

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

UNITED STATES)	
)	
v.)	GOVERNMENT RESPONSE TO
)	DEFENSE MOTION TO DISMISS
BERGDAHL, ROBERT BOWDRIE)	(UNREASONABLE MULTIPLICATION
(BOWE))	OF CHARGES FOR FINDINGS)
SGT, U.S. Army)	
HHC, Special Troops Battalion)	
U.S. Army Forces Command)	31 AUGUST 2017
Fort Bragg, North Carolina 28310)	

I. RELIEF SOUGHT

The Government requests the Court deny the Defense Motion to Dismiss for Unreasonable Multiplication of Charges.

II. BURDEN OF PERSUASION AND BURDEN OF PROOF

The Defense, as the moving party, has the burden of persuasion in accordance with RCM 905(c)(2), and the burden of proof is preponderance of the evidence in accordance with RCM 905(c)(1).

III. FACTS

On 30 June 2009, the Accused, an Infantryman, deployed to Paktika Province, Afghanistan, as part of Task Force Yukon, Combined Joint Task Force-82/Regional Command-East, deserted from his place of duty at Observation Post Mest (OP Mest).

The Accused was captured by enemy forces shortly after he departed OP Mest. As a result, Task Force Yukon and other elements of the United States Armed Forces engaged in extensive search and recovery operations to recover the Accused. The search and recovery effort was initially referred to as Operation Yukon Recovery. Resources were stretched thin to support dangerous and hasty missions to search for and recover the Accused.

IV. EVIDENCE

Excerpt from 2010 Board of Inquiry (Encl 1).

V. LAW AND ARGUMENT

Rule for Court-Martial 307(c)(4) states that “charges and specifications alleging all known offenses by an accused may be preferred at the same time. Each specification shall state only one offense. What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.” In *United States v. Quiroz*, 55 MJ 334 (CAAF 2001), the court established a five factor test to analyze unreasonable multiplication of charges. Defense alleges unreasonable multiplication of the charges with regard to these five factors:

- (1) whether the accused objected at trial that there was an unreasonable multiplication of charges and/or specifications;
- (2) whether each charge and specification is aimed at distinctly separate criminal acts;
- (3) whether the number of charges and specifications misrepresent or exaggerate the accused’s criminality;
- (4) whether the number of charges and specifications unreasonably increase the punitive exposure; and
- (5) whether there is any evidence of prosecutorial overreaching or abuse in drafting of charges.

Id. at 338.

The issue of unreasonable multiplication of charges in the context of a Misbehavior Before the Enemy Charge in violation of Article 99(3) was recently addressed by the Army Court of Criminal Appeals.¹ *United States v. Fosdyck*, CCA LEXIS 525 (ACCA 2017). In *Fosdyck*, the accused was charged with Going from His Appointed Place of Duty, in violation of UCMJ Art. 86, and Misbehavior Before the Enemy, in violation of UCMJ Art. 99. *Id.* Charges were brought based on evidence that the accused left his post during an enemy attack on a forward operating base in Afghanistan in order to masturbate (an act referred to as a “combat jack.”²). *Id.*

Fosdyck utilized the *Quiroz* factors and determined that there was no unreasonable multiplication of charges. *Id.* The similarities between that decision and

¹ While Defense relies on a nearly 100 year old treatise, they fail to address or even acknowledge a controlling decision issued mere weeks prior to the filing of their Motion.

² The *Fosdyck* decision provides additional support for the Court’s earlier conclusion that misconduct for the purposes of Article 99 does not need to be, as the Defense asserted, independently criminal. Masturbation is not in and of itself a crime.

the present case are striking.³ The Government concedes both that this motion is sufficient to satisfy the first prong of raising the issue prior to or at trial and that, under *Fosdyck*, the charges are not aimed at distinctly separate criminal acts. The Government addresses the remaining three prongs in turn.

a. Whether the number of charges and specifications misrepresent or exaggerate the accused's criminality

Fosdyck held that the two charges and their specifications did not misrepresent or exaggerate the criminality of the appellant's actions. *Id.* Most notably, "[t]he government simply charged appellant based on the different harms that arose from appellant's actions." *Id.* The court held that the gravamen of the offenses was different, in that the Article 86 charge was directed at the appellant leaving the FOB without authority, while the Article 99 charge was directed at the appellant's misbehavior before the enemy and endangering the safety of his unit. *Id.* The similarities between the two cases are such that the *Fosdyck* decision clearly controls. In both cases each of the accused was charged with some variety of leaving his place of duty without authority, and separately, with endangering his unit.

In addressing this prong the Defense claims that:

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.

D APP 94 at 4.

