

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

UNITED STATES)	
)	
v.)	GOVERNMENT BRIEF REGARDING
)	THE ADMISSIBILITY EVIDENCE OF
BERGDAHL, ROBERT BOWDRIE)	INJURIES DURING PRESENTENCING,
(BOWE))	MOTION TO RECOGNIZE VICTIMS
SGT, U.S. Army)	UNDER ARTICLE 6b, UCMJ, AND FOR
HHC, Special Troops Battalion)	RECONSIDERATION
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	6 June 2017

I. RELIEF SOUGHT

The Government requests that the Court consider three related issues all dealing with injuries sustained as a direct result of the Accused's misconduct. First, the Government requests that the Court find that evidence regarding injuries sustained by MSG (Ret) Allen, former Specialist Jonathan Morita, and SCPO (Ret) Hatch are admissible during presentencing proceedings under Rule for Courts-Martial (RCM) 1001(b)(4). Second, the Government requests that the Court recognize MSG (Ret) Allen, SPC Morita, and SCPO (Ret) Hatch as victims under the provisions of Article 6b, Uniform Code of Military Justice (UCMJ) in order to permit the exercise of their rights under that rule. Finally, the Government requests that the Court reconsider its ruling denying the Government's earlier request to designate a guardian for MSG (Ret) Mark Allen under RCM 801(a)(6) to exercise his rights under the provisions of Article 6b, UCMJ.¹

¹ In denying the Government's request to designate Shannon Allen as a guardian for MSG (Ret) Allen IAW RCM 801(a)(6), the Court previously concluded that determining whether MSG (Ret) Allen was a direct victim of the Accused's misconduct was "premature," reasoning that "such a determination is too much tied up in the elements of the Article 99 offense and the issue of causation -- matters for the trier of fact to determine in deciding the guilt or innocence of the accused -- for the court to make such a determination at this point in the proceedings." AE 29. The Court should reconsider that decision for several reasons. First, Article 6b and the implementing Rules for Courts-Martial provide a variety of rights to a victim pre-trial. Consequently, the determination of whether a person is a "victim" for Article 6b purposes is necessarily distinct from the question of whether an Accused is guilty of a particular offense, and must be made prior to findings in order to allow victims a meaningful opportunity to exercise their rights. This is also true under the relevant federal victim rights statutes. "Courts are required to afford potential victim status to those who qualify, along with commensurate statutory rights of participation, even before a guilty plea or jury verdict has been entered. The CVRA clearly provides for victims' rights at those stages, and indeed before a prosecution has been initiated." *United States v. Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453 (D NJ 2009). If the Court's conclusion were correct, and it was necessary to wait for a causation determination to be made by the trier of fact, victims such as MSG (Ret) Allen would be prevented from exercising a wide variety of their Article 6b rights. Moreover, as it is clear that a victim of an offense does not need to be named in the offense, such a determination would prevent individuals like SCPO (Ret)

II. BURDEN OF PERSUASION AND BURDEN OF PROOF

The Government, as the moving party, has the burden of persuasion in accordance with RCM 905(c)(2), and the burden of proof is a 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 intended to cause a DUSTWUN² event and a search and recovery effort where “everybody is alerted....CIA is alerted....the Navy is alerted...the Marines are alerted....Air Force is alerted....not just Army.” The Accused believed that as a result of the DUSTWUN that he would be able to gain an audience with a General Officer where he could express his concerns regarding his unit’s leadership.

The Accused was captured by enemy forces shortly after he departed OP Mest. Just as the Accused intended, he created a crisis where 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.

Due to the Accused’s actions, the counterinsurgency mission of Task Force Yukon came to a complete halt while leaders throughout Task Force Yukon focused only on search and recovery and logistical patrols. Resources were stretched thin to support dangerous and hasty missions to search for and recover the Accused. Leaders were forced to accept increased tactical risk in an effort to find the Accused before he was removed from the area of operations or killed by enemy forces.

Hatch from exercising their rights at all. Second, the Court’s conclusion shifted the decision regarding victim status for Article 6b purposes – a mixed question of law and fact – to the trier of fact. The question of whether or not an individual qualifies as a victim for CVRA purposes is a matter to be decided by the Court. The relevant question for that determination, whether the person has “suffered a direct harm as a result of the commission of an offense,” is not one that is directly before the trier of fact in this case for MSG (Ret) Allen (and not at all before the trier of fact for SCPO (Ret) Hatch). The elements of misbehavior before the enemy do not require the trier of fact to determine whether MSG (Ret) Allen suffered direct physical harm as a result of the Accused’s misconduct. Thus, a verdict of guilty on that charge would not constitute a determination one way or the other as to whether MSG (Ret) Allen is a “victim” for Article 6b purposes. Additionally, because the Charge alleges that the Accused endangered “Task Force Yukon and OP Mest” it would be even more difficult to reach the conclusion that a finding of guilty as to that charge necessarily implicated MSG (Ret) Allen’s mission, as opposed to any of the other elements of the Task Force or the Soldiers at the Observation Post. Finally, by shifting the decision making responsibility to the trier of fact, the Court raised the burden for determining whether MSG (Ret) Allen is a victim for Article 6b and RCM 801(a)(6) purposes from preponderance under the provisions of RCM 905 to the beyond a reasonable doubt standard that the trier of fact must utilize.

