CASE NOS. 09-6108 AND 09-6123

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

vs.

STEVEN DALE GREEN, DEFENDANT-APPELLANT.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

BRIEF FOR APPELLANT

s/ Darren C. Wolff
2615 Taylorsville Rd.
Louisville, Kentucky 40205
(502) 451-3911
darrenwolff@dcwolff.com

Of Counsel (*Pro Bono*)

s/ Frank W. Heft, Jr.
s/ Scott. T. Wendelsdorf
s/ Patrick J. Bouldin
Office of the Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, Kentucky 40202
(502) 584-0525
frank_heft@fd.org
scott_wendelsdorf@fd.org
patrick_bouldin@fd.org

Counsel of Record for Appellant.

Corporate Affiliate -Financial Interest Disclosure Statement

Appellant is an individual criminal defendant and, as such, is exempt from the requirements of 6th Cir. R. 26.1.

Table of Contents

Table of Cases, Statutes, and other Authorities

Cases

Statutes

Other Authorities

Statement Regarding Oral Argument

Insofar as the issues presented in this case are matters of initial impression, appellant believes that oral argument will be of material assistance to the Court and therefore requests that argument be heard.

Statement of Subject Matter and Appellate Jurisdiction

This is an appeal from a final judgment entered on September 4, 2009, in a criminal case involving offenses against the laws of the United States. (Record (hereafter R.) No. 282, Judgment). The district court assumed jurisdiction pursuant to 18 U.S.C. §§3231 and 3261. This Court has jurisdiction pursuant to 28 U.S.C. §1291. A Notice of Appeal was filed on September 8, 2009. (R. 283, Notice of Appeal). An Amended Notice of Appeal was filed on September 16, 2009. (R. 286, Amended Notice of Appeal).

Statement of the Issues

I. The Military Extraterritorial Jurisdiction Act (MEJA) (18 U.S.C. §3261) is unconstitutional because it violates the separation of powers, the non-delegation doctrine, and Equal Protection and Due Process under the Fifth Amendment.

II. Appellant was subject to the Uniform Code of Military Justice (UCMJ - 10 U.S.C. §801 *et seq*.). The district court was therefore without jurisdiction to try him under the Military Extraterritorial Jurisdiction Act (MEJA) (18 U.S.C. §3261).

Statement of the Case

A seventeen count indictment was returned on November 2, 2006, and alleged that appellant, Steven Dale Green, was a member of the Armed Forces on March 12, 2006, and subject to the Uniform Code of Military Justice (UCMJ -10 U.S.C. §801 *et seq*.); was discharged from the Army on May 16, 2006; the acts described in

Counts 1-17 occurred in Mahmoudiyah, Iraq; venue is in the Western District of Kentucky[1]; and that the conduct alleged in Counts 1-16 would have constituted offenses punishable by imprisonment for more than one (1) year if it occurred within the special maritime and territorial jurisdiction of the United States. (R. 36, Indictment). With the exception of Count 17, all of the charged offenses were alleged to have been committed in violation of 18 U.S.C. §3261(Military Extraterritorial Jurisdiction Act (MEJA)). *Id*.

The indictment charged that Green and others conspired to murder with malice aforethought Kassem Hamza Rachid Al-Janabi (father), Fakhriya Taha Mosine Al-Janabi (mother), Abeer Kassem Hamza Al-Janabi (daughter - age 14), and Hadeel Kassem Hamza Al-Janabi (daughter - age 6) (Count 1) and that they conspired to commit aggravated sexual abuse against Abeer. (Count 2).[2] Counts 3-6 charged Green and others with the first-degree murders of the Al-Janabi family and Counts 7-10 charged them with the felony murders of the Al-Janabis. Green and others were charged in Count 11 with the aggravated sexual abuse of Abeer and with aggravated

---

[1] The parties agreed to venue. (R. 6, Order on Initial Appearance).

[2] The overt acts in support of the conspiracies were that on March 12, 2006, Green and others changed clothing; left a traffic control point to which they had been assigned; walked to the Al-Janabi house where Green shot and killed the Al-Janabis; and that Green and others committed forcible sexual acts against Abeer. (R. 36 Indictment).

sexual abuse of a child (Abeer)(Count 12).[3] Counts 13-16 charged Green and others with a variety of firearms offenses under 18 U.S.C. §§924(c)(1)(A) and 924(j)(1) and Count 17 charged them with obstruction of justice in that they destroyed, mutilated, and concealed objects and attempted to do so, with the intent to impair the objects' integrity and availability for use in an official proceeding by burning Abeer's body after she was killed; by burning clothing worn during the killings; and by throwing the murder weapon (an AK-47 automatic rifle) into a canal. (Count 17). (R. 36, Indictment).

As to Counts 3 through 10 and 13, the indictment also gave notice of special findings under 18 U.S.C. §§3591(a), (a)(2)(A)-(D), (c)(6), (c)(9), (c)(11), and (c)(16). (R. 36, Indictment). The government gave notice of its intent to seek the death penalty. (R. 70, Notice of Intent to Seek Death Penalty).

Jury selection began on April 6, 2009, and a jury was impaneled on April 17, 2009. (R. 263, Verdict Order). The jury heard proof in the guilt - innocence phase from April 27, 2009, to May 7, 2009, and returned guilty verdicts on Counts 1-11 and Counts 13-16. *Id*. Sentencing phase evidence was presented from May 11-20, 2009. *Id*. The jury could not reach a unanimous decision on whether Green should be

[3] Count 12 was dismissed during trial. (R. 284, Presentence Investigation Report (PSR) (sealed), ¶13.

sentenced to death or life without parole on Counts 3-10 and 13-16. *Id*.

On September 4, 2009, Green was sentenced to concurrent terms of life imprisonment on Counts 1 and 3-11; 60 months on Count 2; and 240 months on Count 17. (R. 282, Judgment). In addition, life sentences were imposed on Counts 13-16. *Id*. Those sentences were run consecutively with each other and to the sentences imposed on Counts 1-11 and 17, for a total of 5 consecutive life sentences. *Id*.

Notice of Appeal was filed on September 8, 2009. (R. 283, Notice of Appeal) and an Amended Notice of Appeal was filed on September 16, 2009. (R. 286, Amended Notice of Appeal).

