

**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.

MOTION TO DISMISS FOR LACK OF JURISDICTION

Comes the defendant, by counsel, and moves the Court to dismiss the indictment for lack of jurisdiction.¹ In support, the defense states as follows:

The Defendant Is Subject to Prosecution under the UCMJ, Thus the Instant Prosecution under the MEJA Is Without Jurisdiction and Inappropriate

The charges herein arise out of alleged crimes committed on March 12, 2006, by five members of the United States armed forces while in an active combat zone in Yousifiyah, Iraq. Four of the defendants were still in the military when charges were brought. One, the defendant herein, had been discharged, according to the government, six weeks prior to being charged.

¹ Defendant has filed a separate motion to dismiss contemporaneously with this motion. Many of the same facts are pled in both pleadings for clarity.

Because of the unique exigencies inherent in civilian society and the military armed forces, Congress has created two separate, incompatible, and inherently unequal systems of criminal justice—*military*, as embodied in the Uniform Code of Military Justice (“UCMJ”), 10 U.S.C. §801, et seq., and *civilian*, as embodied in the federal criminal code and rules. The two systems have vastly different substantive criminal provisions, ranges and types of punishment, and adjudicative procedures.

Two statutes govern which of these two systems of criminal justice is applied to crimes committed in the Iraqi combat theater—Article 2 of the Uniform Code of Military Justice, 10 U.S.C. §802, and the Military Extraterritorial Jurisdiction Act of 2000 (“MEJA”), 18 U.S.C. §3261.

Article 2(a)(1) of the Uniform Code of Military Justice, 10 U.S.C. §802(a)(1), extends military criminal jurisdiction to members of the armed forces in the Iraqi theater of war and Article 2(a)(10) of the Uniform Code of Military Justice, 10 U.S.C. §802(a)(10), extends military criminal jurisdiction to civilians in the Iraqi theater of war. UCMJ Article 2(a)(10) provides as follows:

The following people are subject to this chapter:

....

(10) In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field

Id. “Contingency operation” is defined as a military operation that “is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force. . . .” 10 U.S.C. §101(13)(A).

The Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §3261, extends civilian criminal jurisdiction to military personnel in the Iraqi theater of war. 18 U.S.C. §3261(a) provides in pertinent part as follows:

Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—

(1) while employed by or accompanying the Armed forces outside the United States; or

(2) while a member of the Armed forces subject to chapter 47 of title 10 (the Uniform code of Military Justice),

shall be punished as provided for that offense.

The government alleges that this Court has jurisdiction pursuant to 18 U.S.C. §3261(d)(1), which reads:

(d) No prosecution may be commenced against a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice) under this section unless—

(1) such member ceases to be subject to such chapter; or

(2) an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to such chapter. (emphasis added)

As outlined below, PFC Green is still subject to the UCMJ. Thus, the instant prosecution under the MEJA is improper and this Court lacks jurisdiction to try PFC Green.

The Military Charges and Prosecutions Against Sgt. Cortez, Spec. Barker, PFC Howard, PFC Spielman

On July 8, 2006, Sgt. Cortez, Spec. Barker, PFC Howard, and PFC Spielman were each charged under the UCMJ with conspiracy to commit premeditated murder, rape, and

obstruction of justice in violation of UCMJ Article 81 (10 U.S.C. §881); four counts of premeditated murder and felony murder in violation of UCMJ Article 118 (10 U.S.C. §918); and rape of a person more than 12, but less than 16 years of age in violation of UCMJ Article 120 (10 U.S.C. §920). In addition Sgt. Cortez, Spec. Barker, and PFC Spielman were charged with arson in violation of UCMJ Article 126 (10 U.S.C. §926); housebreaking in violation of UCMJ Article 130 (10 U.S.C. §930); and three counts of impeding an investigation in violation of UCMJ Article 134 (10 U.S.C. §934).

**PFC Green Was Never Legally Discharged from the Army,
Thus He Is Still Subject to Prosecution under the UCMJ**

By charging PFC Green under the MEJA, the Department of Justice presumably assumes it has jurisdiction to try him under such Act because the Department of the Army no longer had personal jurisdiction over PFC Green once he was discharged from the armed services. However, this contention is predicated on the assumption PFC was actually *discharged* from the Army. An entire body of military case law and statutes exist that discuss what steps must be taken for a person to be *discharged* from the armed services. The defense contends this case law and these statutes dictate that PFC Green has not to this very day been properly discharged from the Army and is, therefore, subject to the UCMJ and not to the MEJA.