² DUSTWUN is a designation used when a servicemember is duty status-whereabouts unknown.

Barely a week after the Accused deserted OP Mest, USAF Capt John Marx and SFC Mark Allen, a newly arrived National Guard Soldier assigned to an Embedded Training Team (ETT), were ordered by LTC James Shuto to relocate from FOB Orgun-E to FOB Kushmond to assist in the DUSTWUN operations. After arriving at FOB Kushmond they, along with their Afghan National Army partners, were tasked by LTC Robert Campbell, Commander of 1-40th CAV (part of Task Force Yukon), to move to areas of Paktika Province that U.S. forces had not patrolled for over a year. The planning-to-execution timeline was extremely condensed in order to support the recovery mission. Searching for the Accused was the only purpose of the mission.

On 8 July 2009, SFC Allen and the rest of the ETT were attacked while conducting the search and recovery mission. During the attack, SFC Allen was shot in the head. SFC Allen underwent medical evacuation, suffered a traumatic brain injury stroke, endured multiple surgeries to remove portions of his brain, and completed extensive rehabilitation. Now MSG (Ret) Allen is unable to communicate, 100% dependent on others for daily living activities, and confined to a wheelchair.

Specialist Jonathan Morita was also injured on the ETT mission, when the M-4 rifle he was holding was hit by an RPG. While the RPG did not explode, the force of the impact shattered the weapon causing significant injury to his hands. The damage included multiple fingers split open, a broken bone in his thumb, and a shattered trigger finger. Specialist Morita later underwent several surgeries to repair his hands including a thumb reconstruction, skin graft and removal of shrapnel from his upper elbow area.

The redirection of resources and re-tasking of units was not limited to Task Force Yukon. The special operations community also executed or assisted in executing numerous missions in support of Yukon Recovery. SCPO (Ret) James Hatch was assigned to a team of special operators based out of Forward Operating Base Jalalabad, and was generally responsible for conducting operations in the eastern part of Afghanistan. After the DUSTWUN, however, they redirected their organic intelligence, surveillance, and reconnaissance (ISR) assets to the area where the Accused deserted from and focused all of their efforts on assisting with the recovery operations.

On 8 July 2009, after developing their own intelligence, and based on other intelligence available, the team planned a hostage rescue mission at the location they concluded SGT Bergdahl may have been located. The ultimate decision to execute the mission was made by the Team Commander. The mission would not have taken place were it not being conducted in an effort to save the Accused.

The team departed Jalalabad towards the end of the day on 8 July. As the helicopters touched down at the objective, they took heavy fire, including fire from a belt fed-machine gun. SCPO (Ret) Hatch along with a military working dog named Remco and two other operators began making their way toward suspected enemy/insurgents approximately 400 meters away. The fire team picked up pace in the direction of the enemy but could no longer see them because, unknown to the team, the insurgents had moved into a ditch. Remco was leading the way when an insurgent fired two shots into the dog. The muzzle flash from those shots gave away the position of the insurgents and the team engaged them. One enemy

fighter began spraying his AK-47 wildly and as SCPO (Ret) Hatch moved quickly forward a bullet pierced his leg, causing him to tumble in the air. As a result of his training he attempted to remain silent so as to avoid giving away his position. As he hit the ground, however, his wound was crushed beneath the weight of his body and equipment and he began screaming. The bullet hit Hatch in the femur, right above the knee – sending the bone out the back of his leg.

The two other operators were able to maneuver to eliminate the remaining immediate threat. Two advanced medics from other areas of the objective made their way to SCPO (Ret) Hatch and provided care. The helicopters were called back to extract Hatch. Remco's handler, Chief Petty Officer Michael Toussaint, attempted to perform CPR on the dog to no avail.

Court-martial charges were preferred against the Accused on 25 March 2015. The case was referred to a General Court-Martial on 14 December 2015. The Accused is charged with one specification of desertion with intent to avoid hazardous duty or to shirk important service in violation of Article 85, UCMJ, and one specification of misbehavior before the enemy-endangering the safety of the unit in violation of Article 99, UCMJ.

IV. EVIDENCE

In support of the motion the Government intends to call the following witnesses:

1. SCPO (Ret) James Hatch, USN.
2. Task Force Team Commander³.

V. LAW

a. Evidence in Aggravation under RCM 1001(b)(4)

Evidence is relevant within the meaning of RCM 1001(b)(4) when it is "important to the determination of a proper sentence." *United States v. Arceneaux*, CM 447112, slip. op. at 3. It is "important to the determination" when it has any tendency to make the existence of any fact that is of consequence to the determination of a proper sentence more or less probable. Military Rule of Evidence (MRE) 401; cf. *United States v. Harrod*, 20 M.J. at 779 (If relevant to the determination of an appropriate sentence . . . such evidence is admissible). The Military Judge's Benchbook specifically includes the "nature and extent of any injuries suffered by the victim" as an appropriate consideration at sentencing. DA Pam 23-9.