Statement of Facts

Appellant, Steven Dale Green, was 19 years old when he enlisted in the Army on February 16, 2005. Following basic training, he was assigned to the 101st Airborne Division at Fort Campbell, Kentucky. (R. 284, Presentence Investigation Report (PSR) (sealed), ¶¶90, 98). He was deployed to Iraq from September 24, 2005, through April 7, 2006. (R. 284, PSR ¶¶21, 98; R. 136, Opinion, p.1).

On March 12, 2006, appellant (Private First Class (PFC)) Green, Sgt. Paul Cortez, PFC Jesse Spielman, Specialist James Barker, and PFC Bryan Howard were stationed at a Traffic Check Point (TCP) 2 near Mahoudiyah, Iraq. (R. 284, PSR

¶19).[4] Several Iraqis notified a nearby TCP (TCP 1) that four (4) dead people, including a woman who had been raped, were found in a burned house behind TCP 2. *Id*. Sgt. Yribe, the non-commissioned officer (NCO) in charge of TCP1 advised TCP2 he was sending a patrol to check the burned house and he, Cortez, Spielman, an Iraqi interpreter, and Iraqi soldiers went to investigate. (R. 284, PSR ¶19; R. 92, Motion to Dismiss, Exhibit (EX) 5. Four (4)members of the Al-Janabi family were found dead in the house. They had been shot at close range. (R. 284, PSR ¶20). Abeer appeared to have been sexually assaulted and much of her body was burned beyond recognition. *Id*. The investigation team blamed insurgents for the crimes and no crime scene investigation was undertaken. (R. 284, PSR ¶20; R. 92, Motion to Dismiss, EX 5). However, a shotgun shell that could indicate the involvement of U.S. soldiers was taken from the home but was not made part of the investigation. *Id*.

After the investigation team returned to TCP 2, Green, in the presence of Barker, confessed his involvement in the crimes to Sgt. Yribe. (R. 92, Motion to Dismiss, EX 5). Later that day, Yribe met with his superior, Sgt. Fenlason and later with the company commander, Captain Goodwin, about the investigation but he did

[4] The TCP controlled traffic on small country roads and maintained them for military convoys by preventing bombs from being placed on the road and locating bombs that had been placed on the road at night. (R. 284, PSR ¶19)

not tell them about Green's confession. *Id*.

The next day, Yribe, in the company of Barker, asked Green about the crimes and Green again confessed. (R. 92, Motion to Dismiss, EX 5). Barker remained silent and Yribe told Green that he is going to be discharged - "either get out of the Army or I'm going to help you do it." *Id*. On March 20, Green went to the Combat Stress Team which recommended discharge. *Id*.[5] Green was discharged on May 16, 2006. *Id*.

Between June 20 -24, 2006, senior Army leaders learned that American soldiers may have been involved in the crimes committed against the Al-Janabi family. (R. 284, PSR ¶22). On June 20, PFC Justin Watt told a combat stress counselor that American soldiers raped and killed an Iraqi female and killed 3 other Iraqis in March 2006.(R. 284, PSR ¶22; R. 92, Motion to Dismiss, EX 5). Consequently, Yribe met with Lt. Col. Kunk, the battalion commander, about the crimes but he did not tell Kunk about Green's confession and Yribe lied to the Army's Criminal Investigation Division (CID) about his knowledge of the crimes and Green's confession. *Id*.

---

[5] Green was previously seen by a mental health team at Combat Stress in December, 2005, after two of his superiors were killed at TCP 2. (R. 92, Motion to Dismiss, EX 5). Green told the mental health team that he wanted to kill all Iraqis. He was given anti-psychotic medication and ordered back to duty. *Id*.

On June 24, Kunk interviewed Barker, Cortez, Spielman, and Howard and the information he discovered was referred to CID which took sworn statements from the four (4) soldiers and Yribe.(R. 284, PSR ¶22). CID's investigation revealed that on March 12, 2006, Green, Barker, Cortez, and Spielman, were playing cards and drinking Iraqi whiskey while on duty in violation of General Order No. 1. (R. 284, PSR ¶23). Green suggested killing some Iraqis. *Id*. Barker brought up the idea of having sex with one of the females in a nearby house. *Id*. Barker asked Sgt. Cortez if he would participate and Cortez said he "would think about it." *Id*. Cortez asked Barker what he thought about it and Barker said it "was up to" Cortez. *Id*. The group began to feel the effects of the alcohol and someone said "Let's go." *Id*.

Barker and Cortez wore balaclavas and Green also covered his face. (R. 284, PSR ¶23). Spielman remained in uniform but covered his face with a shirt. *Id*. Before the others left, Cortez gave Howard a walkie-talkie and told him to let him know if American troops approached TCP 2. *Id*. Howard overheard conversation during the card game about having sex with an Iraqi girl but he did not hear any discussion about rape and murder. *Id*. Howard only learned of the crimes after Green, Cortez, Barker, and Spielman returned to the TCP. *Id*.

Green, Cortez, Barker, and Spielman walked to the Al-Janabi house. Along the way, they cut a hole in the a fence, wentt through a second fence and went into the

house. (R. 284, PSR (sealed), ¶23). Spielman took the father (Rachid) and a child (Hadeel) into the bedroom and left them with Green and the mother (Fakhriya) *Id*. Cortez and Barker raped Abeer in the living room. During the rape, Barker heard several gunshots in the bedroom. *Id*. Upon hearing the first gunshot, Spielman tried to enter the bedroom but the door was locked. *Id*. Spielman's knock was answered by Green who assured Spielman that he was alright. *Id*. Spielman and Green, who had an AK-47 rifle, went into the living room and Green said he killed the others in the bedroom. (R. 284, PSR ¶24).[6] Green was described as "wigging out, acting all irate, breathing heavy, and pacing a little." *Id*. One of the soldiers poured kerosene on Abeer's body which was then set on fire. *Id*. The soldiers also burned some clothing after they returned to TCP 2. (R. 284, PSR ¶25). Green brought the AK-47 back to TCP 2 and Spielman threw it into a nearby canal on orders from Cortez. *Id*.

