IN A GENERAL COURT-MARTIAL
IN THE SECOND JUDICIAL CIRCUIT, U.S. ARMY TRIAL JUDICIARY
FORT BRAGG, NORTH CAROLINA

UNITED STATES	)	
	)	
v.	)	**Ruling and Order:**
	)	**Government Motion in Limine to**
SGT Robert B. Bergdahl	)	**Admit Evidence of Injuries**
HHC, Special Troops Battalion	)	
U.S. Army Forces Command	)	**16 December 2016**
Fort Bragg, North Carolina 28310	)	

1. The government has moved this court to admit evidence of injuries to soldiers involved in operations to recover the accused in the government's case in chief. G App 44. The defense did not file a written response. After the motions hearing on this matter, the government filed a supplemental motion. G App 60. The defense filed a written response to the government's supplemental pleading. D App 52

FACTS:

2. The Court considered the government's motion and supplement thereto, as well as the defense reply to that supplement, testimony of witnesses, other relevant appellate exhibits admitted during the motions hearings on this matter, as well as the argument of counsel at both motions hearings. The court finds the following facts by a preponderance of the evidence:

a. In Charge II and its specification, the accused is charged with misbehavior before the enemy by leaving Observation Post (OP) Mest thereby endangering the safety of OP Mest and Task Force (TF) Yukon, who were subsequently charged with trying to recover him.

b. On or about 7 July 2009 six U.S. service members belonging to an Embedded Training Team (ETT) participated in a recovery operation along with 52 soldiers from an Afghan National Army (ANA) unit. All were under the direction of then LTC Robert Campbell, the commander of the Cavalry Squadron responsible for that particular sector in Afghanistan. LTC Campbell and his staff assigned the mission to the ETT and the ANA soldiers.

c. The ETT soldiers were not normally associated with Campbell's squadron but were performing duties with his unit for the DUSTWUN[1] recovery operation to knock on doors of Afghan citizens in the local area to gather information that might lead to the

[1] Duty Status-Whereabouts Unknown. An acronym used to describe a situation where a US service member is unaccounted for and efforts are made to recover him/her.

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recovery of the accused. Organization wire diagrams from the period in question show that the ETTs were OPCONd to TF Yucon. Furthermore, Campbell's clear recollection is that he had complete authority over any assets that came to him in terms of employing them in the search for the accused and that he did not have to route his orders to the ETTs through any other unit or command.

d. The commander of the mission was then CPT John Marx, a U.S. Air Force intelligence officer with no combat experience or training at the time of the mission. Of the five other U.S. soldiers involved in the operation, all had infantry training but only one had extensive combat infantry experience. The ANA soldiers were infantry trained and had their own command structure.

e. During the operation, the team made contact with an unknown number of enemy forces. In the ensuing firefight, three U.S. Service members were injured due to enemy fire. SFC Allen, who received the worst injury, was shot through the head and experienced debilitating head trauma.

f. An AR 15-6 investigation conducted within days of the operation found that the mission was not properly planned, executed, or supported. The AR 15-6 investigation was conducted in less than 11 days from appointment of the IO to issuance of his report. The AR 15-6 IO had very limited experience in combat operations or command and control of same. He had no experience with DUSTWUN operations.

LAW AND ANALYSIS:

3. Relevant evidence is evidence which has any tendency to make a fact of consequence more or less probable than it would be without the evidence. Military Rule of Evidence (MRE) 401. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence. MRE 403. "The overriding concern of MRE 403 'is that evidence will be used in a way that distorts rather than aids accurate fact finding.' " *U.S. v. Stephens*, 67 MJ 233, 236 (2009) *citing* 1 Stephen A. Saltzburg et al., Military Rules of Evidence Manual § 403.2[4], at 4-27 (6th ed. 2006). The danger that MRE 403 is designed to prevent is that evidence, though relevant, "lure the factfinder into finding guilt on a ground different from proof specific to the offense charged." *U.S. v. Collier*, 67 MJ 347 (2009). When applying the MRE 403 balance test, the term "substantially outweighs" dictates that the balance should be struck in favor of admission. *U.S. v. Teeter*, 12 MJ 716 (ACMR 1981). The judge's discretion to exclude evidence under MRE 403 is designed to prevent "unwelcomed influence" and to prevent evidence that will likely be used for something other than its logical probative force, which causes the fact finder to dramatically over-estimate the value of the evidence, which appeals only to an emotional view of the evidence or confuses the members about the actual probative value or purpose of the evidence. *U.S. v. Owens*, 16 MJ 999 (ACMR 1983).