"The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." RCM 1001(b)(4). Such evidence may include, but is not limited to, "evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an

³ The Task Force Team Commander remains on active duty in a position that does not permit the public disclosure of his identity. The Government will provide a separate SECRET addendum to this filing that includes his identity.

offense committed by the accused..." *Id.* "Victim" is defined as "an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under this chapter (the Uniform Code of Military Justice) [10 USCS §§ 801 et seq.]" Article 6b(b), UCMJ. The Court of Appeals for the Armed Forces has observed that RCM 1001(b)(4) has a "rather broad ambit." *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 12 March 2009).

The phrase "directly relating to or resulting from the offenses" imposes a "higher standard" than "mere relevance." *United States v. Gordon*, 31 M.J. 30, 36 (CMA 1990). Evidence is admissible of sentence which shows "the specific harm caused by the defendant." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Not every circumstance or consequence of an accused's misconduct may be admitted into evidence during the presentencing phase of court-martial. *United States v. Stapp*, 60 M.J. 795 (CAAF 2004). An accused is not "responsible for a never-ending chain of causes and effects." *United States v. Witt*, 21 M.J. 637, 640 (ACMR 1985). The evidence sought to be admitted must establish that the offense of which the accused is convicted "contributed to those effects which the government is trying to introduce in evidence." *Witt*, 21 M.J. at 641. "Moreover, [the accused's] offense must play a material role in bringing about the effect at issue; the military judge should not admit evidence of an alleged consequence if an independent, intervening event played the *only* important part in bringing about the effect." *Stapp*, 60 M.J. at 801-802. (emphasis added).

An intervening cause is "an independent cause which intervenes between the original wrongful act or omission and the injury, turns aside the natural sequence of events, and produces a result which would not otherwise have followed and which could not have been reasonably anticipated." *United States v. King*, 4 M.J. 785, 788 (N.C.M.R. 1977), *aff'd*, 7 M.J. 207 (C.M.A. 1979) (summary disposition). See Perkins, *Criminal Law* 614 (1957); *United States v. Zukrigl*, 15 M.J. 798 (ACMR 1983).

MRE 104(b) states that,

When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The military judge may admit the proposed evidence on the condition that the proof be introduced later. A ruling on the sufficiency of evidence to support a finding of fulfillment of a condition of fact is the sole responsibility of the military judge, except where these rules of this Manual provide expressly to the contrary.

Under MRE 403, the court may exclude otherwise relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste or time, or needless presentation of cumulative evidence." MRE 403. "[U]nder the MRE 403 balancing test, a presumption of admissibility exists since the burden is on the opponent to show why the evidence is inadmissible. MRE 403 is a rule of inclusion." *United States v. Banker*, 60 M.J. 216. Moreover, "Rule 403 does not exclude evidence because it is strongly persuasive or compellingly relevant -- the rule only applies when it is likely that the jury will be moved by a

piece of evidence in a manner that is somehow unfair or inappropriate. The truth may hurt, but Rule 403 does not make it inadmissible on that account.” *Polec v. Northwest Airlines (In re Air Crash Disaster)*, 86 F.3d 498 (6th Circuit 1996).

b. Victim Rights under Article 6b, UCMJ

Article 6b, UCMJ provides victims with certain rights primarily relating to notice of and access to various stages of a court-martial. Specifically, Article 6b provides the following eight rights: (1) the right to be reasonably protected from the accused; (2) the right to reasonable, accurate, and timely notice of any public hearing concerning the continuation of confinement prior to trial of the accused, a preliminary hearing under Article 32, a court-martial relating to the offense, a public proceeding of the service clemency and parole board, or of any release or escape of the accused; (3) the right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at the proceeding; (4) the right to be reasonably heard at any public hearing concerning the continuation of confinement prior to trial of the accused, a sentencing hearing, or a public proceeding of the service clemency and parole board; (5) the reasonable right to confer with the attorney for the Government in the case; (6) the right to full and timely restitution as provided in law; (7) the right to proceedings free from unreasonable delay; and (8) the right to be treated with fairness and with respect for the victim's dignity and privacy. Article 6b(a)(1-8), UCMJ.

Article 6b, UCMJ, also grants victims the independent right to seek enforcement by the appropriate service Court of Criminal Appeals of a ruling by a preliminary hearing officer or court-martial which they believe violate their rights under the rule. Article 6b(e)(1).

On 17 June 2015, the President signed Executive Order (EO) 13696 which, among other things, implemented changes to the Rules for Court-Martial consistent with the requirements of Article 6b. The changes related to Article 6b affected RCMs 305(i) and (n) (victim's right to be reasonably heard at pretrial confinement hearing and notice of escaped prisoner); 405(i) (notice to and presence of the victim(s) at preliminary hearing); 801(a)(6)(designation of guardian for victim's under age 18 or incapacitated), 806(b)(2)(right of the victim to attend trial); 906(b)(8)(right of the victim to notice and opportunity to be heard on motion for relief from pretrial confinement); 1001A (Crime victims and presentencing); and 1105A (Matters submitted by a crime victim).