With the exception of Green, the other participants in the crimes were charged on June 6, 2006, and were prosecuted under the UCMJ by Army courts-martial. (R. 284, PSR ¶14; R. 136, Opinion, pp. 1-2). Barker was convicted of 4 charges of premeditated murder and felony murder, conspiracy to commit rape, conspiracy to obstruct justice, arson, housebreaking, 2 charges of obstruction of justice, and

[6] The AK-47 likely belonged to the Al-Janabi family since military policy allowed Iraqis to have one such weapon in the household as long as it was disclosed during security sweeps by American forces. (R. 284, PSR (sealed), ¶24).

violation of a general order regarding the consumption of alcohol. (R. 284, PSR ¶14). On November 16, 2006, Barker was sentenced to life imprisonment with eligibility for parole and was dishonorably discharged. *Id*. However, pursuant to a pre-trial agreement with the Army, Barker's sentence was reduced to 90 years which made him eligible for parole in 10 years. *Id*.

Cortez was convicted of conspiracy to commit rape, 4 charges of premeditated murder and felony murder, rape, housebreaking, and violation of a general order regarding the consumption of alcohol. (R. 284, PSR ¶15). On February 22, 2007, Cortez was sentenced to life imprisonment without parole and was dishonorably discharged. *Id*. However, pursuant to a pre-trial agreement with the Army, Cortez's sentence was reduced to 100 years which made him eligible for parole in 10 years. *Id*.

Spielman was convicted of conspiracy to obstruct justice, arson, abuse of a corpse, 2 charges of obstruction of justice, 4 charges of felony murder, 2 charges of negligent homicide, 1 charge of unpremeditated murder, and violation of a general order regarding the consumption of alcohol. (R. 284, PSR ¶17). Spielman was sentenced to life imprisonment with eligibility for parole and was dishonorably discharged. *Id*. However, pursuant to a pre-trial agreement with the Army, Spielman was sentenced to 110 years which made him eligible for parole in 10 years. *Id*.

Howard was convicted of conspiracy to obstruct justice and accessory after the

fact. On March 21, 2007, he was sentenced to 27 months imprisonment and was dishonorably discharged. (R. 284, PSR ¶16).

On April 2, 2006, Green's Brigade Commander, Colonel Todd Ebel, requested that Green be released from the Iraqi theater due to a personality disorder. (R. 136, Opinion, p. 1). On April 16, 2006, Green was informed by his company commander, Captain Goodwin, that he was initiating an action to separate Green from the military pursuant to Army Regulation 635-200, 5-13 (personality disorder). *Id*. Green was released from the Iraqi theater of operations on May 3, 2006, and was honorably discharged on May 16, 2006, due to a personality disorder. (R. 284, PSR ¶¶21, 95, 98; Supplemental Addendum to PSR, ¶13 and defense counsel's letter of 8-25-09, p. 3, both attached to PSR; R. 136, Opinion, p.1).[7]

On June 30, 2006, Green was arrested by the FBI in North Carolina. (R. 284, PSR ¶¶12, 21, 26). He made his initial appearance in the Western District of North Carolina but the parties agreed that venue was in the Western District of Kentucky. (R. 6, Order on Initial Appearance; R. 284, PSR ¶12).

A jury convicted Green of conspiracy to commit murder (Count 1), conspiracy

---

[7] See Green's discharge certificate (Department of Defense (DD) Form 214) attached to R. 99, Motion to Dismiss for Lack of Jurisdiction and R. 108, Response, Government Exhibit (GEX) 1.

.

to commit aggravated sexual abuse (Count 2), 4 counts of premeditated (first-degree) murder (Counts 3-6), 4 counts of murder committed in the perpetration of aggravated sexual abuse (felony murder) (Counts 7-10), aggravated sexual abuse (Count 11), 4 counts of using a firearm during a crime of violence (Counts 13-16), and obstruction of justice (Count 17). (R. 242, Jury Verdict). The jury could not return a unanimous verdict on whether Green should be sentenced to death or life imprisonment without the possibility of parole. (R. 257, Special Verdict Forms; R. 263, Verdict Order).

Under the Guidelines, Green's total offense level was capped at 43 which resulted in a mandatory life sentence.(R. 284, PSR ¶¶44-81, 104). His criminal history category was I which was based on an uncounseled misdemeanor committed when he was 16 years old. *Id*. at ¶¶83-85. Green was sentenced to a total of 5 consecutive life sentences. (R. 282, Judgment).

Summary of Argument

Argument I - MEJA is unconstitutional because it violates the separation of powers and the non-delegation doctrine. Congress as the Legislative Branch of government has improperly delegated its constitutional powers to the Executive Branch by allowing the Executive to have the unfettered discretion to decide whether a person, who commits a crime while a member of the Armed Forces, is to be tried by the military under the UCMJ or in district court under MEJA. Moreover, the

disparate treatment of Green and the more severe punishments he faced as compared to his military co-accused violated Green's rights to equal protection and due process.

Argument II - Green was improperly subjected to prosecution in district court under MEJA because his discharge from the Army was invalid. The "clearing process" that is an essential component of a soldier's separation from the miliary failed to comply with Army Regulations thereby rendering Green's discharge invalid and subjecting him to prosecution under the UCMJ rather than MEJA .

Arguments

I. The Military Extraterritorial Jurisdiction Act (MEJA) (18 U.S.C. §3261) is unconstitutional because it violates the separation of powers, the non-delegation doctrine, and Equal Protection and Due Process under the Fifth Amendment.

A. Standard of Review

Constitutional challenges are subject to *de novo* review. *United States v. Barton*, 455 F.3d 649, 652 (6th Cir. 2006) *cert*. denied 549 U.S. 1087 (2006).

B. Raising the MEJA Issue

Appellant filed a Motion to Dismiss the indictment on the ground that MEJA is unconstitutional because it violates the separation of powers, the non-delegation doctrine, equal protection and due process. (R. 92, Motion to Dismiss). The government filed a response. (R. 108, Response). Appellant filed a reply. (R. 125,

Reply). The motion was denied without a hearing. (R. 136 and 137, Opinion and Order Denying Motion to Dismiss).

