the defense is required to present “‘some evidence’ “of unlawful

command influence. *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F.1999) (quoting *United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F.1995)); *United States v. Simpson*, 58 M.J. 368, 373 (C.A.A.F.2003). The defense must: (1) “show facts which, if true, constitute unlawful command influence” and (2) show “that the alleged unlawful command influence has a logical connection to the court-martial, in terms of its potential to cause unfairness in the proceedings.” *Biagase*, 50 M.J. at 150. If the defense meets its burden, the Government must establish one of the following by proof beyond a reasonable doubt: (1) disprove the predicate facts on which the allegation of unlawful command influence is based; (2) persuade the military judge that the facts do not constitute unlawful command influence; or (3) prove at trial that the unlawful command influence will not affect the proceedings. *Id.* at 151.

- b. The statements of the officers and SNCO’s to subordinates and seniors of the accused regarding his guilt are unlawful command influence.

A neutral member of the public aware of all the facts of this case would harbor significant doubt about the fairness of a court-martial wherein the command who is charging the accused and statutorily empowered to prosecute him, yet remain neutral during the process, publicly denounces the accused as a “bad Marine” and asserts belief in his guilt. Sgt Brito was moved from billet to billet and given no opportunity to develop good military character. On the contrary, he was arguably being setup to fail by being sent to commands without transfer orders and assigning him duties unrelated to his MOS. His XO, and at times acting convening authority LtCol Begin, called Sgt Brito a ‘bad Marine’ to Sgt Brito’s SNCOIC. Sgt Brito’s SNCOIC was intimidated for attempting to help Sgt Brito. In front of junior Marines, a senior SNCO told them that Sgt Brito had had a hissy fit. The innuendo, criticisms, maltreatment, and harassment of Sgt Brito in the presence of Marines within the command constitutes unlawful command

influence because it had an actual unlawful influence wherein members of the command now believe that Sgt Brito is actually guilty. Members of the command will be reluctant to contradict the views of senior offices and SNCO's in the command. Alternatively, there is a clear perception of an appearance unlawful influence because a member of the public informed of the facts of this case would harbor significant doubt about the fairness of a trial of Sgt Brito by a command that has declared its belief in his guilt and called him a bad Marine.

4. Burden of proof.

The initial burden is on the defense to present a quantum of evidence to raise the issue of unlawful command influence. Once raised the burden shifts to the government to prove beyond a reasonable doubt that UCI does not exist or that it is harmless beyond a reasonable doubt. *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999). *United States v. Harris*, 65 M.J. 594, 598 (N.M. Ct. Crim. App. 2007).

5. Relief Requested. Based on the forgoing, the accused by and through counsel, respectfully requests dismissal of all charges and specification with prejudice.

6. Argument. Respectfully requested.

By: /S/
Haytham Faraj
Attorney for Plaintiff
1800 Diagonal Road
Suite 210
Alexandria, VA 2314
Tel 888-970-0005
Fax 202-280-1039
Email: Haytham@puckettfaraj.com

26 September 2010
Date

CERTIFICATE OF SERVICE

I certify that an electronic copy of this document was served upon government counsel on
26 September 2010.

By: /S/

Haytham Faraj
Attorney for Plaintiff
1800 Diagonal Road
Suite 210
Alexandria, VA 2314
Tel 888-970-0005
Fax 202-280-1039
Email: Haytham@puckettfaraj.com

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