As discussed above, “victim” is generally defined consistently throughout Article 6b, UCMJ and the above referenced Rules for Courts-Martial as “an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under this chapter.”⁴ Art. 6b(b). As the plain text of the definition makes clear, it is not necessary that an individual be named in a specification in order to qualify as a “victim.”

⁴ The single exception is RCM 405(i) which adds the language “and is named in one of the specifications under consideration.” RCM 405(i) is the only rule which takes into consideration whether an individual victim is named in a specification. To the extent that RCM 405(i) adds a requirement that is not present in Article 6b, as a statutory provision, Article 6b would control.

Specific to this case, it is significant to note that “[a]n unauthorized absence is not a victimless crime; the victim is the Army, the unit, and its members.” *United States v. Scheuerman*, 67 M.J. 709, 711 (ACCA 2009) (citing *United States v. Cantrell*, 44 M.J. 711 (AFCCA 1996)).

Article 6b, UCMJ, was added to the Code in December 2013 as part of the National Defense Authorization Act for Fiscal Year 2014, 113 P.L. 66; 127 Stat. 672, and “mirrors those [rights] afforded under the Crime Victims' Rights Act (CVRA), 18 U.S.C § 3771.” *United States v. Daniels*, 2017 CCA LEXIS 240 (AFCCA 2017)(unpublished). As the Court recognized in Appellate Exhibit 29, as a relatively new provision there is very little law specifically relating to Article 6b. Those military courts which have had the opportunity to consider Article 6b cases have recognized the relationship between the two statutes. See *United States v. Rowe*, 2017 CCA LEXIS 89 (AFCCA 2017) (“The National Defense Authorization Act for Fiscal Year 2014 incorporated the Crime Victims' Rights Act into Article 6b, UCMJ.”)(internal citations omitted) (quoting *United States v. Wareham*, 2016 CCA LEXIS 609 (AFCCA 2016); *United States v. Daniels*, 2017 CCA LEXIS 240 (NMCCA 2017) (“Unif. Code Mil. Justice art. 6b delineates the rights of victims and mirrors those afforded under the Crime Victims' Rights Act”). The law relating to the CVRA is, therefore, instructive.

The CVRA was enacted in 2004 and repealed The Victim's Rights and Restitution Act of 1990 (VRRRA), 42 U.S.C. § 10606. The CVRA created virtually the same eight rights that would later be included in Article 6b, UCMJ. See 18 U.S.C. § 3771(a)(1-8). The CVRA, unlike its predecessor, created a mechanism allowing a victim to independently seek enforcement of an adverse ruling to the Court of Appeals.

One significant difference between the CVRA and Article 6b, however, is the definition of “victim.” The CVRA defines a “crime victim” as “a person directly *and proximately* harmed as a result of the commission of a Federal offense....” 18 U.S.C. § 3771(e) (emphasis added). This additional causation language is similar to two other federal statutes relating to victims, the Victim and Witness Protection Act of 1982 (“VWPA”), 18 U.S.C. § 3663, and the Mandatory Victims Restitution Act of 1986 (“MVRA”), 18 U.S.C. § 3663A, both of which include the proximate harm language.

Like Article 6b, all three of the relevant federal statutes do not require that a victim be named in a charge. Federal courts have repeatedly recognized that there is no such requirement to qualify as a victim for CVRA, VWPA or MVRA purposes. See *United States v. Alisuretove*, 788 F.3d 1247, 1257 (10th Circuit 2015) (“Notably, however, the MVRA defines the term ‘victim’ to ‘mean a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.’ Quite clearly, this language does not limit the term ‘victim’ to any person or entity specifically listed in the charging document”); *United States v. Dickerson*, 370 F.3d 1330 (11th Circuit 2004) (“the courts have held that restitution may be ordered to a victim not named in the indictment, provided that the victim was ‘directly harmed by the defendant's criminal conduct in the course of a scheme or conspiracy.’”); *United States v.*

Brock-Davis, 504 F.3d 991, 998-1000 (9th Cir. 2007) (owner of second location at which defendants conspired to manufacture methamphetamine was MVRA victim for resulting cleanup costs although not named in indictment); *United States v. Rand*, 403 F.3d 489, 493-96 (7th Cir. 2005) (all individuals who sustained losses caused by acts of identity theft performed in the charged identity theft conspiracy were MVRA victims, not just those listed in the indictment or in the plea agreement).

VI. ARGUMENT

a. The injuries suffered by MSG (Ret) Allen, SPC Morita and SCPO (Ret) Hatch are admissible under RCM 1001(b)(4) and both are victims under Article 6b⁵

The Court has already concluded that the evidence regarding injuries is relevant for the purposes of establishing the element of endangerment. That decision is supported by the plain language of RCM 1001(b)(4) which extends to evidence beyond harm inflicted by the Accused himself to include the consequences directly relating to or resulting from his misconduct.⁶ The injuries to MSG (Ret) Allen, SPC Morita, and SCPO (Ret) Hatch clearly fall within this category.

1) The Court has already concluded that the evidence regarding injuries is relevant

In ruling on the admissibility of evidence of injuries on the merits as proof of endangerment, the Court recognized the facial relevance of such evidence. Specifically, the Court concluded, "...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." Neither party has asked the Court to reconsider that finding. Implicit in that conclusion is that the evidence is relevant at sentencing.