C. Background of MEJA

MEJA (Pub.L.106-523, 114 Stat.2488) "was quickly enacted in response to ... *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000), which highlighted a gap in prosecutions of civilian personnel living abroad with the military." *Alvarez-Machain v. United States*, 331 F.3d 604, 630, fn. 33 (9th Cir. 2003) reversed *sub nom*. *Sosa v. Alvarez-Machain*, 542 U.S.692 (2004). See also *United States v. Arnt*, 474 F.3d 1159, 1161 (9th Cir. 2007) ("To close this gap, MEJA creates federal jurisdiction over those who commit felonies while 'accompanying the Armed Forces outside the United States.' 18 U.S.C. § 3261(a)(1).").

In *Gatlin*, 216 F.3d at 209, the defendant, a civilian, who was married to an Army sergeant, had sexual intercourse with his wife's 13 year old daughter while the family was living in base housing in Germany. The defendant, who was neither in the military nor employed by the military, was charged in federal court "with engaging in sexual acts with a minor within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. §2243(a)." *Id*. at 210. On appeal, the conviction was reversed and the indictment was dismissed for lack of jurisdiction. *Id*. The Second Circuit concluded that 18 U.S.C. §7(3) which defines the "special

maritime and territorial jurisdiction of the United States" did "not apply extraterritorially and that §2243(a) cannot, therefore, apply to Gatlin's acts." *Id*. But see *United States v. Corey*, 232 F.3d 1166, 1169, 1175, 1183 (9th Cir. 2000) *cert*. denied 534 U.S. 887 (2001), in which the Ninth Circuit found that federal courts have jurisdiction under 18 U.S.C. §7(3) in the case of a civilian government employee, who was charged under 18 U.S.C. §§2241(a) and 2242(1), with committing sexual acts against his stepdaughter at the family's residences on an air base and in housing provided to government employees.

The "jurisdictional gap" was cited by Senator Sessions in his remarks introducing MEJA. "This bill will close a legal loophole through which civilians who commit crimes while accompanying the Armed Forces overseas evade punishment... [and] extend[s] the reach of Title 18 ... to include those civilians that accompany the military outside the United States." 145 Cong. Rec. S3634-02, S3634, Statements on introduced bills and joint resolutions.

D. The MEJA Statute

The MEJA statute (18 U.S.C. §3261) provides in pertinent:

> (a) 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...

(c) Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.

(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.

E. Discussion

MEJA extends civilian criminal jurisdiction to military personnel in the Iraqi theater of war and to civilians who are there with the military. 18 U.S.C. §3261(a)(1) and (2). In addition to MEJA, military criminal justice is applied to crimes committed in an active combat zone such as Iraq through the UCMJ, 10 U.S.C. §801 *et seq*.[8]

[8] 10 U.S.C. §802, Art. 2(a) provides: "The following people are subject to this chapter: (1) Members of a regular component of the armed forces ... (10) In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field." "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 constitutional issues surrounding this case stem from the unequal and disparate treatment of five (5) soldiers who committed crimes while on active duty in Iraq. Cortez, Barker, Spielman, and Howard were still in the military when the charges were brought and they were prosecuted under the UCMJ. Green, however, had been discharged when the charges were brought and he was prosecuted under MEJA.[9] Nevertheless, Green, who was honorably discharged, was eligible to re-enlist with the Army's consent and thereby subject himself to the UCMJ. Green offered to re-enlist but the Army declined the offer. (R. 92, Motion to Dismiss, Exhibits (EX) 6, 7, and 8; R. 136, Opinion, p. 2). Although they were equally culpable, the defendants charged with the crimes against the Al-Janabi family were prosecuted in two, different criminal justice systems which resulted in unequal treatment and a grossly disparate punishment for Green. The Executive Branch's unfettered discretion whether to prosecute Green under the UMCJ or MEJA violates the separation of powers and non-delegation doctrines and amounts to a denial of due process and equal protection.

1. Differences between military and civilian systems of justice

Whether the accused is prosecuted in the military or civilian justice system

[9] Green does not concede the validity of his discharge. He maintains that his discharge was improper and the district court lacked *in personam* jurisdiction. See Argument II.

makes a world of difference. There are significant protections afforded a military defendant during the pre-trial, trial and post-trial stages. For example, there is parole in the military while there is no parole in the federal system. There are far broader rights of discovery in the military system as manifested by an Article 32 Investigation which requires "a thorough and impartial investigation of all the matters set forth" in the charges or specifications. 10 U.S.C. §832, Art. 32(a). The accused can be present and represented by counsel, he can cross-examine witnesses, and "present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused." *Id*. at Art. 32(b). An Article 32 Investigation "is a **substantial pretrial right** protected by the Sixth Amendment ..."*United States v. Davis*, 62 M.J. 645, 647 (A.F.Ct.Crim.App. 2006) (emphasis original) affirmed 64 M.J. 445 (Ct.App.Armed Forces 2007). There is no civilian counterpart to Article 32.

Another substantial difference between the military and civilian justice systems is punishment. With the exception of premeditated murder and murder committed in the course of designated crimes, the military justice system does not have mandatory minimum punishments and only prescribes the maximum punishment. The military court thus has the power to impose any sentence up to and including the maximum prescribed by the Manual for Courts-Martial (MCM)

http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf. In Green's case, the district court did not have the wide range of options available to its military counterpart. Moreover, there is a substantial disparity between military and civilian punishments on the most serious charges Green faced.

A. Military Penalties:

> Conspiracy - defendant is "subject to the maximum punishment authorized for the offense which is the object of the conspiracy, except that in no case shall the death penalty be imposed." Manual for Courts-Martial (MCM) (2008 Ed.), ¶5, Art. 81(e); see also UCMJ (10 U.S.C. §881, Art. 81;
>
> Murder committed with "a premeditated design to kill" or while "engaged in the perpetration [of] ... rape of a child ... aggravated sexual assault of a child ..." - "death" or "Mandatory minimum - imprisonment for life with eligibility for parole." MCM ¶43, Art. 118 (a)(1), (a)(4), (e); 10 U.S.C. §918, Art. 120(1) and (4) [10];
>
> Rape of a child - " Death or such other punishment as a court martial may direct." MCM ¶45, Art. 120(f)(1); 10 U.S.C. §920, Art. 120;
>
> Aggravated sexual assault - "confinement for 30 years" MCM ¶45, Art. 120(f)(2); and
>
> Aggravated sexual assault of a child between 12 - 16 years of age - "confinement for 20 years" - MCM ¶45, Art. 120(f)(3).

