

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

UNITED STATES)	Defense Motion to Dismiss
)	(Unreasonable Multiplication
v.)	of Charges for Findings)
)	
SGT Robert B. Bergdahl)	
HHC, Special Troops Battalion)	
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	25 August 2017

RELIEF SOUGHT

The defense moves for an order directing dismissal of one of the two charges against SGT Bergdahl for unreasonable multiplication of charges (UMC) for findings. The issue is one of law; oral argument is not required.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The defense as moving party has the burden of persuasion. Proof by preponderance of the evidence is required for factual matters. RCM 905(c)(1), but there are no material issues of fact to be determined in connection with this motion.

FACTS

SGT Bergdahl is charged with violations of Articles 85 and 99, UCMJ. Each charge alleges – and the specification for each describes – only a single, instantaneous act: that SGT Bergdahl left OP Mest on 30 June 2009. No other acts by SGT Bergdahl are charged or specified.

ARGUMENT

As a leading authority observed long ago, “[a]n unnecessary multiplication of forms of charge for the same offense is *always* to be avoided.” William Winthrop, *Military Law and Precedents* 143 (2d ed. 1920 Reprint) (emphasis added). RCM 906(b)(12) permits the military judge to dismiss charges before findings for unreasonable multiplication of charges:

(12) Unreasonable multiplication of charges. The military judge may provide a remedy, as provided below, if he or she finds there has been an unreasonable multiplication of charges as applied to findings or sentence.

(i) *As applied to findings.* Charges that arise from substantially the same transaction, while not legally multiplicitous [*sic*], may still be unreasonably multiplied as applied to findings. When the military judge finds, in his or her discretion, that the offenses have been unreasonably multiplied, the appropriate remedy shall be dismissal of the lesser offenses or merger of the offenses into one specification.

“What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.” RCM 307(c)(4). Five factors bear on whether charges have been unreasonably multiplied:

- (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
- (2) Is each charge and specification aimed at distinctly separate criminal acts?
- (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
- (4) Does the number of charges and specifications [unreasonably] increase the appellant's punitive exposure? And
- (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

United States v. Quiroz, 55 MJ 334, 338 (CAAF 2001). Any one of the five factors may be sufficiently compelling, without more, to merit relief. *United States v. Campbell*, 71 MJ 19, 23 (CAAF 2012).

Courts have been vigilant in finding UMC for findings, often based on a low threshold review of one or more *Quiroz* factors. In practice, the most vigilant policing has been when single acts of misconduct result in more than one charged offense. Said another way, UMC jurisprudence has evolved, with some exceptions, to give particular focus on violations of the second *Quiroz* factor. See *United States v. Eaton*, No. 20130298, 2015 CCA LEXIS (ACCA 2016) (dismissing a second specification on UMC, despite no UMC objection at trial, when convictions for two different charges were based on the same underlying sexual act); *United States v. Chin*, 75 MJ 220, 223-24 (CAAF 2016) (ACCA can grant UMC for findings even when claims of UMC waived at trial); *United States v. Curtis*, No. 20130289, 2015 CCA LEXIS 192 (ACCA 2015) (accused charged with false official statement under Article 107 and making a fraudulent claim under Article 132 for falsifying a DA Form 5960; ACCA ruled UMC for findings because both charges arose from the same act of filling out the form); *United States v. Elespuru*, 73 MJ 326, 327-30 (CAAF 2014) (abusive sexual contact and wrongful sexual contact were charged in the alternative; the wrongful sexual contact specification was dismissed and set aside as UMC for findings); *United States v. Hill*, No. 20130240, 2015 CCA LEXIS 177 at 2-3 (conviction for communicating indecent language in violation of Article 134 was dismissed and set aside where it was conceded by the government that it was charged