The Court ultimately ruled that the evidence was inadmissible after conducting a balancing test under MRE 403. As discussed below, that analysis is markedly different when it comes to evidence at sentencing. The material that the Court permitted the Government to offer, however, is significant to the determination of what is relevant under the provisions of RCM 1001(b)(4). The Court wrote that,

⁵ The test for whether evidence is admissible under RCM 1001(b)(4) is functionally the same as the test for whether an individual is a victim under Article 6b, UCMJ. Thus, a determination that the Government has established by a preponderance of the evidence that the injuries were "directly relating or resulting from the offenses" would similarly resolve the question of whether they "suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense [under the UCMJ]." The Government will therefore address both issues simultaneously.

⁶ The Defense Brief Regarding Admissibility of Injury Evidence on Sentencing, D APP 64, addresses the issue of uncharged misconduct, however their analysis is fundamentally flawed. The Government is not alleging that the Accused committed a separate, uncharged, crime that resulted in injuries, rather that the injuries are directly related to or resulted from the Accused's misconduct. As such, the doctrine of uncharged misconduct simply does not apply.

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.

It would be an absurd result, assuming that the Accused is convicted, for the Government to be allowed to present evidence of shots being fired at servicemembers on the merits, but to then preclude the Government from offering evidence of where those shots landed during sentencing.

2) The holdings in *United States v. Rust* and *United States v. Nourse* and a numerous other cases support the admissibility of the evidence

It is axiomatic that conducting operations in a combat zone exposes servicemembers to danger - namely, the enemy. The Accused, by his own admission, intentionally abandoned his post in order to cause a DUSTWUN event, knowing that doing so would expose others to that danger. MSG (Ret) Allen and SCPO (Ret) Hatch were, in fact, engaging in missions undertaken as a direct result of the DUSTWUN, where they were exposed to and injured by that danger. In short, the Accused engaged in misconduct, that misconduct exposed others to a known danger, and as a consequence of that exposure several people were injured. The causal connection is direct and clear.

The holding in *United States v. Rust*, 41 M.J. 471 (C.A.A.F. 1995) supports this conclusion. In *Rust*, the accused, an Air Force physician, was convicted of dereliction of duty after failing to appear at a military hospital to evaluate a pregnant patient who was later admitted to the emergency room where her child was born prematurely and later died. The father of the child subsequently murdered the mother and then committed suicide, leaving a suicide note that made reference to the loss of the child as the motivation for his actions. The Government at trial sought to enter the suicide note as evidence in aggravation. The Air Force Court of Criminal Appeals concluded that the murder-suicide, while perhaps logically connected, was too attenuated to be admissible.

Rust's applicability to this case is striking, not for what the Court held to be inadmissible aggravation evidence, but for what was permitted to be introduced, namely, the premature birth and death of the baby. In this manner, the similarities between the two cases are significant. Major Rust’s misconduct - failing to treat a pregnant patient – exposed others to a known danger, namely the risks associated with not providing appropriate medical care to a pregnant woman. The direct consequence of being exposed to that known danger was the premature birth and subsequent death of the baby, which was admissible as aggravation.

The evidence that the Court concluded was inadmissible - the suicide note - was in effect a "consequence of a consequence," and thus too far removed from the Accused's misconduct to be admissible aggravation evidence. That is simply not the case here. For example, were the Government attempting to offer evidence that, as a result of their grief-stricken reaction to the injuries suffered by MSG (Ret) Allen, a member of his family had taken some deranged action to harm themselves or MSG (Ret) Allen, the *Rust* holding would certainly apply. The critical takeaway from *Rust* is that the aggravation evidence of the death of the baby was admissible.⁷

In *United States v. Nourse*, 55 M.J. 229 (CAAF 2001), the Accused pled guilty to theft of equipment from a local civilian Sheriff's Office where he was employed part time. The Court held that evidence of uncharged thefts from the same office was admissible as an aggravating circumstance under RCM 1001(b)(4) to "to show the full impact of appellant's crimes upon the [victim]." *Id.* at 232. As discussed in Footnote 5 above, the evidence of injuries that the Government seeks to offer here is not uncharged misconduct, rather it is the natural and probable consequence of the Accused's actions. The significance of *Nourse*, and the line of cases permitting the use of uncharged misconduct at sentencing, is that the scope of appropriate aggravation evidence is broad, stretching beyond the four corners of the charge sheet to evidence that puts in context the criminal acts of an Accused.

A variety of other cases, from both military and civilian courts, also support a more expanded view of appropriate aggravation evidence. For instance, in *United States v. Chapman*, 2007 CCA Lexis 243 (NMCCA 2007), the Accused was convicted of unauthorized absence and missing movement by design. The Court held that evidence that another Marine was selected as a replacement for the accused, and that a member of the unit was injured during the deployment, was appropriate aggravation evidence, despite the fact that, as here, there were no specified victims in either specification. *See also United States v. Kaminski*, 501 F.3d 655 (6th Cir. 2007) (affirming finding that "society at large" was the victim of offenses under the Food, Drug and Cosmetic Act involving the sales of unapproved and adulterated drugs).