B. Civilian Penalties:

> Conspiracy - "any term of years or life" - 18 U.S.C. §1117;
>
> First Degree Murder and Felony Murder - death or life imprisonment - 18 U.S.C. §1117(b);
>
> Aggravated Sexual Abuse - "any term of years or life" - 18 U.S.C. §2241(a);
>
> Firearms offenses - "not less than 10 years" death, life, or

[10] "When confinement for life is authorized, it may be with or without eligibility for parole." Rules of Courts-Martial (RCM) 1003(b)(7).

> imprisonment for not less than 10 years (Count 13) and not less than 25 years (Counts 14-16) consecutive with each count and consecutive to any other term of imprisonment-18 U.S.C. §§924 (c)(1)(A)(iii), (c)(1)(C)(i), and(j)(1).[11]

(R. 1 Indictment; R. 284, PSR ¶103). As previously noted, Green faced a mandatory life sentence. (R. 284, PSR ¶¶103-104).

Military defendants can also enter into a pretrial agreement with the "convening authority" which can "promise" to "[t]ake specified action on the sentence adjudged by the court-martial." (Rules of Courts-Martial (RCM) 705(b)(2)(E)).[12] The Discussion following RCM 705(b) states, "the convening authority may agree to approve no sentence in excess of a specified maximum, to suspend all or part of a sentence, to defer confinement, or to mitigate certain forms of punishment into less severe forms."

In capital cases, RCM 1004(e) provides, "Except for a violation of Article 106 [of the UCMJ, 10 U.S.C. §906, Art. 106 which is entitled "Spies"], when death is an authorized punishment for an offense, all other punishments authorized under RCM 1003 are also authorized for that offense, including confinement for life, with or

---

[11] There is no equivalent of the aforementioned firearms offenses in the MCM or UCMJ.

[12] "'Convening authority' includes a commissioned officer in command for the time being and successors in command." RCM 103(6).

without eligibility for parole, and may be adjudged in lieu of the death penalty ..." All sentences are subject to reconsideration any time before the "sentence is announced in open session of the court" (RCM 1009(a)) and any member of the court-martial can request reconsideration. (RCM 1009(e)).

Moreover, RCM 1002 provides in pertinent part, "the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or **may adjudge a sentence of no punishment**."(emphasis added). Thus, with the exception of a crime that carries a mandatory minimum sentence, a military defendant, unlike Green, may receive no punishment in spite of a conviction. And, as shown below, the convening authority has even more sentencing discretion than a court-martial because it is not constrained by any mandatory minimum.

Another significant difference is the opportunity for clemency/sentence reduction in the military justice system even before the case is appealed to a Court of Criminal Appeals (RCM 1201 and RCM 1203(b)) and the Court of Appeals for the Armed Forces (RCM 1204).

"After a sentence is adjudged in any court-martial," the accused may submit to the convening authority "Clemency recommendations by any member, the military

judge, or any other person." RCM 1105(a) and (b)(2)(D). Before the convening authority takes action on the sentence under RCM 1107 on a record of a general court-martial which includes a sentence of "confinement of one year," the "convening authority's staff judge advocate or legal officer shall ... forward to the convening authority a recommendation ..." RCM 1106(a). "The purpose of the recommendation ... is to assist the convening authority to decide what action to take on the sentence in the exercise of command prerogative." RCM 1106(d)(1). The recommendation must include information pertaining to any "recommendation for clemency by the sentencing authority ..." RCM 1106(d)(3)(B).

The rules further explain that "The **action to be taken on the findings and the sentence is within the sole discretion of the convening authority**" and "is a matter of command prerogative." RCM 1107(b)(1) (emphasis added). This "action is taken in the interests of justice ... clemency, and other appropriate reasons." RCM 1107(b)(1), Discussion. The convening authority must consider the staff judge advocate's or legal officer's RCM 1106 recommendation (RCM 1107(b)(3)(A)(ii)) and "[t]he **convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased**." RCM 1107(d)(1) (emphasis added). The convening authority's

sentencing power is also codified in 10 U.S.C. §860(c)(2), Art. 60, which states, "Action on the sentence of a court-martial shall be taken by the convening authority or by another person authorized to act under this section... The convening authority or other person taking such action, in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part."

Furthermore, "The convening or higher authority may not increase the punishment imposed by a court-martial." RCM 1107(d)(1). Thus, under RCM 1107 the convening authority has complete discretion regarding the imposition of a sentence and is not required to impose a mandatory minimum. **"When the court-martial has adjudged a mandatory punishment, the convening authority may nevertheless approve a lesser sentence**." RCM 1107(d)(2) (emphasis added). See e.g. *United States v. Russo*, 29 C.M.R. 168, 174, 11 USCMA 352, 358, 1960 WL 4477 (Ct. Military Appeals 1960) review denied 29 C.M.R. 586, 1960 WL 4984 (1960) in which the court held, "whether it be termed commutation, mitigation, or merely a reduction in punishment, we hold that both the convening authority and a board of review have the authority to lessen the severity of a death penalty by converting it to dishonorable discharge and confinement at hard labor." As shown, the convening authority has unlimited sentencing discretion and there is no counterpart within the federal criminal justice system because a district court, except

in very limited circumstances, cannot sentence a defendant below the statutorily mandatory minimum. See 18 U.S.C. §3553(e) and (f); USSG §5G1.1(b); USSG §5K1.1; *United States v. Wheeler*, 535 F.3d 446, 458 (6th Cir. 2008) *cert*. denied ___ U.S. ___, 129 S.Ct. 2030, 173 L.Ed.2d 1117 (2009). Thus, a military defendant has numerous chances for a sentence reduction even before the appeals process starts. Green, however, is subject to a mandatory sentence of life without parole.

As a result of the differences in criminal and adjudicative procedures, and ranges and types of punishments, factually identical crimes committed by defendants with identical backgrounds, as in the case at bar, are subject to greatly disparate treatment depending on which system of criminal justice is applied. Thus, it is critical that separation of powers and non-delegation doctrines be strictly enforced to prevent any infringement by the Executive Branch on Congress' constitutional powers.

