

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
(Filed Electronically)**

**CRIMINAL ACTION NO. 5:06CR-19-R
UNITED STATES OF AMERICA,**

PLAINTIFF,

vs.

STEVEN DALE GREEN,

DEFENDANT.

**REPLY TO UNITED STATES' RESPONSE TO
MOTION TO DISMISS FOR LACK OF JURISDICTION**

Comes the the defendant, Steven Dale Green, by counsel, and for his reply to the United States' response to his motion to dismiss for lack of jurisdiction, states as follows:

The United States' response to Defendant's motion to dismiss for lack of jurisdiction is in large part an attempt to minimize the impact of *United States v. King*, 27M.J. 327 (C.M.A. 1999). In its response, the United States, in essence, characterizes the *King* holding as addressing a mere bureaucratic or administrative process that is steeped in paperwork. The prosecution first encourages this Court to overlook its holding because it would become federal precedent that would provide military authorities an opportunity to "comb through personnel regulations in order to challenge standard out-processing procedures...in efforts to retain court-martial jurisdiction over discharged servicemembers" (Response, p. 11). The prosecution then encourages this Court to find that the Army did in fact comply with the discharge requirements mandated in *King*. (Response, p. 5).

However, the “clearing process” identified in *King* is much more significant than the prosecution is willing to admit because that process determines whether service personnel have been properly discharged by their branch of the military and thus whether or not they are subject to the UCMJ. The “clearing process” is not merely ministerial as the prosecution argues. For purposes of PFC Green’s case, it is pivotal and this Court’s jurisdiction over this Defendant is determined by an analysis of the *King* holding.

As argued in the Defendant’s original motion, the court in *King* recognized that the applicable statutes [10 U.S.C. §§1168(a) and 1169)] set forth three requirements for a proper early discharge. *Id.* at 329. When those three requirements are not met, there can be “no valid discharge.” *Id.* at 328. The requirement at issue in PFC Green’s case is whether he completed the ‘clearing’ process required under appropriate service regulations to separate him from military service.” *Id.* at 329. The United States can call the “clearing process” whatever it wants but the fact remains it is an essential element to a valid discharge and, for the reason stated in the Defendant’s motion to dismiss for lack of jurisdiction (pp. 4-8) that requirement was not met in this case.

The prosecution’s argument that a ruling by this Court wherein it is determined that PFC Green was not properly discharged would give military authorities federal precedent which would encourage them to engage in efforts to retain military jurisdiction over the 23.5 million discharged veterans is preposterous. (Response, p. 11). The fact is PFC Green cannot even convince the military to exercise jurisdiction in this one single case which is arguably the most publicized Army justice case in the last decade (as this Court is aware,

PFC Green has petitioned the Army to exercise jurisdiction over him through a voluntary reenlistment and his request was rejected.¹⁾ Therefore, the threat that the military will begin to “comb” through regulations in an attempt to retain jurisdiction over discharged military members should be of no concern to this Court or to the other 23,499,999 veterans who are not a party to this case.

The prosecution also argues PFC Green essentially waived the Army’s lack of compliance with the discharge process. (Response, p. 10 - 11). The prosecution states “Green did not raise this issue when a *military court* would have had the opportunity to review it.” (Response, p. 10)(emphasis added). This statement shows a fundamental lack of understanding of the military justice system by the prosecution in this case. To read this statement, one would be led to believe that a military member has open access to the military justice system like civil litigants do in the civilian court system and has the ability to file an action with a military court whenever he or she deems necessary. This is not the case. There simply is no military equivalent of the civilian civil litigation system. A military member only has access to the military court system when a predicate preferral and referral of criminal charges by a military authority is made - only then can a military member ask the military to address his or her concerns.

