

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH**

UNITED STATES OF AMERICA

PLAINTIFF

v.

Electronically Filed
CRIMINAL ACTION NO. 5:06 CR-19-R

STEVEN D. GREEN

DEFENDANT

UNITED STATES' MOTION IN LIMINE

Pursuant to Fed. R. Crim. P. 12(b), and for the reasons set forth in the accompanying Memorandum, the United States hereby moves that the Court enter an Order prohibiting the defendant from eliciting, offering, or commenting on the following evidence during the guilt phase of trial on the grounds that it is irrelevant to the charges and the fact-finding duties of the jury, and, alternatively, that its probative value is substantially outweighed by the danger of unfair prejudice:

1. Evidence or argument that the United States could have, or should have, prosecuted the defendant under the Uniform Code of Military Justice;
2. Evidence or argument concerning the reasonableness, wisdom, fairness, or consequences of prosecuting the defendant under Federal criminal law as opposed to the Uniform Code of Military Justice;
3. Evidence concerning the defendant's desire and willingness to be tried under the Uniform Code of Military Justice and his efforts to reenlist in the Army for that purpose;
4. Evidence concerning differences or similarities between Federal criminal law and the Uniform Code of Military Justice, including with respect to available charges, criminal penalties, sentencing, and eligibility of parole; and

5. Evidence or argument that only individuals who are in the military or who have military experience, and not civilians, can or should evaluate the defendant's conduct.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF
UNITED STATES' MOTION IN LIMINE**

Pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure, the United States has filed a Motion In Limine with the Court that addresses certain matters that are capable of resolution prior to trial. This Memorandum sets forth the reasons for the relief sought and the supporting legal authority.

I. The Evidence Is Inadmissible Because It Is Irrelevant To The Charges and Fact-Finding Duties of the Jury.

While relevant evidence is generally admissible, irrelevant evidence is not. Fed. R. Evid. 402. For the reasons explained below, the evidence that the United States seeks to exclude is irrelevant and therefore inadmissible.

The evidence that the United States seeks to exclude fails to satisfy the relevancy requirements of Fed. R. Evid. 401. "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Whether a fact is "of consequence to the determination of the action" is governed by substantive

law.¹ In a criminal case, the facts that are of consequence to the determination of the action consist of “the elements of the offenses charged and the relevant defenses (if any) raised to defeat criminal liability.” *See United States v. Hall*, 653 F.2d 1002, 1005 (5th Cir. 1981).² Since this case involves sixteen counts of rape, premeditated murder, conspiracy, and obstruction of justice, the facts of consequence during the guilt phase of this trial will be, for example, whether the defendant caused the death of the victim with *malice aforethought* and *premeditated intent*, whether the defendant *agreed* with others to commit murder, whether the defendant engaged in a *sexual act* with the victim, whether the defendant *knowingly* obstructed justice, etc.

Here, the evidence that the United States seeks to exclude has no conceivable tendency to make the existence of such facts more or less probable. For example, evidence that the United States could have, or should have, prosecuted the defendant under the Uniform Code of Military Justice (*see United States Motion In Limine*, No 1.) or that the defendant attempted to re-enlist in the Army for that purpose (*id.*, No. 3), bears no relationship to whether an agreement existed between two or more people to commit premeditated murder. Similarly, testimony questioning a

¹ *United States v. Morris*, 957 F.2d 1391, 1400 (7th Cir. 1992) (“Whether or not a fact is of consequence is determined not by the Rules of Evidence but by substantive law. Thus, before the district court could properly have received evidence . . . the district court had to find that this fact was relevant to the determination of . . . liability.”); *United States v. Shomo*, 786 F.2d 981, 985 (10th Cir. 1986) (“[E]vidence is not relevant unless the fact to be proved or disproved is material. Whether a fact is material is determined by the substantive law which governs the action.”).