This position truly strains credulity. First, it presumes that the Accused's explanation for his actions is both true and is the exclusive reason he engaged in his misconduct. It utterly ignores the fact that the Accused has repeatedly also said that he abandoned his post in order to demonstrate that he was ready to go Special Forces, or, as he put it to film maker Mark Boal, that he was like "Jason Bourne." In any event, it is undisputed that the Accused's mission on the morning of 30 June 2009 was guard duty. No Solider is entitled to put aside his assigned duty and invent his own "mission," and then later claim that he did not intend to avoid his actual duty because he was off attempting to fulfill his own objective. Finally, the Accused's own statements make clear that missing his guard duty was not simply a collateral consequence, it was a critical part of his plan. The Accused was counting on the alarm that would result from missing his guard shift in order to gain an audience with a General Officer.

³ SSG *Fosdyck* was charged with a violation for Article 86 for failing to go to his appointed place of duty, versus Desertion in violation of Article 85. Article 86 is, of course, a lesser included offense of Article 85, and the controlling nature of *Fosdyck* is thus unaffected.

Moreover, the degree to which the Accused's actions endangered his unit is monumentally more significant than *Fosdyck*. SGT Bergdahl's conduct exposed hundreds, if not thousands, of his fellow Soldiers to extremely hazardous conditions in the massive and extended search operation that followed his departure.⁴

b. Whether the number of charges and specifications unreasonably increase the punitive exposure.

Fosdyck analyzed the unreasonable increase in punitive exposure prong together with the misrepresentation and exaggeration prong. The Defense offers very little of its own analysis of this issue, stating simply:

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.

D APP 94 at 4.

Once again, this ignores the holding in *Fosdyck*. The maximum punishment for Failing to Go to an Appointed Place of Duty is one month, while the Misbehavior Charge carries a maximum punishment of life. The *Fosdyck* court found no unreasonable multiplication of charges when the maximum punishment was increased from one month to life in prison. It is difficult to understand how Desertion, with its higher maximum punishment of five years, could be said to unreasonably increase the Accused's punitive exposure.

The Defense also repeats their frequent complaint that Article 99 is "rarely charged."⁵ No court has ever held that the frequency with which an Article of the UCMJ is charged is a relevant factor under *Quiroz*. More to the point, the infrequent need to charge Misbehavior Before the Enemy is a reflection of the fact that few Soldiers choose to betray among their most fundamental duties by engaging in misconduct that endangers the lives of their fellow Soldiers in combat zones.

c. Whether there is any evidence of prosecutorial overreaching or abuse in drafting of charges.

The Defense has devoted the greatest amount of time to arguing the fifth *Quiroz* prong, whether there is evidence of prosecutorial overreach or abuse in the drafting of

⁴ The *Fosdyck* court briefly notes that one U.S. and one Afghan soldier were injured. The extent of those injuries is unknown, however, the severity of the injuries sustained by former SPC Morita, SCPO (Ret.) Hatch, and MSG (Ret.) Allen is known in this case, and were appropriate considerations in the charging decision.

⁵ The Government notes that, despite the Defense claims about the rarity of the Misbehavior charge, the possible application of it to SGT Bergdahl's action was a topic of discussion as early as 2010 during the Board of Inquiry. Encl 1.

charges. Far from identifying anything that remotely supports such a conclusion, the four factors that the Defense points to are facially irrelevant to the issue of potential prosecutorial overreach. Indeed, a basic application of the concept of linear time is all that is required to eviscerate most of the Defense's arguments on this point, as all but one of the issues they point to occurred *after* charges were preferred.

The Defense begins by citing to the comments made by Senator McCain and Candidate Trump. In both cases the comments were made *after* the preferral of charges, and it is difficult to imagine how these statements could therefore have impacted the drafting of the charges.

Second, the Defense references the decision to refer the case from USARNORTH to FORSCOM. While this decision was made prior to charges being preferred, the link between that decision and the choices on the charge sheet is difficult to discern (the Defense certainly offers no analysis of how the two are connected).

Third, the Defense points to the decision to leave the FORSCOM SJA in place rather than rotate as scheduled. Again, the logical link between this decision and the charges is difficult to understand. What is more difficult to understand, however, is how a change in the rotation of Staff Judge Advocates *in 2016* is evidence of prosecutorial overreach in charges that were preferred *in 2015*.

Next, the Defense raises the fact that 50 attorneys have signed non-disclosure agreements on behalf of the prosecution. They fail to note that the vast majority of those were executed long after the charges were preferred. The very obvious explanation for why a large number of attorneys have worked on this case is that there were two million pages of classified discovery reviewed by the Government.