With respect to the surrender of Green’s military identification (Response, p.15), Army Regulations clearly place the burden on the *military personnel* in charge of

¹The prosecution argues that PFC Green’s request through counsel to voluntarily reenlist in the Army in this matter shows that PFC Green concedes he was properly discharged. (Response, p. 11). However, the Court will likely understand that letters from counsel to the Army seeking a resolution to this matter are not admissions of any fact and are merely discussions to be viewed in the same light in which settlement discussions are viewed.

conducting a departing service member's out-processing to obtain the identification from the departing service member. Army Regulation 635-10 3-14 states, "[i]mmediately following final payment, the individual will surrender Identification Card (DD Form 2A) or sworn statement of loss to the finance and accounting officer or class B agent officer." Thus, if PFC Green did not surrender his identification after receiving his final payment (as we all agree he did not in this case), the Army was obligated to obtain a "sworn statement of loss" from him. Its failure to do so (there is no such sworn statement of loss in the discovery provided to the defense in this case) is another factor leading to the undeniable conclusion that PFC was never actually discharged from the Army.

In response to the defense's position regarding the Army's lack of compliance with Army Regulation 635-200 5-15, the United States argues that the regulation is misread by the defense and does not encompass Sgt. Yribe under the facts of this case because Sgt. Yribe was not PFC Green's "commander" as only commissioned officers can be "commanders." (Response, p. 17-18). In order to support their position, the prosecution erroneously points to RCM (Rules for Courts-Martial) 103(5) for the proposition that "commander" means a commissioned officer in command. (Response, p. 18). RCM 103 is entitled "Definitions and Rules of Construction" and the very first line reads "[t]he following definitions...apply throughout *this manual*..." (Emphasis added). There is absolutely no correlation or connection between the Army Regulations and the RCM. RCM 103 specifically states that the definitions apply throughout the RCM and does not even suggest that the definitions apply to Army Regulations as suggested by the prosecution.

This argument also shows a lack of understanding of the military system by the prosecution in this case.

Assuming arguendo that RCM 103 applies to Army Regulations, it should be noted that a full reading of RCM 103(5) shows the definition does not specifically limit the definition of “commander” to commissioned officers as argued by the prosecution. RCM 103(5) states in full:

“Commander” means a commissioned officer in command *or an officer in charge* except in part V *or unless the context indicates otherwise.*” (Emphasis added).

Clearly the full reading of RCM 103(5) leads to a conclusion other than that put forth by the prosecution. Sgt. Yribe was superior in rank to PFC Green, was his “officer in charge” on March 12, 2006 and also on the day he ordered PFC Green to get out to the Army in order cover up his claim of involvement in the charges of this case. Additionally, the context of Army Regulation 635-200 5-15 dictate a conclusion that Sgt. Yribe was PFC Green’s commander for the purposes of that regulation.

In an attempt to show that PFC Green had actually completed the requirements set forth in *King* in relation to the “clearing” process, the prosecution presents documentary evidence relating to PFC Green’s departure from Ft. Campbell, Kentucky. After explaining that the Army complied with all the requirements relating to briefings and other instructional requirements set forth by Army Regulations, the prosecution then argues, when discussing the requirement mandated in AR 635-10 3-1 (departure ceremony), that “if the conditions of war in Youssifiyah, Iraq, were as desperate as the defendant claims” it is “reasonable for

regulatory policies mandating parties and ceremonies to give way to the demands of war, operational readiness, and the fact that Green's discharge, although honorable, was initiated because of a personality disorder and 'continued poor performance.'" (Response p. 14). This is the prosecution's way of explaining non-compliance with AR 635-10 3-1.

This is yet another argument that not only shows the prosecution's lack of understanding of the military system, but it also displays a level of callous disregard for the conditions in Youssifiyah, Iraq, that is offensive to read. First, anyone with any type of military insight or experience understands the importance of ceremonial activities to service members. All branches of the service are steeped in tradition and ceremonies are a regular event in the military community regardless of conditions. It is not uncommon to see ceremonies take place in the harshest conditions.² In fact, the Army considers ceremonies to be of such grave importance to their culture they have a regulation (AR 635-10 3-1) which mandates a departure ceremony for all honorably -discharged soldiers. In his case, PFC Green was honorably discharged and the requirement to conduct the ceremony was not optional - it was mandatory. The fact he was being separated for a personality disorder is completely irrelevant and misses the point. AR 635-10 3-1 does not state that a person being separated for a personality disorder is excluded from the requirement. This regulation was simply not followed and the "clearing" process requirements of the Army were not completed.