4. The court is persuaded that the government has presented evidence by which a finder of fact could reasonably find that the US service members from the ETT who conducted the fateful 7 - 8 July 09 mission to recover the accused were a part of TF Yukon. There is evidence that they were OPCONd to LTC Campbell's unit, that his unit was a part of TF Yukon and that for all practical purposes, OPCON means that they belonged to that command. Thus, evidence of injury to members of that ETT is relevant under MRE 401 because it does tend to make a fact of consequence (that the accused's alleged misconduct endangered TF Yukon) more likely.

5. In order to meet its burden with respect to Charge II, the government must prove beyond a reasonable doubt that the accused, among other things, misbehaved and that misbehavior endangered the safety of OP Mest and TF Yukon. In this case, that misbehavior is charged as intentional misconduct rather than some negligent act. Endanger is not defined by Article 99. However, in *U.S. v. Carey*, the United States Court of Military Appeals (USCMA) applied the term "jeopardized" when analyzing whether certain misconduct endangered within the meaning of Article 99. *U.S. v. Carey*, 15 CMR 112, 116 (USMCA 1954). This usage applies a plain meaning to the term endanger, which is the interpretation that will be applied here.

6. Important to the consideration of whether a certain action may have endangered a command is the application of the legal principle of causality. Determining causality means analyzing whether a specific result would have occurred "but for" a certain action. This is commonly called proximate cause. In the context of Article 99, that means determining whether the endangerment was the natural and probable consequence of the accused's intentional act. *Id.* Furthermore, in the law of causality, the concept of superseding intervening cause can be critical to the analysis. An intervening cause can override another person's responsibility for consequences when "the second act looms so large in comparison with the first that the first is not to be regarded as a substantial factor in the final result." *U.S. v. Lingenfelter*, 30 MJ 302, 307 (CMA 1990) (Internal citations omitted). In a trial where an accused is charged with involuntary manslaughter, for example, evidence of the victim's contributory negligence or of the intervening negligence of some third party would be critical to the determination of causality and, thus, criminal responsibility for the homicide. Surely, much time in trial would be devoted to that determination. Such a determination would be critical to the outcome of that trial.

7. Here, however, the accused is not charged with causing anyone's injury or death. He is charged with endangering the command. While there are similarities in those consequences, they are distinct. What is more, it is not necessary to the determination of endangerment to determine the issue of causality for anyone's injuries -- which is not true in the involuntary manslaughter example discussed above. That is to say, in an involuntary manslaughter trial, the evidence of cause of death is "the very essence of the trial" as opposed to one factor about one type of evidence among many that can be used to prove one aspect of one element of an offense. And, where, as here, there is a warm dispute as to the proximate cause of those injuries, a careful MRE 403 balance test application is required.

8. In this case, the government admits that it has ample evidence that the commands conducted numerous operations to attempt to recover the accused. What is more, the government has undisputed evidence that these operations, of necessity, had the tendency to and, in fact, did bring members of the command into contact with an extremely hostile enemy. This is potentially compelling evidence which likely will not be disputed by the defense. The government argues that they should not be limited to this evidence, but, rather, should be allowed to seal-the-deal with their most compelling evidence -- that soldiers were actually injured trying to recover the accused. However, courts-martial are not no-holds-barred affairs where all relevant evidence is admitted. Furthermore, the fact that someone was injured on a mission is no more proof that the members of the unit conducting the mission were endangered than evidence that no one was injured would be proof that the mission did not endanger any member of the unit. When the nature of that evidence is such that the danger of unfair prejudice *substantially* outweighs the evidence's probative value, the evidence should be excluded. Such is the case here.