3) The factors cited by the Defense regarding the missions are themselves evidence in aggravation and do not constitute intervening causes

The Defense claims that "multiple factors unrelated to SGT Bergdahl's actions contributed significantly to the resulting injuries in question." D APP 64 at 4. Specifically, the Defense claims that the following "factors" weigh against admissibility: "the enemy's actions attacking the Afghan unit to which Allen and Morita were embedded; the improper staffing of the mission, the improper equipping of the unit to conduct the mission; the unqualified personnel chosen to lead the mission without the necessary experience of training; the lack of infantry experience of the ETT for the type of mission; the lack of adequate communications; and, the lack of proper fire and air support." *Id.* The Defense argument fails for several reasons.

⁷ This is additionally significant because, as here, Major Rust was not charged with causing the death of the baby, nor was the baby a named victim of any specification.

First, the claim that “the enemy’s actions attacking” the unit constitutes an intervening cause strains credulity. The actions of the Taliban in engaging U.S. Forces in combat did not constitute an intervening cause; they were the natural, probable, and foreseeable consequence of causing servicemembers to conduct missions in Afghanistan. Apart from the patently obvious fact that the danger in Afghanistan was exposure to the enemy, the Accused acknowledged his own awareness of the risks, both in his statements and in his actions in leaving the outpost at night, wearing a disguise, and considering stealing a weapon. An Accused cannot escape the consequences of exposing others to a known danger by claiming third party intervention when the third party itself was the known danger. *Rust* does not stand for the proposition that the actions of a third party are not appropriate aggravation evidence, indeed, were that the case the *Rust* court would not have needed to conduct any analysis beyond that point. The prohibition in *Rust* was specific to the unforeseeable actions of a “deranged mind.”⁸ *Rust* at 478. The risk of injury from the Taliban was not simply foreseeable, it was the obvious danger to all personnel conducting missions in Afghanistan.

Second, the Defense claims regarding the staffing, equipping, and support for the mission inappropriately treats those claims as established facts. They are not. The Government disputes that the personnel assigned to the mission were not appropriately trained or that they had inadequate experience. As the Court concluded in its finding of facts on the ruling regarding the admissibility of injuries on the merits, all five of the Soldiers assigned to the mission had infantry training, and one had “significant combat experience.”⁹ Moreover, it is the Government’s position that the nature of the mission, including the increased level of risk, was a calculated tactical risk made by the mission commander, COL Robert Campbell.

The Accused not only intended to create a crisis, it was an essential part of his plan to gain an audience with a general officer. The nature of the ensuing crisis, as with any emergency situation, required an increased level of acceptable risk. The hasty nature of search and recovery operations was not only foreseeable, it was necessary in order to have any realistic possibility of preventing the Accused from being moved across the border into Pakistan.¹⁰ Far from being intervening causes of the injuries to MSG (Ret) Allen, the atmospherics of the mission were the direct result of a DUSTWUN crisis in Afghanistan, and are themselves appropriate evidence in aggravation.

⁸ It is not difficult to imagine a scenario where the actions of a deranged third party could still be admissible against an accused at sentencing. For instance, were an accused to lock a person in a room with a person they knew to be a violent psychotic, they could hardly claim that any ensuing injuries were the result of third party intervention such that they should be held responsible at sentencing.

⁹ The Government respectfully disagrees with the Court’s conclusion that Major Marx had “no combat experience or training at the time of the mission.” As Major Marx testified, he was trained for approximately two months prior to the deployment in combat operations, and at the time of the mission had been embedded with the ANA unit for approximately 6 months and had conducted multiple combat operations with them. Moreover, MSG (Ret) Allen, as evidenced by his enclosed ERB, had significant combat experience prior to this mission.

¹⁰ The Defense makes the bizarre argument that the injuries were too far removed in time and distance from the location where the Accused deserted to be admissible, as if it were only reasonable and foreseeable for Army to attempt to rescue the Accused for a short period of time and only in the immediate vicinity of OP Mest.

4) Assuming arguendo that the factors relating to the missions are intervening causes, they are neither independent, nor the only important part in bringing about the injuries

Even if the Court were to treat the atmospherics of the mission as constituting intervening causes, they are not "independent" events which "[turn] aside the natural sequence of events, and produces a result which would not otherwise have followed and which could not have been reasonably anticipated." The natural sequence of events after the Accused intentionally caused unnecessary search and recovery missions in Afghanistan was that service members would be exposed to dangerous conditions outside of the wire. It is hardly plausible to argue that servicemembers being injured during those missions could not have been reasonably anticipated.

Personnel Recovery Operations are among the most important missions the U.S. military conducts. "It is the Army's Policy that all Soldiers and Department of the Army (DA) civilians shall abide by the Warriors Ethos. The Army [Personnel Recovery] Program is specifically supported by the Ethos statement that 'I Will Never Leave a Fallen Comrade.'" AR 525-28, paragraph 3-1. "Preserving the life and well-being of persons working for the Army, or any Department of Defense (DOD) organization, is one of the highest priorities of the United States Government. The personnel recovery mission includes protecting Soldiers, other Service members, DOD civilians, and DOD contractors in danger of isolation while participating in any activity or mission sponsored by the United States." FM 3-50.1 Army Personnel Recovery, November 2011.