Finally, the Defense once again complains about the "still unexplained" decision by GEN Abrams to refer the case despite the recommendation of the Preliminary Hearing Officer.⁶ There is no law, rule, or other requirement that a convening authority offer any such explanation. More importantly, preferral necessarily occurs before referral, and once again it is difficult to understand a decision by GEN Abrams (whether explained or not) made in December 2015 is evidence of overreach in a charging decision made nine months earlier.

VI. CONCLUSION

In short, the only *Quiroz* factors present in this case are that the Accused has raised the issue and that the charges are aimed at related criminal acts. The second factor was also present in *Fosdyck*, but did not tip the scale of reasonableness. The critical conclusion that the *Fosdyck* court reached was that the gravamen of each charge was distinctly different. The same is true here. As such, *Fosdyck* controls, and

⁶ The Government notes that the Defense had the opportunity to interview GEN Abrams and that he testified at an Article 39(a) session, yet they made no attempt to ask him about this issue.

the Defense motion should be denied.



JUSTIN C. 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 31 August 2017.



JUSTIN C. OSHANA
MAJ, JA
Trial Counsel

LTC Fair/President: Does anyone have any questions about the documentary evidence in this case?

MAJ Holland/Board Member: MAJ Holland does not.

Mr. Myers/Legal Counsel for the Board: No

Mr. Whitaker/Missing Person's Counsel: Mr. Whitaker does not.

MAJ Reed/Board Member: MAJ Reed does not.

LTC Fair/President: LTC Fair does not at this time.

LTC Fair/President: Does anyone believe that additional evidence is necessary in order to determine the status of SPC Bergdahl by a preponderance of the evidence?

MAJ Holland/Board Member: No.

Mr. Myers/Legal Counsel for the Board: No.

Mr. Whitaker/Missing Person's Counsel: There probably would be evidence, but I can't think of anything offhand that I know the Government has but has not been provided.

MAJ Reed/Board Member: Kind of in accordance with counsel, because I do believe there is other information but we just don't have it at this time, Sir.

LTC Fair/President : I have to add as a qualification there is a significant piece of evidence that we will not have access to until the Soldier is actually recovered or released from custody, and that is his view of what occurred especially on the first day that he actually was determined lost. That being said we will move on.

LTC Fair/President: Mr. Whitaker, have you had a chance to review the evidence in this case? Is there any other evidence that you would like the Board to consider prior to making its recommendation about the status of this Soldier?

Mr. Whitaker/Missing Person's Counsel: No Sir, I do not have any additional information to present at this time. I have spoken with the family of SPC Bergdahl yesterday, and they have no additional matters that they would like to put before the Board either.

LTC Fair/President: Ok, thank you very much.

LTC Fair/President: The documentary evidence previously referenced will be considered by the Board.

LTC Fair/President: Does any Board member wish to take up any matters before we deliberate? Does the Missing Person's Counsel wish to take up any matters before the members deliberate?

Mr. Whitaker/Missing Person's Counsel: Sir, I have no matters to bring up at this time.

Mr. Myers/Legal Counsel for the Board: No Sir.

MAJ Holland/Board Member: MAJ Holland does not Sir.

MAJ Reed/Board Member: MAJ Reed does not Sir.

LTC Fair/President: No additional items. At this point we have an open time, a free opportunity to discuss what we have actually been able to go through in the way of evidence, in the way of historical background and the current reports from the Defense Intelligence Agency. With your concurrence, what I will do is, I will go back to the most recent report that we received that is as of 3 August 2010, which at this point the report from DIA indicates a primary aspect that we have to consider and continues to indicate that SPC Bergdahl is alive. Also, the video we just observed indicates that, as of at least the beginning of February, that the soldier still is alive. My initial thought is that we together come to a conclusion that that no longer needs to be considered as a situation of one of the four areas that we have to consider.

MAJ Holland/Board Member: Sir, I agree with that.

MAJ Reed/Board Member: Sir, I agree with that as well.

LTC Fair/President: Do any of the two gentlemen (referring to the two legal counsels) need to add anything? Basically we are simply excluding any further consideration of whether the Soldier has departed.

Mr. Whitaker/Missing Person's Counsel: I understand.

LTC Fair/President: Then, I believe that is a uniform, joint, at least, consideration on that aspect of it. It makes it a little easier to look at. The Soldier's current status as previously declared by the Secretary of the Army was Missing-Captured. Is that correct CPT Chatman?

CPT Chatman-Terry/Personnel Recovery Manager: Yes Sir, that is correct.

LTC Fair/President: MAJ Holland do you have any consideration about any other status of the Soldier?