² *See also id.* (“Whether a proposition is of consequence to the determination of the action is a question that is governed by the substantive law. Simply stated, the proposition to be proved must be part of the hypothesis governing the case, a matter that is in issue, or probative of a matter that is in issue, in the litigation. . . . The governing hypothesis of any criminal prosecution consists of the elements of the offenses charged and the relevant defenses (if any) raised to defeat criminal liability.”).

civilian's ability to evaluate a soldier's conduct (*id.*, No. 5) sheds no light on the factual issue of whether or not there was contact between the defendant's penis and the victim's vulva. Nor does evidence concerning differences or similarities between Federal criminal law and the Uniform Code of Military Justice (*id.*, No. 4) make it any more or less probable that defendant obstructed justice knowingly, instead of mistakenly or accidentally.

Indeed, far from proving facts of consequence to the action, the evidence that the United States seeks to exclude in this case pertains primarily to the United States charging decisions, which are never a proper subject for the jury. As courts have frequently affirmed, the United States alone retains broad discretion in making charging decisions. *United States v. Goodwin*, 457 U.S. 368, 380, n. 11 (1982); *accord, Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980). That discretion extends to decisions concerning the appropriate forum in which to bring charges. *See, e.g., United States v. Talbot*, 825 F.2d 991, 999 (6th Cir. 1987) (recognizing that the United States has discretion to choose between military and civilian courts when bringing criminal charges and noting that prosecutorial discretion in making charging decisions is an inherent part of the criminal justice system). Recognizing the United States' broad discretion in this area, district courts properly exclude evidence concerning charging decisions at trial based on lack of relevance. *See, e.g., United States v. Carneglia*, 2009 WL 185725 (E.D.N.Y Jan. 27, 2009) ("Evidence related to the United States charging decisions may be excluded at trial based on lack of relevance."); *United States v. McLee*, 436 F.3d 751, 762 (7th Cir. 2006) (finding that the district court was within its discretion to exclude evidence of the U.S. Attorney's charging decisions regarding witnesses' father and noting that admitting the evidence may well have lead

to introduction of collateral matters likely to distract and mislead the jury);³ *United States v. Re*, 401 F.3d 828, 832 (7th Cir. 2005) (“[T]he government’s charging decisions are not proper subjects for cross-examination and argument.”).

Applying those principles to this case, the evidence identified in the United States’ Motion In Limine should be excluded as irrelevant during the guilt phase of trial because all of it pertains, directly or indirectly, to charging decisions. The evidence listed at 1 and 2 in the United States Motion in Limine speaks directly to the United States charging decisions. It specifically seeks to exclude evidence that the United States “could have, or should have, prosecuted the defendant under the Uniform Code of Military Justice,” and evidence concerning “the reasonableness, wisdom, fairness, or consequences of prosecuting the defendant under Federal criminal law instead of under the Uniform Code of Military Justice.” Similarly, the evidence listed at 3, 4, and 5 pertains, albeit indirectly, to the United States charging decisions. This evidence is so closely related to the United States charging decisions that hearing it would

³ In *McLee*, the district judge excluded evidence concerning the U.S. Attorney’s charging decision based on lack of relevance and threatened to hold in contempt any lawyer who subsequently referenced the matter. The court made the following statement at a sidebar conference:

And I want to make it plain now to everybody if there is any mention before this jury about his father's charges and later dismissal, I will hold that lawyer in contempt. That is off limits based on a pretrial ruling. We are not going to deviate from that. And these questions do not elicit any additional probative value as to his motive and bias and court the danger that we are going to get into his father's case. It is entirely proper to ask, as has been asked by counsel, about his father's participation and did he do this and do that. There is nothing wrong with that. But the charges that were dismissed are decisions by the U.S. Attorney's office and do not add anything to this case and are not properly before this jury.

