

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

UNITED STATES)	
)	
v.)	SUPPLEMENT TO GOVERNMENT
)	MOTION <i>IN LIMINE</i> TO ADMIT
BERGDAHL, ROBERT BOWDRIE)	EVIDENCE OF INJURIES IN THE
(BOWE))	GOVERNMENT CASE IN CHIEF
SGT, U.S. Army)	
HHC, Special Troops Battalion)	
U.S. Army Forces Command)	18 November 2016
Fort Bragg, North Carolina 28310)	

RELIEF SOUGHT

The Government requests the Court grant the Government Motion to Admit Evidence of Injuries in the Government Case in Chief. The Government requests oral argument.

FACTS

The Government incorporates by reference the facts as stated in the original motion *in limine*. G App 44 at 1-2. In addition, the Government offers the following facts.

The underlying motion *in limine* was filed on 1 September 2016. G App 44. The Defense responded on 9 September 2016 with a single paragraph that contended that the Government's motion should be held in abeyance until the completion of discovery. D App 47. The Defense offered no substantive argument regarding the motion in its filing. On 14 and 15 November 2016 during an Article 39(a) session the Government presented five witnesses, COL (Ret.) Robert Campbell, Maj John Marx, SSG Jason Walters, COL Peter Minalga (via telephone) and former SPC Jonathan Morita. The Defense offered testimony from LTC (Ret.) Jose Aymat (via telephone).

LAW AND ARGUMENT

By his own admission, the Accused left Observation Post (OP) Mest with the intent to cause a DUSTWUN, knowing that doing so would cause servicemembers to be sent to look for him. It is indisputable that the mission where MSG (Ret.) Allen and Mr. Morita were injured would never have occurred were it not for the Accused's deliberate action. Thus, their injuries while on that mission are facially relevant to the element of endangerment.

The Defense generally articulated two positions during oral argument at the 15 November Article 39(a) session. First, they argued that the Embedded Training Team (ETT) which was the subject of the mission was not part of Task Force Yukon and

therefore should be excluded under Mil. R. Evid. 401. Second, they argued that the mission was poorly planned, manned and resourced, and that consequently the probative value, if any, was diminished such that the danger of unfair prejudice substantially outweighs the probative value under Mil. R. Evid. 403. The Court should reject both arguments for the reasons set forth below.

a. The Government presented sufficient evidence for a fact finder to conclude that the ETT was a part of Task Force Yukon

The Accused is charged with Misbehavior Before the Enemy in violation of Article 99, UCMJ. One of the elements of Article 99 as charged is that the Accused endangered the safety of a command, unit, place, ship, or military property. The Government specifically charged the Accused with endangering OP Mest and Task Force Yukon. Thus, the relevance of any of the evidence of injuries that the Government seeks to admit is predicated on whether or not those injured were a part of Task Force Yukon. The standard for deciding such predicate questions is governed by Mil. R. Evid. 104.

Mil. R. Evid. 104(b) makes it clear that when relevance of evidence depends on a predicate fact, the party offering the evidence need only introduce sufficient proof to support a finding that the fact does exist.

In determining whether the government has introduced sufficient evidence to meet Mil. R. Evid. 104(b)... the trial court neither weighs credibility nor makes a finding that the government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the fact-finder could reasonably find the conditional fact by a preponderance of the evidence.

United States v. Zammit, 1999 CCA Lexis 273 (N-M. Ct. Crim. App. 1999) (unpublished) (citing *United States v. Mirandes-Gonzalez*, 26 M.J. 411, 413-14 (C.M.A. 1988); *United States v. Acton*, 38 M.J. 330, 333 (C.M.A. 1993) (citing *United States v. Huddleston v. United States*, 485 U.S. 681, 690 (1988))).

Joint Publication 1, *Doctrine for the Armed Forces of the United States*, defines Operational Control ("OPCON") as:

The Command authority that may be exercised by commanders at any echelon at or below the level of CCMD [Combatant Command] and may be delegated within the command. OPCON is able to be delegated from and [sic] lesser authority than COCOM. It is the authority to perform those functions of command over subordinate forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction over all aspects of military operations and joint training necessary to accomplish the mission.

Colonel Campbell, then a battalion commander under Task Force Yukon, testified that the ETT was under his OPCON at the time of the mission. Colonel Minalga testified that the ETT was OPCON to his battalion, also a subordinate unit of Task Force Yukon, prior to the DUSTWUN. The Government also offered a Task Organization chart from June 2009 which showed the ETT as a subordinate unit of Task Force Yukon.

The testimony regarding the execution of the mission by COL Campbell, Maj Marx, and SSG Walters is further evidence the ETT was part of Task Force Yukon. Specifically, the fact that COL Campbell directly ordered the ETT to conduct this specific mission, and they conducted the mission, is evidence that he possessed OPCON of the team as defined in Joint Publication 1.