as an alternate theory of liability to a charge of maltreatment for the same conduct); *United States v. Jinetecabarcas*, 2015 CCA LEXIS 122 at 15-21 (two specifications for violating Article 109 where the destruction occurred in a single transaction held to be UMC for findings); *United States v. Apeldoorn*, No. 20120965, 2015 CCA LEXIS 179 at 2-5 (two convictions for assault were dismissed and set aside as UMC where they were charged as an alternate theory of liability to two specifications alleging wrongful sexual contact in violation of Article 120 UCMJ for the same two acts); *United States v. Bollinger*, 2014 CCA LEXIS 908 (ACCA 2014) at 2-6 (four specifications for violating Article 107 where each of the statements was made during a single interview, *held*, UMC for findings); *United States v. Flinner*, 2015 CCA LEXIS 126 (ACCA 2015) at 2-4 (two specifications for violating Article 121 where property belonging to different owners was stolen at one place and time, *held*, UMC for findings); *United States v. Perez*, 2015 CCA LEXIS 191 at 2-7 (ACCA 2015) (four specifications for assault where each act of assault occurred as part of continuous course of conduct; *held*, UMC for findings); *United States v. Willis*, 2015 CCA LEXIS 60 at 8-10 (ACCA 2015) (two specifications for indecent acts where each act occurred during the same course of conduct; *held*, UMC for findings).

The *Quiroz* factors show an unreasonable multiplication of charges for findings here.

(1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?

This motion constitutes a timely objection.

(2) Is each charge and specification aimed at distinctly separate criminal acts?

This case is not, as in *Quiroz*, about disparate acts on disparate days, that may constitute “substantially one transaction.” Each of the charges and specifications asserts precisely the *same* single and instantaneous act: that SGT Bergdahl left the wire at OP Mest on 30 June 2009.

As to the Article 85 charge, the government has pointed to no alleged act of “shirking” or “avoiding” other than that departure. As to Article 99, no act of alleged misbehavior, nor of alleged endangerment, is specified other than that departure.

The specification to the charge under Article 99(3) lists as “intentional misconduct” that the accused “wrongfully caused search and recovery operations,” but this is not the specification of an act – and certainly not of a “distinctly separate criminal act,” as *Quiroz* requires. This Court has already concluded that this refers not to an act at all, but to the alleged *result* of an act. (Appellate Exhibit 49, dated 29 June 2017). No separate act of causation is specified other than departing the wire.

(3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?

The multiplication of these charges and specifications both misrepresents and exaggerates SGT Bergdahl's alleged criminality.

Misrepresentation. The articles charged suggest a level of criminality utterly out of relation to the specifications and the government's theory of the case. The essence of the crime of desertion is the abandonment of duty. Yet this accused sought – however imprudently – to *report* to a post. The crime must involve either “avoidance” of a hazard, or “shirking” of an important duty, while the essence of this accused's act was to undertake what he regarded – again, however imprudently – as an important mission, at great hazard to himself. That guard duty would be missed at OP Mest was a collateral consequence, not the objective of the overnight expedition to report to FOB Sharana. Thus “Desertion” misrepresents the essence of the accused's conduct.

So too does “Misbehavior.” In previous motions, SGT Bergdahl has shown that his conduct contradicted the usual models (running away, playing dead, and the like), and that his motives, however imprudent, were the opposite of cowardice, selfishness, or venality – that he was motivated by a desire (however imprudent) to protect his fellow soldiers.

Exaggeration. Charging both Desertion *and* Misbehavior also exaggerates the nature of the alleged offense. Short desertion involves a conscious purpose to shirk or avoid one's duty within the chain of command. Here the accused's absence from morning guard duty was, on the government's best case, a collateral consequence of a conscious purpose to travel *to another base within the command*. Misbehavior charges typically involve cowardice. This case involves a form of misplaced bravery – poor judgment to be sure, but certainly not cowardice.

And while the government has disclaimed any effort to seek the death penalty, advancing a charge with that extreme penalty available represents a massive exaggeration of what, on the best evidence the government can muster in this case, was an act of poor judgment.