McLee, 436 F.3d at 761.

require the jury to evaluate the wisdom, fairness, and consequences of the decision to prosecute the defendant under Federal criminal law. For example, the jury could not hear evidence or argument that only soldiers can properly appreciate or evaluate the conduct of other soldiers (United States Motion In Limine, No. 5) without going on to consider whether it was proper, fair, or wise for the United States to prosecute the defendant in federal court instead of under the Uniform Code of Military Justice. Similarly, the jury could not hear how the defendant's lot would have been different had he been prosecuted under the Uniform Code of Military Justice (*id.*, No. 4), or that he wanted to be tried under the Uniform Code of Military Justice and attempted to reenlist in the Army for that purpose (*id.*, No. 3), without going on to consider whether federal court is the proper forum for his prosecution. Such judgments about charging decisions belong to the United States alone, and are completely irrelevant to the fact-finding duties of the jury during the guilt phase of trial. Accordingly, the court should exclude all such evidence and argument during the guilt phase.⁴

⁴ Underscoring the inappropriateness of allowing a jury to hear evidence pertaining to charging decisions is the fact that courts themselves are loath to review such decisions. *See, e.g., Talbot*, 825 F.2d at 1000 (“[T]he decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution’s general deterrence value, the United States enforcement priorities and the case’s relationship to the United States overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.”); *See United States v. Vassar*, 2007 WL 470397, 2 (E.D. Tenn. 2007) (“[S]eparation of powers concerns prohibit [a court] from reviewing a prosecutor’s charging decisions absent a *prima facie* showing that it rested on an impermissible basis, such as gender, race, or denial of a constitutional right”) (*citing United States v. LaBonte*, 520 U.S. 751, 762 (1997); *United States v. Palmer*, 3 F.3d 300, 305 (9th Cir.1993)); *United States v. Donatuu*, 720 F.Supp. 619, 627 (N.D. Ill. 1989) (rejecting defendant’s demand that the United States give its reasons for certain charging decisions because such a demand “asks the Court to intrude upon an area of prosecutorial discretion—charging decisions—which is exclusively within the prosecutor’s domain”) (*citing United States v. Batchelder*, 442 U.S. 114, 123 (1979); *United States v. Schwartz*, 787 F.2d 257, 266 (7th Cir.1988) (“[t]he question whether to proceed with a prosecution is for the Executive Branch and the grand jury alone”)).

Further highlighting the irrelevance of this evidence is the fact that much of it relates to questions of law, which are outside the fact-finding duties of the jury. The role of the jury, as the Sixth Circuit Pattern Jury Instruction 1.02 makes clear, is not to decide or consider questions of law, but rather “to decide what the facts are from the evidence” and “to take the law [as stated in the court’s instruction], apply it to the facts, and decide if the United States has proved the defendant guilty beyond a reasonable doubt.” *Id.* No. 1.02. Here, the evidence that the United States seeks to exclude is unrelated to any factual issues in the case. The question of who is qualified to serve on the jury and to determine facts in connection with a soldier’s conduct (United States Motion in Limine, No. 5) is a legal question and not one that should be presented to a jury. The defendant therefore should not be permitted to comment on this subject during the guilt phase of trial.⁵

II. Even If The Evidence Could Satisfy Relevancy Requirements, It Should Nevertheless Be Excluded Because Its Probative Value Is Substantially Outweighed By The Danger Of Unfair Prejudice.

Federal Rule of Evidence 403 provides that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Fed. R. Evid. 403. Unfair prejudice does not refer to “the damage that results from the legitimate probative force of evidence,”⁶ but rather to an “undue tendency to suggest decision on an improper basis,

⁵ This rationale applies to other categories of evidence that the United States is seeking to exclude. *See* United States Motion In Limine, No. 1 (evidence concerning whether the United States could have prosecuted the defendant under the Uniform Code of Military Justice); *id.*, No. 2 (evidence concerning the consequences of charging the defendant under Federal Criminal Law instead of the Uniform Code of Military Justice); *id.*, No. 4 (evidence concerning the differences or similarities between Federal criminal law and the Uniform Code of Military Justice with respect to available charges, criminal penalties, sentencing, and eligibility of parole).