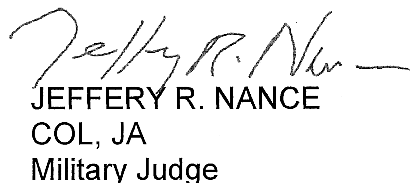
9. First, when compared to other evidence on the issue of endangerment, the value of the evidence of these terrible injuries to SFC Allen, SPC Morita and SPC Benson is reduced. Were this the only evidence of endangerment, its value would be extremely high. And, just because the government believes such evidence is more compelling than the mere evidence of possible injury, that is not necessarily true (see paragraph 8 above). No real value is added by demonstrating that injury actually occurred beyond that which is achieved by showing that it was likely to occur. The government must prove that the accused misconduct endangered the command not that it actually caused injury. Second, in order to decide whether they should consider the evidence of injury at all, the members would have to be instructed about proximate cause and superseding cause and decide whether or not the acts of the accused caused the injuries in this legal sense. And this inquiry relates to only one aspect of one element of a total of four elements. Then, the members must be able to pivot back to the actual charged offense and determine if the other three elements have been proved beyond a reasonable doubt -- all the while removing from their minds any sympathy or outrage they may feel over the fact that those innocent soldiers were injured. Though they would be instructed by this court carefully on the law of proximate cause as well as the fact that if they decide the accused did cause the injuries in question they may not allow that determination to cause them to jump all the way to a finding of guilty for the offense charged, this likely would be asking too much of them. Anyway, it is a risk that does not have to be taken. Third, there is little doubt, based upon the testimony and atmosphere at the motions hearing on this matter, that we would spend days at trial litigating the proximate cause issue -- in spite of what the government says in its supplemental pleading[2]. The members would certainly be confused and much time would be wasted

[2] Indeed, the two day motions hearing seemed to be just a taste of what it would be like to litigate the issue of cause at the actual trial. The witnesses who testified would be examined and cross-examined more thoroughly. Other witnesses who were involved in the assigning, planning, provisioning and execution of the mission would be called. Dueling experts on tactics, planning and operations would likely be called. The defense would surely want radio transmission recordings and battle camera recordings from the Air Force F-15s and Army rotary aircraft involved in

proving (or not proving) a point that can be easily established without going down this proverbial "rabbit hole" -- that is, that the accused's intentional actions endangered (not caused injury to members of) the command. Weighing the probative value against the danger of unfair prejudice, I find that the probative value compared to other evidence on the question of endangerment is low and that the danger of unfair prejudice to the accused, confusion of the issues, misleading the members and wasting time substantially outweighs that limited probative value. In arriving at this conclusion I considered the likelihood that some instruction from the court would cure the possibility of unfair prejudice. I do not believe an instruction would solve that problem under the circumstances. The accused is not to be convicted because, while searching for him, his comrades were horrifically injured. Even (perhaps especially) hardened combat veterans of many deployments who might sit on this panel would be hard pressed not to be affected by the horrific injuries to SFC Allen, in particular. Since the danger can be avoided, I deem that it should be.

RULING:

10. The government motion in limine is DENIED. The government is free to put on evidence, assuming they have it, of the missions undertaken to recover the accused; the hasty nature of the planning of such missions due to the circumstances; the risk associated with such missions; that any such missions actually had or potentially could have had contact with the enemy; the nature of that enemy and his capabilities; the numbers, frequency and manning of such operations; the impact, if any, such operations had on other missions specifically and on security in general; and any emphasis or pressure from higher ups to "find Bergdahl"; as well as any other relevant, admissible evidence on the issue of endangerment. However, the government may not put on evidence of actual injuries suffered by any service members in conducting operations to recover the accused.



JEFFERY R. NANCE
COL, JA
Military Judge

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the CAS and relief of the mission. The command would be placed on trial. The mission would be dissected and examined, turned over and filleted. The litigator's imagination verily explodes with possibilities.