(4) Does the number of charges and specifications [unreasonably] increase the appellant's punitive exposure?

Little need be added on this point, other than that “Misbehavior Before the Enemy,” as preserved in Article 99 is rarely charged – and yet was charged here, with the result that the government can claim magnanimity in “limiting” itself to the right to seek life imprisonment.

(5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

The Defense is not privy to the drafting history of the charges. We cannot interview former trial counsel, current trial counsel, or the Staff Judge Advocate. But there are many suggestions that the profound political and command intrusion into the case has indeed influenced charging decisions. To wit:

First, the case presents an *astonishing* level of political intrusion. The chairman of the SASC (himself perhaps the most revered former service member serving in the Congress) urged that SGT Bergdahl should be punished. Later, a presidential candidate (now the Commander in Chief) made the accused a campaign whipping boy, with regular tirades featuring strident and uninformed slander.

Second, surrounding much of this political pressure, officials serving at the highest levels of the Pentagon (whose duties would normally make it unlikely that they would even be aware of a case of this kind) took part in decisions, including disposition decisions. The case was subject to an unprecedented and unexplained referral from SGT Bergdahl's unit at USARNORTH to Army Headquarters and then to FORSCOM – FORSCOM's first-ever court convened in over 40 years. Indeed, we understand that the FORSCOM Staff Judge Advocate's regularly scheduled rotation away from FORSCOM was cancelled because of *this specific case*, following direct coordination between the FORSCOM Commander and TJAG.

Third, the Army has devoted resources to this case out of all proportion to the usual pursuit of a military prosecution. *Fifty* members of the prosecution team have signed classified information protective order acknowledgements, and FORSCOM has spent millions of dollars pursuing this prosecution. One can hardly justify a team of fifty for a case of a military offense by a junior enlisted Soldier that could have easily been handled as a routine military justice matter by a normal OSJA military justice section in balance with other cases. This is the unique hazard of the "special prosecutor" cautioned by Justice Scalia, who warned of systems "designed to heighten, not to check, all of the occupational hazards of the dedicated prosecutor; the danger of too narrow a focus, of the loss of perspective, of preoccupation with the pursuit of one alleged suspect to the exclusion of other interests." Scalia, J., dissenting, *Morrison v. Olson* 487 U.S. 654, 731 (1988).

Fourth is the charge sheet *itself*. The visible iceberg of unusual political and command activity, together with whatever has happened beneath the surface and out of the Court's view, resulted in charges far graver than recommended by MG Dahl; an additional, obscure charge of "Misbehavior Before the Enemy," that, as prior briefing has shown, is rarely seen. Same too with GEN Abrams' still-unexplained decision to ignore the recommendation of the Article 32 preliminary hearing officer for a low level disposition.

In short, all of the *Quiroz* factors are present here. However imprudent his decision eight years ago, SGT Bergdahl stands accused of a single act, undertaken at great danger to himself, out of a genuine, if perhaps misplaced concern for the safety of the Soldiers at his outpost, unmotivated by any desire to escape danger or difficulty. Nothing in law or precedent – but everything in politics – explains why this single act produced two grave criminal charges, one of them so serious that it nominally permits the ultimate sanction.

CONCLUSION

Marine PFC Anthony Quiroz pleaded, *inter alia*, to four offenses: that he conspired to dispose of explosives in May, that he received them in June, that he possessed them through the month, and that he sold them at month's end. His convictions were vacated by CAAF, with directions on remand to consider whether there had been unreasonably multiplication of charges.

Eight years ago, another PFC acted alone, on a single night, in carrying out a single act that is the subject of his court-martial. The government should be directed to decide which of its two charges it believes appropriate to that act. *United States v. Palagar*, 56 MJ 294, 296 (CAAF 2002). The other should be dismissed.



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CERTIFICATE OF SERVICE

I certify that I emailed the foregoing to the Court and Trial Counsel on 25 August 2017.



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