2. Separation of powers and non-delegation doctrines

The district court found that "MEJA provides no discretion to the Executive in a case" like Green's which involves a former serviceman. (R. 136, Opinion, p. 5). The court, however, overlooked the disparate treatment between Green and his military co-accused. As shown below, MEJA would have allowed all of the soldiers to have been prosecuted in the same criminal justice system but for the Executive's decision to treat them differently. By allowing the Executive Branch to have the

unfettered discretion to prosecute a member of the Armed Forces under MEJA or the UCMJ, Congress has unconstitutionally delegated to the Executive, its exclusive power to determine conduct that is subject to criminal sanctions, fix the sentence for crimes, and set forth procedures for the adjudication of criminal cases. The result is that disparate sentences may be imposed and different adjudicative procedures may be applied at the whim of the Executive in factually identical cases involving identically situated defendants.

A. Congress has the exclusive power to define crimes, the range and type of punishment, and adjudicative procedures and cannot delegate that power to the Executive Branch.

In Article I, §1, Article II, §1, and Article III, §1, the Constitution divides the delegated powers of the federal government into three branches, legislative, executive, and judicial to ensure that the power of each branch is limited to its designated responsibilities. *I.N.S. v. Chadha*, 462 U.S. 919, 951(1983). "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Id*. "The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches." *Boumediene v. Bush*, ___ U.S. ___, 128 S.Ct. 2229, 2246, 171 L.Ed.2d 41(2008). "'[T]here can be no liberty where the legislative and executive powers are united in

the same person, or body of magistrates'...." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) quoting The Federalist No. 47, p. 325 (J. Cooke ed. 1961). The separation of powers is a system of checks and balances that limits the power of each branch of Government and the need to be vigilant against encroachment by one branch on the power of another branch is essential in a democratic society. "It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence ..."*Mistretta v. United States*, 488 U.S. 361, 380 (1989), and "it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 757 (1996). Thus, the Supreme Court "consistently has given voice to, and has reaffirmed, the central judgment of the Framers ... that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta*, 488 U.S. at 380. "Even when a branch does not arrogate power to itself, moreover, the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving*, 517 U.S. at 757.

Article I, §1 of the Constitution provides, "All legislative Powers herein granted shall be vested in a Congress of the United States" and thereby gives Congress the exclusive power to define crimes, determine the range and types of

punishment, and regulate the practice and procedure of the courts. *Mistretta*, 488 U.S. at 364; *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941). And just as neither the Executive nor the Judiciary may arrogate to itself the power of the Legislative Branch, Congress is forbidden by the separation of powers doctrine from voluntarily abdicating its responsibility to another branch of government. "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government... and we long have insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." *Mistretta*, 488 U.S.at 371-372 (other citation omitted).

> Another strand of our separation-of-powers jurisprudence, the delegation doctrine, has developed to prevent Congress from forsaking its duties... The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or entity.

Loving, 517 U.S. at 758. In short, "Congress may not constitutionally delegate its legislative power to another branch of Government." *Touby v. United States*, 500 U.S. 160, 165 (1991).

B. MEJA is an unconstitutional delegation by the Congress to the Executive of the exclusive power of Congress to define crimes, ranges and types of punishment, and adjudicative procedures.

Although the non-delegation doctrine may be easy to state, its application may

be difficult because a court must inquire whether Congress "has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others." *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935). It is not an unconstitutional delegation of legislative power for Congress to legislate "in broad terms leaving a certain degree of discretion to executive or judicial actors." *Touby*, 500 U.S. at 165. Indeed, the non-delegation doctrine does not prevent Congress from obtaining the assistance of the other Branches of government. As long as Congress "lay[s] down by legislative act an intelligible principle" that governs the exercise of the delegated legislative power, then it has not unlawfully delegated that power. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); *Touby*, 500 U.S. at 165; *Mistretta*, 488 U.S. at 372. A delegation is too broad if the absence of standards for guidance make it impossible to determine "whether the will of Congress has been obeyed." *Yakus v. United States*, 321 U.S. 414, 426 (1944).

In a criminal case, more than an "intelligible principle" is necessary for a proper delegation of power. In *Touby*, the Court considered the delegation by Congress to the Attorney General of the power, upon compliance with specified procedures, to add new drugs to five "schedules" of controlled substances, the manufacture, possession, and distribution of which are regulated or prohibited by

federal law. The Court acknowledged that "something more than an 'intelligible principle'" may be necessary "when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions." *Touby*, 500 U.S. at 166-167. The Court concluded, "[o]ur cases are not entirely clear as to whether more specific guidance is in fact required," *Id*. at 167 but found it unnecessary to resolve the issue because the statute under review "passes muster even if greater congressional specificity is required in the criminal context." *Id*. The Court found that Congress had set forth in the enabling legislation "an 'intelligible principle' to constrain the Attorney General's discretion to schedule controlled substances on a temporary basis" and the "Attorney General's discretion to define criminal conduct." *Id*. at 165-66. A comparison of the "intelligible principles" in *Touby* and the absolute lack of such principles in Green's case is instructive.

The Attorney General's discretion to define criminal conduct is constrained by 21 U.S.C. §201(h). To schedule a drug temporarily, the Attorney General "must find that doing so is 'necessary to avoid an imminent hazard to the public safety.'" *Touby*, 500 U.S. at 166 (other citations omitted). In making that determination, the Attorney General must consider several, specific factors and within those factors consider several sub-factors. *Id*. The Attorney General must also adhere to several notice requirements regarding the proposed scheduling and "must satisfy" the statutory

requirements that identify "the criteria for adding a substance to each of the five schedules." *Id*. Since Congress required the Attorney General to jump through so many hoops in order to add drugs to the controlled substances schedules, there was no improper delegation of power. "It is clear that in §§201(h) and 202(b) Congress has placed multiple specific restrictions on the Attorney General's discretion to define criminal conduct. These restrictions satisfy the constitutional requirements of the nondelegation doctrine." *Touby*, 500 U.S. at 167.