The seminal case on the issue of what steps must be taken to effectuate a discharge from the armed forces is United States v. King, 27 M.J. 327 (C.M.A. 1989). In King, the U.S. Court of Military Appeals stated in pertinent part “[w]e read these statutes as generally requiring that three elements be satisfied to accomplish an early discharge. First, there must

be a delivery of a valid discharge certificate...Second, there must be a final accounting of pay made...Third, appellant must undergo the “clearing” process required under appropriate service regulations to separate him from military service.” *Id.* at 329.

In the instant case, the defense concedes the first and second requirements mandated in *King* to effect a discharge were accomplished. PFC Green received a copy of his Department of Defense Form 214 (“DD 214”) ² - this serves as his discharge certificate under the *King* case requirement. Additionally, PFC Green received a final accounting of his pay and allowances. However, PFC Green never completed the “clearing” process required under Army regulations.

Army Regulation 635-10³ (“AR 635-10”) and Army Regulation 635-200⁴ (“AR 635-200”) are the regulations relating to the separation of Army personnel. These regulations mandate the policies and procedures to be followed by Army commands in order to separate personnel. The Army neglected to follow the mandates of these regulations and therefore failed to effectively discharge PFC Green from the armed forces. What follows is discussion of some of the neglected regulations.

²See attached DD214.

³ AR 635-10 is entitled *Personnel Separations – Processing Personnel for Separation*. Under the summary section of the regulation, it states “[t]his regulation establishes standardized transition processing policies for all military personnel centers (PSC), personnel service companies (PSC), and personnel service divisions (PSD). It also establishes final transition processing policies at US Army Transition Points (TP) and US Army Transition Activities (TA).”

⁴ AR 635-200 is entitled *Personnel Separations - Active Duty Enlisted Administrative Separations*.

AR 635-10 2-3

This regulation requires the implementation of a pre-separation services program in the form of a mandatory briefing which contains several important areas of interest to separating personal. The areas to be discussed in this brief range from VA benefits to reenlistment opportunities. There is no evidence PFC Green participated in this briefing.

AR 635-10 2-4

This regulation requires various counselings, examinations, and other procedures occur prior to separation of a service member. In violation of this regulation, there is no evidence that PFC Green was ever informed of his ability to seek compensation and treatment from the VA due to the fact he had a service related injury or disease. Additionally, there is no evidence that PFC Green was ever informed of his option to purchase short-term medical insurance as required by this regulation.

AR 635-10 3-1

This regulation requires the unit to conduct a departure ceremony prior to an honorably-discharged member's separation. No such ceremony was afforded PFC Green.

AR 635-10 3-6 through 3-8

These regulations require, among other things, out-processing in the form of orientations, medical examination reviews and the presentation of certain informational packets designed to educate separating service members. PFC Green did not receive a majority of the requirements set forth in these regulations.

AR 635-10 3-14

This regulation requires a service member to surrender his or her identification card (DD Form 2A) to the finance or accounting officer prior to separation from the service. When PFC Green was arrested in North Carolina, he was still in possession of his military identification card because he was never required to surrender his military identification prior leaving his discharge point (Fort Campbell).

AR 635-200 1-16

Generally, this regulation requires “adequate counseling and rehabilitative measures” before initiating separation of a service member for a personality disorder. Specifically, the regulation requires at least one counseling by commanders prior to the initiation of separation processing for a personality disorder.⁵ In addition, the counseling must be recorded in writing on a DA Form 4856 (General Counseling Form) and the member’s records must reflect that he or she was formally counseled about his or her deficiencies and was given an opportunity to overcome or correct them. There is no evidence in this case that this regulation was followed prior to the command’s processing of PFC Green for a personality disorder.

AR 635-200 5-13

This regulation specifically discusses the separation of service members who have been diagnosed with a personality disorder. The regulation specifically states “[c]ommanders will not take action prescribed in this chapter in lieu of disciplinary action

⁵ As the attached DD214 demonstrates, PFC Green was processed out of the service under service regulations allowing the discharge of service members who have a personality disorder.

solely to spare a soldier who may have committed serious acts of misconduct for which harsher penalties may be imposed under the UCMJ.” That is precisely what happened in this case. Sgt. Yribe (arguably PFC Green’s “commander”) effectively ordered PFC Green to get out of the Army knowing at the time of the order that PFC Green had claimed participation in the killing of four Iraqi civilians. Sgt. Yribe’s order clearly spared PFC Green the harsher penalties he would have received had he been subjected to the UCMJ for his alleged participation in these crimes.

As the above discussion demonstrates, PFC Green was never actually *discharged* from the service and is therefore still subject to the UCMJ and not to the provisions of the MEJA under which the Government attempts to prosecute him in this current criminal action in U.S. District Court.

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CERTIFICATE

I hereby certify that on February 15, 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.

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