MAJ Holland/Board Member: Sir, the portion of the deliberation notes, as I was preparing for this meeting... on Monday I was given my packet and read through the

packet. I essentially also reviewed some Articles of the Uniform Code of Military Justice. Namely, Articles 85, which is Desertion, Article 86 which is Absent without Leave, and also, the point of Article 99, which is Misbehavior Before the Enemy. In reading through those three articles, they seemed germane. Two of which were purposely mentioned in the text. Article 99 to me was of interest because of the case and how the individual may have gone missing. It doesn't seem to be a duty status, and in my personal experience and professional experience as a personnel officer, that is not a duty status, and we are talking the individual's duty status, whether he is missing/captured, a deserter or absent without leave or deceased and we have concluded previously, as we just mentioned a moment ago, that we all believe he is still alive, based on the credible evidence we have. So I do not think Article 99 would be germane to our actual discussion here, but I did find that interesting as part of my research. Based upon what I did read under Article 99, it did mention Article 85, which is Desertion, being a lesser form of Misbehavior before the Enemy. Reading the 15-6 investigation, which was read earlier today when we came into the conference room. It was my first time reading that... and looking at the great column of information that is sitting here before the table and that supporting evidence to that summary which looks to be about 4-6 inches worth of paperwork that has not been reviewed. It's almost, in my opinion... It is in my opinion that, considering what has been done in Afghanistan to this point, there was something that allowed the Investigating Officer to conclude that the person be declared missing and captured as opposed to a deserter. I don't know what that was. I am interested to see what the other Board members thoughts on that are... if anyone has any prior information to that or if our supporting CPT from Casualty does. She's shaking her head, "no."

CPT Chatman-Terry/Personnel Recovery Manager: No Sir, I don't.

MAJ Holland/Board Member: I would like to consider that for discussion. At this time, if there is anything that anyone would like to add along that thought, and, whether, if we can come out of... we think it's germane to come away from what was previously decided, based on the little bit of information that we have, relative... what are anyone's thoughts?

MAJ Reed/Board Member: I think you bring up some great points but, at the same time, I kind of thought that counsel would educate us on what was in that, as to... if you had read it... and I understand...

Mr. Myers/Legal Counsel for the Board: I have not had... I'm sorry to interrupt, I actually have not had, nor has Missing Person's Counsel had, the opportunity to review what is in the 15-6 investigation.

CPT Chatman-Terry/Personnel Recovery Manager: I can expound a little more on what is contained in the 15-6 investigation. The 15-6 investigation contains a series of statements from members of the Soldier's unit. They are giving the Investigation Officer background information concerning the Soldier. They gave information regarding the Soldier's state of mind, what type of Soldier he was, in regard to his duty performance. They discussed conversations they had had with the Soldier in an effort to determine what may have led to this situation. Based upon the interviews, they came up with their findings. The 15-6 investigation does not provide detail as to why it was recommended that the Soldier be placed in a Missing-Captured Status as opposed to AWOL or Deserter. You are welcome to view the 15-6 investigation prior to making a decision. However, the complete 15-6 investigation was not placed in your informational packet because it was information that was completed prior to the determination of Missing-Captured. As per the DoDI 2310.05, your duties as members of this Board were to only look at evidence that has been obtained since he was placed in his current status, and not prior to.

Mr. Myers/Legal Counsel for the Board: Thank you, I am going to anticipate Missing Person's Counsel and concur in what he might offer, which is that we visit, in light of MAJ Holland's comments and concerns, that we pay close attention to the definition of deserter... and that if, in fairness to SPC Bergdahl, that we do consider the 15-6, that it is closely reviewed by this Board. I would make that suggestion at this time, Sir. If the Board does feel like this is the direction of our deliberations right now...whether he's to be considered a deserter or if he is, in fact, still a missing person.

Mr. Whitaker/Missing Person's Counsel: I just want to point out, Sir, that typically these questions would have been answered in the Initial Board of Inquiry, but one was not held in this particular case. From what I understand from CPT Chatman-Terry and my assumption based on the review evidence, after having reviewed the documentation, the leaders felt that there was simply sufficient evidence to declare him MIA-captured without a Board of Inquiry. But because we don't have that, we don't have a formal way to review exactly how they came to that determination. I don't think even the 15-6 is going to provide a great deal of additional information as far as the thought process. It would merely provide additional background to a little bit more about SPC Bergdahl's thought process prior to the last time he was seen.

MAJ Holland/Board Member: I would like to add, I don't know if the rest of the packets only have two pages from the summary for the 15-6 investigation, but I only have two pages. It stops at paragraph 3, which is Findings. Is that a deliberate omission or ...

Mr. Whitaker/Missing Person's Counsel: You were just focusing on the executive summary?