"The appropriate level of command makes prudent risk decisions after applying [risk management] and weighing potential gain against potential loss. Commanders need not be risk averse. Forces may undertake even high-risk endeavors when commanders determine that the sum of the benefits exceeds the sum of the costs." ATP 5-19, Risk Management, paragraph 1-8.

The decision to accept a higher level of risk was made by COL Campbell, the ground commander, and a combat veteran with multiple deployments who ultimately commanded at the Brigade level. His decision to accept that higher level of risk in, as he aptly put it, an *in extremis* situation, was hardly an intervening independent cause. Emergency situations necessitate emergency responses. The Defense, in arguing that the atmospherics of the mission rose to the level of inappropriate risk, offered the testimony of LTC (Ret) Jose Aymat, the AR 15-6 investigator, who, as the Court concluded, "conducted [his investigation] in less than 11 days from appointment ... to the issuance of his report" and "had very limited experience in combat operations or command and control of the same. He had no experience with DUSTWUN operations." Appellate Exhibit 29 at 2. If the Defense believes that it is tactically wise to attempt to put COL Campbell's decisions "on trial" by claiming that he risked *too much* in an attempt to save their client, they are certainly free to do so. A litigant cannot, however, claim that because they intend to contest an issue that it is a waste of time. Such a conclusion would effectively permit any Accused to preclude Government evidence simply because they strenuously object to it.

United States v. Stapp is significant to this issue, not for what the Court concluded was inadmissible sentencing evidence, but for what was permitted. In *Stapp*, two underage civilian girls ran away from home and entered Fort Lewis, where they met, among others, the accused. *Stapp*, 60 M.J. at 795. The girls stayed in the barracks at Fort Lewis for several days, where they were provided alcohol and marijuana, and one of them was sexually assaulted by a servicemember other than the accused. *Id.* *Stapp* ultimately pleaded guilty to distributing marijuana and violating a lawful general order by allowing an underage runaway to stay the night in his barracks room. *Id.* At sentencing, the mother of the girl who was assaulted testified concerning her daughter's emotional state and need for professional counseling since the incidents. *Id.* at 800. Defense counsel objected on the grounds that "there apparently were many men involved here and many incidents over many days." *Id.* The trial court overruled the objection and instructed Defense Counsel to "explore that on cross-examination, if you so choose." *Id.*

ACCA reversed the sentence, and while the Court found a variety of other testimony offered at sentencing to be impermissible, it did not conclude that the emotional impact testimony was improper, notwithstanding the objection at trial. Rather, they faulted the military judge for not permitting wider cross examination of the mother regarding her awareness that her daughter had stayed at Fort Lewis willingly and attempted to avoid detection.

The takeaway from *Stapp* is applicable here. While there were other individuals who contributed to the psychological and emotional harm that the victim experienced (and in arguably a much more significant manner than *Stapp* himself), that was not sufficient to make the evidence inadmissible against the accused, but rather was appropriately addressed through cross examination.

Here, just as the involvement of other individuals in *Stapp* was not the *only* cause of the trauma suffered by the victim, the nature of the mission was not the *only* cause of MSG Allen's injuries. The Defense is, of course, free to offer evidence in an attempt to mitigate the weight of the evidence, but it is not a basis to exclude the evidence altogether, particularly since their basis for arguing that the evidence is inadmissible remains hotly contested.

Similarly with regards to the Hatch mission, as detailed above, and as the Government will present during testimony on this issue, the mission was entirely related to the search for SGT Bergdahl, and would not have happened were it not for the Accused's misconduct. The Defense's sole basis for claiming that the Hatch mission should not be admissible is that it may have "supported a previously planned operation and targeted a well-known enemy combatant approximately 20 miles away from where the accused allegedly deserted." D App 64 at 5. First, the Government disputes this factual conclusion. More importantly, unless the Defense can establish that an intervening cause was the *only* important role in bringing about the injuries, the evidence is admissible at sentencing. As discussed in Footnote 10 above, the physical proximity to the point of desertion is irrelevant. The DUSTWUN crisis that the Accused created was not limited to his observation post. Quite the opposite, and as he was fully aware and counting on, it extended to multiple branches and across the area of operations.

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

The probative value of the serious consequences of the Accused's misconduct could not be higher. Victim impact evidence is explicitly recognized as a proper aspect of aggravation. RCM 1004(b)(4). The Military Judge's Benchbook specifically includes the "nature and extent of any injuries suffered by the victim" as an appropriate consideration at sentencing. DA Pam 23-9. As a rule of inclusion, the burden shifts to the Defense to articulate the existence of *unfair* prejudice, and that demonstrate the risk that the probative value of the evidence would be *substantially* outweighed by such prejudice.

For a variety of reasons, this analysis is distinct from the MRE 403 balancing test that the Court conducted for injury evidence as it relates to the endangerment element on the merits. In that context the Court concluded that the danger of unfair prejudice substantially outweighed the probative value of the evidence.