Here, Congress has created two separate, incompatible, and inherently unequal systems of criminal justice—military, as embodied in the UCMJ, and civilian, as embodied in the United States criminal code and rules. As outlined above, the two systems have vastly different substantive criminal provisions, ranges and types of punishment, and adjudicative procedures. While it may be within Congress' exclusive power to define crimes, determine the range and types of punishment, and regulate the practice and procedure of courts, it is **not** within the power of Congress to delegate to the Executive Branch the discretion to choose which of these two systems to apply to those accused of criminal conduct while they are members of the Armed Forces. Contrary to the district court's conclusion (R. 136, Opinion, p. 6), this is not simply of matter of exercising discretion between which of two statutes should be the basis for prosecution. Instead, the fundamental defect in the proceedings is that Green

is prosecuted in a civilian criminal justice system while the government opts to try his similarly situated co-accused in a military tribunal thereby denying Green treatment similar to that of his co-accused.

"[T]he most extravagant delegations of authority, those providing no standards to constrain administrative discretion, have been condemned by the Supreme Court as unconstitutional." *Humphrey v. Baker*, 848 F.2d 211, 217 (D.C. Cir. 1988), *cert*. denied 488 U.S. 966 (1988) citing *Schechter Poultry*, as an example. Here, the Executive, not the Congress, has decided which system of substantive criminal provisions, ranges and types of punishment, and adjudicative procedures to apply to Cortez, Barker, Howard, Spielman, and Green for their crimes. Under MEJA, all of them could have been prosecuted in the military system if the Army allowed Green to re-enlist as he requested (see fn. 10, p. 16); all of them could have been prosecuted in the civilian system (18 U.S.C. §3261(d)(2)); and some could have been prosecuted in one system and some in the other system (*Id*.) - all at the unfettered and unreviewable discretion of the Executive. Green's case exemplifies one of those "extravagant delegations of authority" because the Executive has the unrestricted ability to decide who to prosecute in which system of justice.

C. Green's prosecution in federal court violates equal protection.

The district court improperly recast Green's equal protection claim as a

selective prosecution argument. (R. 136, Opinion, pp. 6-8). Green's argument, however, is one of equal protection because similarly situated defendants are treated differently based on the whim of the Executive.

> The Fifth Amendment does not contain an explicit equal protection clause as does the Fourteenth Amendment applicable on its face only to the states, but statutory classifications may be so unjustified as to be violative of the due process clause of the Fifth Amendment...[which] provides the same basic safeguards as the equal protection clause and the general principles of the latter apply to the former.

United States v. Craven, 478 F.2d 1329, 1338 (6th Cir. 1973) *cert*. denied 414 U.S. 866 (1973) (other citations omitted) abrogated on other grounds by *Scarborough v. United States*, 431 U.S. 563 (1977).

The Supreme Court's "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, fn. 2 (1975); see also *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment")."[I]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it does on a State to afford equal protection of the laws ..." *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). See also *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 225, 231-232 (1995). Moreover, equal protection is a "personal right"

because it "protect[s] persons, not groups"[13] and "'requires that similarly situated persons be treated equally.'" *Bowman v. United States*, 564 F.3d 765, 772 (6th Cir. 2008) *cert*. denied ___ U.S. ___, 130 S.Ct. 55 (2009) (other citation omitted). See also *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (equal protection "is essentially a direction that all persons similarly situated should be treated alike."). As a personal right,"equal protection claims [can be] brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

Congress has enacted legislation to provide for the prosecution and punishment of individuals who commit crimes in the Iraqi war zone. The UCMJ extends military criminal jurisdiction to members of the armed forces in Iraq and civilians "serving with or accompanying an armed force in the field ..." 10 U.S.C. §802(a). MEJA extends civilian criminal jurisdiction to members of the armed forces, who were in Iraq and subject to the UCMJ at the time of the offense, if they are no longer subject to the UCMJ when the prosecution commenced. 18 U.S.C. §§3261(a) and (d). In short, civilians who commit crimes in Iraq may be prosecuted under the UCMJ, but

---

[13] *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. ___, ___, 128 S.Ct. 2146, 2150, 170 L.Ed.2d 975 (2008) quoting *Adarand*, 515 U.S. at 227.

soldiers, like Green, may be prosecuted under the more onerous criminal provisions, ranges and types of punishment, and adjudicative procedures of the federal criminal code merely because the government chose to discharge them before prosecution commenced. Like Cortez, Barker, Spielman, and Howard, Green was subject to the UCMJ when the offenses were committed. In fact, Green confessed his involvement to his superior and the person in charge of the investigation, Sgt. Yribe, who, as previously discussed, played a role in initiating Green's separation process. Green did not apply for discharge and could not have declined when the government -for whatever reason - chose to discharge him; and it was this discharge - a discretionary act of the government -that gave the government the power to prosecute Green in the civilian system. Cortez, Barker, Spielman, and Howard could have just as easily been discharged by the government before commencing prosecution. But, for its own reasons, the government chose not do so. Cortez, Barker, Spielman, and Howard could have been joined in Green's indictment and forced to stand trial in the civilian system pursuant to 18 U.S.C. §§3261(1)(d)(2) but, for its own reasons, the government chose not to do so.

> When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being 'treated alike, under like circumstances and conditions.' Thus, when it appears that an individual is being

> singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a 'rational basis for the difference in treatment.'

Engquist, 553 U.S. at ___, 128 S.Ct. at 2153 (other citations omitted). Equal protection and due process, stem "from our American ideal of fairness ..." *Bolling*, 347 U.S. at 499. Green's prosecution conflicts with that ideal because the government has offered no rational basis for the difference in the treatment of the five (5) soldiers involved in the crimes especially in light of Green's willingness to re-enlist and the government's ability to jointly prosecute all of the soldiers in one or the other system of justice. This grossly disparate treatment by the government of similarly situated individuals is the epitome of a denial of equal protection.

D. Green's prosecution in federal court violates due process.

Due process "embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with the deepest notions of what is fair and right and just." *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting) abrogated by *Ford v. Wainwright*, 477 U.S. 399 (1986). Due process is "a limitation upon the executive, legislative and judicial powers of the federal government" and is "a required minimum" for the protection of the rights of life, liberty, and property. *Truax v.*

Corrigan, 257 U.S. 312, 332 (1921). Due process is "intended to prevent government 'from abusing [its] power' and "to protect the people from the State ..." *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989)(other citation omitted). Thus, due process requires that "criminal prosecutions ... comport with prevailing notions of fundamental fairness."*California v. Trombetta*, 467 U.S. 479, 485 (1984). See also *Patterson v. New York*, 432 U.S. 197, 202 (1977).

