

**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.

DEFENDANT'S RESPONSE TO GOVERNMENT'S MOTION IN LIMINE

Comes the defendant, by counsel, and for his response to the government's motion in limine herein (R. 220 United States' Motion In Limine) says as follows:

Central to this case are two very important mitigating factors: 1) the unwarranted disparity in the penalties sought and imposed by the United States on defendant and the equally culpable co-defendants; and 2) the unwarranted disparity in substantive criminal provisions, ranges and types of punishment, and adjudicative procedures applied by the United States to defendant and the equally culpable co-defendants.

Unwarranted Disparity in Penalties Sought and Imposed

Sgt. Paul Cortez, Spec. James Barker, and PFC Jesse Spielman, persons equally or more culpable in the offenses charged, will not face the death penalty for their involvement in the murders charged herein. Indeed, the United States did not even seek the death penalty against these co-defendants. Instead, the United States imposed on each of these equally or

more culpable co-defendants sentences that will make each of them eligible for parole in 10 years.¹ The *minimum* sentence PFC Green can receive in this case is a mandatory sentence of life imprisonment without the possibility of release. He will never be eligible for parole.

The United States seeks to draw a distinction between the military and civilian prosecutions of these co-defendants as if the former were in a state or a foreign country over which the United States had no control. This is disingenuous. *All* of the prosecutions arising out of the Yusufiyah offenses have been by and under the control of one prosecuting authority—the United States of America. This is evident when one considers that double jeopardy prohibitions apply to prosecutions in United States District Court and United States Army courts-martial. Trial in one for an offense precludes prosecution in the other. It is no different than the United States trying someone in this federal district after they have been acquitted of the same offense in another federal district. Secondly, Congress has been explicit that it is a statutory reason not to impose death on a defendant if an equally or more culpable co-defendant—for any reason—does not also face death for the offense. Congress did not qualify its position in any way. The bottom line is this: the *United States* did not seek death in Cortez, Barker, and Spielman, but the *United States* is seeking death in Green. This is an unwarranted disparity and a mitigator that should not be denied Mr. Green.

¹ PFC Spielman was found guilty of felony murder, rape, conspiracy to commit rape, and housebreaking. He was sentenced to 110 years custody in a military prison. He will be eligible for parole in 10 years. Spc. Barker pled guilty to premeditated murder, conspiracy to commit rape, and obstruction of justice. He was sentenced to 90 years custody in a military prison. He will be eligible for parole in 10 years. Sgt. Cortez pled guilty to four counts of felony murder, rape, conspiracy to commit rape, housebreaking, and violating a general order. He was sentenced to 100 years custody in a military prison. He will be eligible for parole in 10 years.

**Unwarranted Disparity in Substantive Criminal Provisions,
Ranges and Types of Punishment, and Adjudicative Procedures**

The United States could have tried Sgt. Cortez, Spec. Barker, PFC Howard, PFC Spielman, *and* PFC Green together in United States District Court under civilian law and procedures before a civilian judge and jury for their involvement in the murders²; or it could have tried all of them in military court³ under the law and procedures of the Uniform Code of Military Justice before a military judge and jury, but chose to try only PFC Green in civilian court and the others in military court. As a result, he faces particularly more onerous sanctions than did the equally culpable co-accused:

1. The United States is seeking death on the civilian premeditated and felony murder counts against PFC Green. The United States did not seek death on the military premeditated and felony murder counts against Sgt. Cortez, Spc. Barker, and PFC Spielman.

2. The civilian premeditated and felony murder counts against PFC Green carry mandatory minimum sentences of life imprisonment without the possibility of parole. The military premeditated and felony murder counts against Sgt. Cortez, Spc. Barker, and PFC Spielman carried no mandatory minimum sentences.

² Under the Military Extraterritorial Jurisdiction Act, even active members of the military (Cortez, Barker, and Spielman) can be prosecuted in civilian court if they are joined with one not subject to the UCMJ (Green). At one point in the prosecution, the United States Attorney specifically threatened to do just that— indict Spc. Barker with PFC Green in the Western District of Kentucky. The Department of Justice could just as easily have joined *all* of the military co-defendants with PFC Green for trial in civilian court, if it had chosen to do so.

³ Assuming, *arguendo*, that PFC Green was properly discharged from the Army, he was *and still is* eligible for re-enlistment with the consent of the United States. Once back in the Army, PFC Green would again be subject to the Uniform Code of Military Justice and could be fully prosecuted and punished in the military system for the Yusufiyah offenses, as were Sgt. Cortez, Spc. Barker, PFC Howard, and PFC Spielman. To this end, defendant offered to re-enter the Army and subject himself to court-martial for the Yusufiyah offenses. The United States acknowledged that this was permitted, but declined to allow it.

3. The civilian rape count against PFC Green carries a mandatory minimum sentence of 30 years without the possibility of parole. The military rape counts against Sgt. Cortez, Spc. Barker, and PFC Spielman carried no mandatory minimum sentences.

4. There is no parole in the civilian system. Sgt. Cortez, Spc. Barker, and PFC Spielman will each be eligible for parole in 10 years.

5. The civilian firearm counts against PFC Green carry a total mandatory minimum sentence of 85 years consecutive to any other sentences and a maximum sentence of death. No such military charges were even brought against Sgt. Cortez, Spc. Barker, and PFC Spielman because similar substantive criminal offenses simply do not exist under the UCMJ.

This unwarranted disparity is a significant mitigator that the jury should be allowed to consider in deciding whether to impose the death penalty herein.

Conclusion

Every one of the five arguments the government seeks to suppress in this case are indeed important mitigators that the defendant intends to present as reasons the jury should spare his life herein. These mitigators highlight what are in fact unwarranted disparities in the prosecution and punishment of Sgt. Cortez, Spec. Barker, PFC Spielman, and PFC Green. These disparities were *not* unavoidable. They are, instead, the direct result of a conscious, intentional decision by the United States to impose different criminal provisions, ranges and types of punishment, and adjudicative procedures on equally culpable and situated defendants; to seek the death penalty against one, but not against the others; and to deny any possibility of release for one while imposing parole eligible sentences on the others.

In prosecuting and punishing Sgt. Cortez, Spec. Barker, PFC Spielman, and PFC

Green for the Yusufiyah offenses, the United States could have tried all of them in military court under the UCMJ or all of them in this Court under civilian law. In deciding to treat them differently, the United States has injected unwarranted disparities into this case. The government should not be allowed to prohibit the jury from considering these issues in deciding whether Mr. Green should live or whether he should die.

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CERTIFICATE

I hereby 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 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