² The Defense notes that the military routinely conducts ceremonies in combat zones. In the instant case alone the Army conducted memorial ceremonies for soldiers killed in PFC Green's unit in Iraq, such as Sgt. Kenneth Casica, Sgt. Travis Nelson, Lt. Benjamin Britt and SPC William Lopez.

Besides the lack of understanding of the military system, the prosecution callously questions the conditions in Youssifiyah, Iraq, when trying to articulate why it believes it was acceptable to deny PFC Green his departure ceremony and violate the mandates of AR 635-10 3-1.³ As a reference, the prosecution points to a letter sent by the Secretary of Defense and the Secretary of the Army wherein counsel outlines some of the statements made by members of PFC Green's unit at companion proceedings. (Response, p. 14). The conditions relayed by the defense to the recipients of the letter in question were not attributable to PFC Green - but were made by other members of his unit. Most importantly, the prosecution's statement implies that the conditions in Youssifiyah, Iraq were not difficult - an implication that is clearly disputed by all accounts.⁴ To imply the conditions were anything less than those portrayed in the defense's statement is to degrade all of the service members who served in Youssifiyah, Iraq, who have testified in companion proceedings.

The prosecution then attempts to use the case of United States ex rel. *Toth v. Quarles*, 350 U.S. 11, (1955) to support the proposition that the Supreme Court has stated that once a person is discharged from the service, he or she is a civilian and may not be subjected to

³ Again, the prosecution writes "if the conditions of war in Youssifiyah, Iraq, were as desperate as the dependent claims."

⁴ For Example, the investigating officer who conducted the preliminary proceedings in the co-defendants' cases (the Article 32 hearings) specifically made findings that this unit experienced significantly harsh circumstances in Youssifiyah, Iraq, including: losing much of its leadership through death and non-availability, the negative impact of four unit members being killed in a short period of time, the constant danger and stress through IED sweeps, unusually long rotations at traffic checkpoints, and the destruction of the unit's Home Base ("FOB") in Youssifiyah by fire.

court-martial jurisdiction. (Response p. 4). It is not necessary for the Defense to address this issue because it assumes a service member has been *discharged*. As outlined, PFC Green was never discharged from the Army. Therefore, an in-depth discussion of the holding in *Toth* is unnecessary.

The prosecution next argues that this Court should not rule on the issue of the sufficiency of PFC Green's discharge from the Army because to do so would require the Court to "navigate uncharted waters of a clearing process that is generally unfamiliar in civilian proceedings." (Response, p. 10). The prosecution goes on to state "the Supreme Court has long recognized a policy of judicial non-intervention in the affairs of the military." (Response, p. 10). This argument is illogical in this case. The fact is this Court has before it a defendant who has been charged in a federal civilian criminal court for offenses allegedly committed while he was on active duty in Iraq. PFC Green did not request this case be tried in the civilian courts. He instead requested that his case be tried by the military.⁵ The prosecution charged PFC Green in this court and must now deal with issues unique to a service member being tried by civilians for crimes committed in a foreign country in a time of war. To suggest that this Court should in essence bury its head in the sand and refuse to deal with military-related issue in this case, such as the sufficiency of the Defendant's discharge from the Army, is untenable and must be dismissed.

⁵ To the best of defense counsel's knowledge, PFC Green is one of first, if not the first, person to be prosecuted in a U.S. civilian court for charges stemming from active military service overseas.

Conclusion

In conclusion, the MEJA allows civilian authorities to prosecute members of the Armed Forces in federal court as long as they are not subject to the UCMJ. 18 U.S.C. Section 3261. In this case, PFC Green is still subject to the UCMJ by virtue of the fact he was never properly discharged by the Army. Therefore, as he is still subject to the UCMJ, the instant prosecution under the MEJA is unlawful and must be dismissed for lack of jurisdiction over PFC Green.

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CERTIFICATE

I hereby certify that on April 18, 2008, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following: Marisa J. Ford, Esq., Assistant United States Attorney; James R. Lesousky, Esq., Assistant United States Attorney; and Brian D. Skaret, Esq., Attorney at Law.

/s/ Scott T. Wendelsdorf