⁶ *United States v. Guthrie*, 557 F.3d 243, 250 (6th Cir. 2009).

commonly, though not necessarily, an emotional one.”⁷ This rule does not apply only to evidence offered by the United States. In the Sixth Circuit, as in the majority of circuits, evidence offered by a criminal defendant that is otherwise relevant may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice to the prosecution. See *United States v. Lucas*, 357 F.3d 599, 604-606 (6th Cir. 2004); *United States v. Wesley*, 417 F.3d 612, 622 (6th Cir. 2005).⁸

Here, the evidence that the United States seeks to exclude presents the danger of unfair prejudice because it tends to suggest the jury should base its decision-making on the Defendant’s guilt or innocence of the crimes charged on the improper basis of deference to the military. As voir dire in this case demonstrated, some civilians have some bias toward allowing the military to prosecute the misconduct of its own soldiers. There are many possible reasons for this tendency: our high regard for the military, its members, and its capabilities; our sense of indebtedness to the service and sacrifice of our fighting men and women; for civilians, perhaps a lack of experience with the realities of war or the sacrifice of serving in the military. Whatever the underlying foundation, it is clear that this bias could have tendency to influence the jury improperly during the guilt phase of the trial..

⁷ Fed. R. Evid. 403 advisory committee note. *Accord Old Chief v. United States*, 519 U.S. 172, 180 (1997); *United States v. Guthrie*, 557 F.3d 243, 250 (6th Cir. 2009); *United States v. Lawson*, 535 F.3d 434, 442 (6th Cir. 2008) (quoting *United States v. Newsom*, 452 F.3d 593, 603 (6th Cir. 2006)).

⁸ *United States v. Wilson*, 750 F.2d 7 (2d Cir. 1984); *United States v. Burton*, 737 F.2d 439 (5th Cir. 1984); *United States v. Silverman*, 745 F.2d 1386 (11th Cir. 1984); *United States v. Bear Ribs*, 722 F.2d 420 (8th Cir. 1983); *United States v. Stanfa*, 685 F.2d 85 (3d Cir. 1982); *United States v. Fosher*, 590 F.2d 381 (1st Cir. 1979); *United States v. Sellers*, 566 F.2d 884 (4th Cir. 1977); *United States v. Harris*, 542 F.2d 1283 (7th Cir. 1976), *cert denied* 430 US 934.

In this case, for example, offering evidence in the guilt phase that the defendant attempted to re-enlist in the Army for the purpose of being tried under the Uniform Code of Military Justice could lead the jury to speculate whether the United States' charging decision was misplaced, and it could potentially lead jurors to acquit the defendant, not on the basis of facts or determination of guilt, but on the ground that his prosecution could have taken place in the military. Similarly, offering evidence concerning the differences between Federal criminal law and the Uniform Code of Military Justice, or evidence concerning how defendant's lot would have been different had he been prosecuted by the Army, could lead the jury to speculate concerning the fairness of prosecuting the defendant under Federal criminal law, and it could potentially lead the jury to consider an acquittal of the defendant, not the basis of facts or determination of guilt, but on personal notions concerning the prosecution of soldiers for crimes committed while in theater. Moreover, offering evidence or argument concerning the ability of civilians to evaluate the conduct of the defendant will serve primarily to lead jurors to acquit, not on the basis of facts of determination of guilt, but on the jury's personal reluctance to evaluate conduct committed while by the defendant while he was in the Army.

Since all of these are improper grounds for the jury's decision during the guilt phase of the trial, the evidence that the United States seeks to exclude is unfairly prejudicial. And, since there is no apparent admissible purpose for introducing such evidence, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Accordingly, the evidence should be excluded during the guilt phase of Green's trial under Rules 403.

CONCLUSION

For the foregoing reasons, the United States Motion in Limine should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 21, 2009, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to Scott T. Wendelsdorf, Federal Defender, Patrick J. Bouldin, Assistant Federal Defender, and Darren C. Wolff, counsel for Defendant, Steven D. Green.

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