The Defense offered the testimony of LTC (Ret.) Jose Aymat in an attempt to counter the Government's evidence and establish that embedded training teams were a part of Task Force Phoenix. The Court, however, is not required to resolve this dispute in the evidence. Under the standard of Mil. R. Evid. 104(b), the only question is whether a fact finder could reasonably find that the ETT was a part of Task Force Yukon at the time of these events. The combination of two ground commanders testimony regarding their understanding of the task organization, documentary evidence in the form of a task organization chart, and the undisputed testimony that COL Campbell did, in fact, exercise direct operational control over the ETT during this mission, is all more than sufficient to meet the Mil. R. Evid. 104(b) standard.

b. The probative value of the evidence of injuries is not substantially outweighed by the risk of unfair prejudice

The Government presented evidence from multiple witnesses that the DUSTWUN event was an "in extremis" situation, resulting in extraordinary assets being devoted to the search for the Accused. As Colonel Campbell made clear, the nature of the mission necessitated higher than normal risk, as assets were tasked out quickly and resources were stretched thin. The Defense argues that the planning, manning and resourcing of the mission were substandard to such a degree that the mission should not have been undertaken. This, they argue, diminishes the probative value of evidence such that the Court should exclude the evidence under Mil. R. Evid. 403. This position fails for several reasons.

First, the Government's position is that the evidence reflects a calculated decision by leaders to assume additional risks because of the nature of the mission. Far from diminishing the probative value of the evidence, this increased risk is independent evidence of endangerment.

Second, the testimony of the Defense witness, LTC (Ret.) Aymat, who conducted an Army Regulation 15-6 investigation following the mission, was fundamentally flawed. LTC (Ret.) Aymat criticized the lack of rehearsals and redundant communication equipment, but never bothered to interview COL Campbell (a more experienced infantry officer who ultimately commanded at both the battalion and brigade level) or any of the

other leadership from the battalion. He went on to critique the experience level of the team, but inexplicably failed to ask any of them about their prior experience, thus failing to learn that Maj Marx conducted 30-40 combat patrols during his deployment, that SSG Walters had prior combat experience with the a Ranger battalion, that Mr. Morita had previously deployed as an infantryman with 3rd Infantry Division, or that MSG (Ret.) Allen had multiple combat deployments. LTC (Ret.) Aymat's investigation and his subsequent critique of the mission can be described, at best, as incomplete.

Finally, evidence should only be excluded under Mil. R. Evid. 403 if the probative value of the evidence is *substantially* outweighed by a danger of unfair prejudice, confusion of the issues, misleading of the members, undue delay, waste of time, or needless presentation of cumulative evidence. Mil. R. Evid. 403. Therefore, the higher the probative value of the evidence, the less likely it should be excluded. "In weighing the probative value of evidence against the dangers of prejudicial impact, the general rule is that the balance should be struck in favor of admission." *United States v. Teeter*, 12 M.J. 716 (A.C.M.R. 1981) *aff'd in part, rev'd in part on other grounds*.

Admission of evidence regarding the ETT's mission and the subsequent injuries will not cause confusion of the issues by creating a "trial within a trial." The question of whether members of Task Force Yukon were endangered on missions searching for the Accused is directly relevant to an element of a charged offense. The Accused has made multiple admissions regarding the fact that he intentionally left OP Mest. Therefore, endangerment is one of few fully disputed issues remaining. Far from being a "trial within a trial" the missions that Task Force Yukon executed as a result of the Accused's intentional conduct are critical to establishing one of the only disputed elements of the offense.¹ That is to say, they are the very essence of the trial itself.

When the evidence offered goes directly to establishing an element of the offense, courts have provided wide latitude in admitting potentially unfairly prejudicial evidence, recognizing that it did not substantially outweigh the high probative value. *United States v. Williams*, 445 F.3d 724, 729-33 (4th Cir. 2006) (Holding that circumstantial evidence of an uncharged murder was admissible to prove possession of firearm and ammunition even though the evidence "carries with it some risk that it will incite the emotions of the jurors, the evidence was also highly probative" and the court issued a limiting instruction); *United States v. Grimmond*, 137 F.3d 823, 833 (4th Cir. 1998) (holding that "because [evidence of multiple shootings] would have directly established an element of the offense, there would also be no question whether its probative value was substantially outweighed by its prejudicial effect" discussing *United States v. Swiatek*, 819 F.2d 721, 728 (7th Cir. 1987)).

¹ The Government notes that all of the evidence on this motion was presented in what was essentially less than one day of court time. This is not an unreasonable amount of time in what is projected to be at least a two week contested trial that includes an offense that carries with it a potential term of life in prison. Federal Courts have noted that the more "sensational or disturbing" the instant charge, the less likely borderline evidence should be excluded. See *United States v. Byers*, 649 F.3d 197, 210 (4th Cir. Md. 2011) (citing *United States v. Boyd*, 53 F.3d 631, 637 (4th Cir. Md. 1995)) (involving FRE 403 balancing tests for 404(b) evidence); see also *United States v. Mehanna*, 735 F.3d 32, 72 (1st Cir. 2013) (the very nature of the elements required to prove certain offenses may require evidence by the Government that "packs an emotional punch").