First, the probative value of the evidence is dramatically higher for sentencing purposes than for the more limited purpose of establishing endangerment on the merits. Far from being merely one of several ways that the Government might establish an element on the merits, this is the only evidence that the Government can present that establishes the true scope of the impact of the Accused's actions.

Second, the risk of "unfair" prejudice is significantly reduced at sentencing. The concern on the merits, as highlighted by the Court in Appellate Exhibit 29, is that the Accused "is not to be *convicted* because, while searching for him, his comrades were horrifically injured." (emphasis added). At sentencing that concern is obviously not present. There is simply no risk that at sentencing the evidence "will be used in a way that distorts rather than aids accurate fact finding," as the evidence of the consequences of the Accused's criminal conduct goes directly to the determination of an appropriate sentence. *Id.*

Similarly, because of the differing questions that must be decided by the fact finder on the merits versus sentencing, the concern regarding confusion of the issues and waste of time is significantly reduced. This is particularly true when considering the different standard regarding causation. To meet the burden during sentencing proceedings of having evidence excluded as a result of an independent, intervening cause, the Defense would have to establish that such cause was the *only* important part in bringing about the injuries. This is a significantly lower standard than the "but for" standard referenced in the Court's earlier ruling. The Defense is certainly free to attempt to mitigate the effect of the evidence regarding injuries by arguing that there were mistakes made in the planning, resourcing, or execution of the missions, or that they had additional objectives; those arguments at sentencing go to weight, not admissibility.

The Government strongly disagrees with the notion that these issues would be particularly time consuming. Contrary to the position that the Defense takes, the actual litigation regarding the Allen mission consumed less than a single day of testimony (the

record will reflect that the proceedings recessed at approximately 1300 and resumed the following day simply because of the unavailability of LTC (Ret) Aymat, who ultimately testified for less than one hour. Had he been available on the first day, the entirety of the testimony would have consumed approximately 4 hours.). Nor is it accurate that at trial this would require more time in the form of additional witnesses or evidence. With regard to the MSG (Ret) Allen and former SPC Morita mission, the Government has no intention of calling anyone other than the witnesses who testified at the Article 39(a) session, and has already provided the Defense with all of the information relating to the mission that still exists.¹¹ The mere fact that a party intends to vigorously litigate an issue is not a basis to conclude that presentation of the evidence would be a waste of time – that is the nature of adversarial litigation. Nor can this evidence be said to “confuse” the issue, as at sentencing the issue of what constitutes an appropriate sentence cannot be fairly considered without knowing the consequences of the Accused’s actions.¹²

The mere fact that the evidence of injury may result in emotional testimony does not alter the analysis. In *United States v. Ashby*, 68 M.J. 108 (CAAF 2009), the Accused was convicted of obstruction of justice and conspiring to obstruct justice after he destroyed flight tapes of an accident where a Marine aircraft struck a gondola line, resulting the death of several Italian civilians. The Court permitted the testimony of three family members of the victims that not knowing what was on the videotape had left lingering questions regarding their loss, in spite of the Defense claims that the evidence was “enflaming,” unnecessarily humanized the victims, and unfairly portrayed the Accused as being responsible for their deaths. Similarly, in *Rust*, as discussed above, the Court permitted evidence of the premature birth and death of a baby.

In both cases, although the accused were not charged directly with causing the death of anyone, evidence that individuals had been killed was held to be admissible. It is difficult to imagine more potentially emotional testimony than the death of a newborn baby. These cases clearly demonstrate the differences between the MRE 403 analyses at sentencing versus the merits. When the consequences of an accused’s misconduct result in serious injuries or death, the fact that the evidence may be emotional does not result in *unfair* prejudice; instead, the severity of the consequences are precisely the type of evidence that must be considered in determining an appropriate sentence.

¹¹ The Defense continues to believe that there is a significant volume of material relating to these missions that the Government has not discovered. As the Court has recognized repeatedly, the Government has “looked under every rock” in an effort to provide all discoverable material to the Defense. While it may well be true that there was information that existed at one point, the Government is confident that there is no additional material that has not been turned over or is presently the subject of litigation.

¹² Contrary to the Defense’s claims, the Government has not proposed excluding the Accused from sessions where evidence is presented that is above his classification level. The Government specifically suggested that every effort should be made to present evidence in a way that does not implicate the issue, and requested permission to brief alternatives should it become necessary. The Government does not intend to offer any evidence regarding any of these missions that will implicate any TOP SECRET or ACCM material and, as such, it is not a basis to exclude the evidence.

VII. CONCLUSION

The Accused set in motion a plan which he knew would expose others to serious danger. MSG (Ret) Allen, SPC Morita, and SCPO (Ret) Hatch were not only exposed to that danger, they were seriously injured as a result. All of the injuries occurred on missions that would not have happened were it not for the Accused's manufactured and unnecessary crisis. Their injuries are directly relating to and resulted from the Accused's misconduct, and, as such, the evidence is admissible at sentencing and they should be recognized as victims under the provisions of Article 6b.

//Original Signed//

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 6 June 2017.

//Original Signed//

JUSTIN C. OSHANA
MAJ, JA
Trial Counsel

[Place holder for SECRET Addendum to G APP 81.]