By contrast, where the Government offers evidence, for instance, of a prior sexual assault allegation under Mil. R. Evid. 412, there is a significant risk that the parties will litigate the merits of a crime an Accused is not on trial for. That is simply not the case here. These hasty search and rescue missions, necessitated by the Accused's intentional creation of a DUSTWUN "crisis," are direct evidence of the element of endangerment that the Government must establish to prove Misbehavior Before the Enemy.

Although this is the only mission where the Government intends to allege that members of Task Force Yukon were injured on the merits, the Government does intend to offer evidence of other missions, including those conducted by the Accused's own platoon, which involved increased risk. In addition, and as the Court articulated during oral argument, the Government can present testimony that the nature of DUSTWUN operations generally increased risk. While such testimony will be further proof of endangerment, it is fundamentally less probative than the evidence that MSG (Ret.) Allen and Mr. Morita were directly exposed to danger and injured. One must only imagine the argument that will surely be advanced by the Defense; that while witnesses may claim that other missions involved increased risk, as no one was actually injured, such claims are mere conjecture. In such a case, the probative value of the evidence of actual injuries becomes clear. It is the difference between theory and fact.

The risk of unfair prejudice regarding this evidence is low, and can be further ameliorated in several ways. The Government acknowledges that the gunshot wound to the head suffered by MSG (Ret.) Allen runs some risk of unfair prejudice. It is important to recognize, however, that the Government is seeking to offer only the fact of the injury on the merits, and is only seeking to do so through testimony. Similarly with regard to Mr. Morita, the Government is seeking to offer his testimony regarding the injury to his hand. By contrast, courts have frequently admitted gruesome photographs of dead or wounded individuals. "Photographs, although gruesome, are admissible if used to prove time of death, identity of the victim, or exact nature of wounds. It is not a matter of whether the photographs are inflammatory but whether they serve a legitimate purpose." *United States v. Gray*, 37 M.J. 730, 739 (A.C.M.R. 1992). Here, the Government is not seeking to admit photographs of the injured or evidence of the after effects of their injuries.² This limitation on the proffered evidence reduces the likelihood that it would be used for an improper purpose.

Moreover, the risk that military members, selected under the criteria of Article 25, are likely to be so inflamed by the existence of injuries that they would be unable to follow the Court's instructions is low. This is particularly true considering the fact that the military has been engaged in sustained conflict for more than 15 years. In *United States v. Redmond*, 21 M.J. 319, 326 (C.M.A. 1986), *cert. denied*, 476 U.S. 1105 (1986), the court reasoned that "we can hardly believe that the experienced officers who sat on the court-martial would have been significantly influenced by" admission of an actual skull of a victim. The ability of the members to avoid improper influence can also

² Should the case proceed to a sentencing phase, the Government would offer such evidence as aggravation.

be ensured through the *voir dire* process. See *United States v. Phillips*, 49 M.J. 521 (N-M. Ct. Crim. App. 1998) (finding that the danger of unfair prejudice was diminished, in part, because the Military Judge permitted the Defense to pose appropriate questions during voir dire).

Finally, a limiting instruction on the proper use of testimony has long been recognized as a means of resolving concerns about the danger of unfair prejudice. See generally *United States v. Whitner*, 51 M.J. 457 (C.A.A.F. 1999); *United States v. Orsburn*, 31 M.J. 182 (C.M.A. 1990). Moreover, “[m]ilitary members are presumed to follow a military judge’s instructions to consider evidence for a proper purpose” *United States v. Collier*, 67 M.J. 347 (C.A.A.F. 2009). The Government proposes the following as an example of an appropriate limiting instruction regarding the evidence of injuries:

Evidence has been presented that servicemembers were injured during search operations. You may only consider that evidence as to the element of endangerment in Charge II. You may not consider it for any other purpose. In determining what weight, if any, to give to such evidence you may consider whether the planning, resourcing and manning of the mission were adequate.

Such an instruction, which includes specific references to the concerns raised by the Defense, would sufficiently protect against any concerns that the members might use the evidence of injuries for any purpose other than evaluating the element of endangerment.

VI. CONCLUSION

The evidence of injury to MSG (Ret.) Allen and Mr. Morita is admissible on the merits to prove the Accused endangered Task Force Yukon. The Government respectfully requests this Court grant the Government Motion to Admit Evidence of Injuries in The Government Case in Chief.



JUSTIN OSHANA
MAJ, JA
Trial Counsel

I certify that I have served or caused to be served a true copy of the above on the Defense Counsel on 18 November 2016.



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