Substantive due process prevents the government from engaging in conduct that 'shocks the conscience' ... or interferes with rights 'implicit in the concept of ordered liberty,'" *United States v. Salerno*, 481 U.S. 739, 746 (1987) (other citations omitted), and limits the government's ability to deprive one of life, liberty, or property. *Does v. Munoz*, 507 F.3d 961, 964 (6th Cir. 2007). "Government actions that burden the exercise of those fundamental rights or liberty interests are subject to strict scrutiny, and will be upheld only when they are narrowly tailored to a compelling governmental interest." *Does*, 507 F.3d at 964 (other citations omitted),

"When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner...This requirement has traditionally been referred to as 'procedural' due process," *Salerno*, 481 U.S. at 746 (other citation omitted) which "imposes constraints on governmental decisions [that] deprive individuals of 'liberty' or

'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Thus, a due process violation exists not only when the government's conduct unreasonably hinders a fundamental right, but also when the government's action is "arbitrary or irrational." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 84 (1978). Due process is the foundation of the criminal justice system and requires that the system be fundamentally fair. Green's prosecution in a civilian court amounts to a violation of substantive and procedural due process because all of the post-crime events that enabled the government to acquire jurisdiction in federal court were initiated by military or civilian personnel - not by Green. Thus, it can hardly be claimed that the government is treating Green fairly when he - and he alone - is subjected to different and more onerous substantive criminal provisions, ranges and types of punishment, and adjudicative procedures than his military co-accused.

The disparate treatment of Green is a deprivation of his liberty interest because his discharge was predicated on Sgt. Yribe's attempt to cover up the Iraq crimes. Under 18 U.S.C. §3261, the United States had no jurisdiction to charge, let alone try, Green in the civilian system for the Iraq offenses when they were committed. Jurisdiction was created **after the fact** by the government itself when it chose - for its own reasons or no reason - to discharge Green. The government could just as

easily have discharged Cortez, Barker, Spielman, and Howard and then used the newly bestowed jurisdiction of §3261 created by their discharges to prosecute them in the civilian system as well. And even if those four soldiers were not discharged they could have been prosecuted under MEJA because Green had been indicted in federal court. See 18 U.S.C. §3261(d)(2). The government chose not to violate the military co-defendants' rights to due process but this largesse does not diminish the seriousness of the constitutional violation visited on Green.

The government had no civilian jurisdiction over Green when the offenses were committed. MEJA permitted the government to create civilian jurisdiction over Green after those offenses had occurred based solely on the government's decision to discharge him - a purely discretionary act that it is free to apply or not apply in cases such as these as suits its whim. Allowing the government to create jurisdiction after the fact where none existed when the crime was committed simply by changing a person's status from soldier to civilian deprives that person of life and liberty without due process and, on the facts of this case, violates equal protection.

Such an after-the-fact change in status cannot constitutionally form the basis of jurisdiction where none existed before, particularly where, as here, the consequences - a change from military to civilian jurisdiction with the concomitant change in substantive criminal provisions, ranges and types of punishment, and

adjudicative procedures - are so dire and the government itself changes the defendant's status.

Green's situation can be analogized to the jurisdictional issue that arises in some juvenile court cases. Like the military and civilian systems of justice, the juvenile and adult systems of justice each have their own - and often very different - substantive provisions, ranges and types of punishment, and adjudicative procedures. If a person commits an offense while a juvenile, but is arrested or charged after he becomes an adult - a change in status occurring after-the-fact - the government cannot bypass juvenile criminal jurisdiction and prosecute him in the adult criminal system because, as an adult, he is not subject to juvenile criminal jurisdiction. Since the defendant was subject only to juvenile criminal jurisdiction when he committed the offense, he cannot be subject to adult criminal jurisdiction merely because his status (i.e. age) changed and he was over 18 years of age when he was charged.[14]

In *State v. Skakel*, 276 Conn. 633, 658, 888 A.2d 985, 1007 (Conn. 2006) *cert*. denied 549 U.S. 1030 (2006), the defendant was 40 years old when he was arrested

[14] A juvenile court can, under certain circumstances, waive jurisdiction and transfer the juvenile's case to adult court. See e.g. Kentucky Revised Statute (KRS) 635.020 and 640.010. No such power exists in the civilian and military systems of justice. The point is that the defendant is subject to juvenile, not adult, jurisdiction, despite his change in status. Green, likewise, should only be subject to military, not civilian, jurisdiction, despite his change in status.

and charged with a crime that occurred when he was 15 years old. Notwithstanding the defendant's current age, adult court could not acquire jurisdiction over the case until the State complied with the mandatory and jurisdictional juvenile court proceedings.

> '[A] juvenile in whom a liberty interest in his or her juvenile status has vested, has a substantial liberty interest in the continuation of that juvenile status and that the juvenile cannot and should not be deprived of that status without [proper] procedural protections ....'

Skakel, 276 Conn. at 658, 888 A.2d at 1007 citing *State v. Angel C.*, 245 Conn. 93, 103, 715 A.2d 652, 659 (1998). See also *State v. Griffith*, 675 So.2d 911, 912 (Fla. 1996), in which the defendant was 22 years old when he was charged with multiple offenses that occurred while he was a juvenile. The Florida Supreme Court held that the State could not bypass juvenile court. The issue was jurisdictional and if the defendant "had been charged at the time of the offenses, he would have received the benefit of the 'firm layer of protection for juveniles' as intended by the legislature..."*Griffith*, 675 So.2d at 913 (other citation omitted).

The rationale underlying *Skakel* and *Griffith* applies with equal force to Green. If he had been charged at or near the time of the offenses (such as when he confessed to his superior Sgt. Yribe), he would have received the "firm layer of protection" the UCMJ has afforded his co-defendants. The government's delay in charging Green

until after his discharge - for whatever reason - cannot constitutionally result in a waiver or denial of his rights and vested liberty interests under the UCMJ and subject him not only to disparate treatment but also to the more onerous federal criminal justice system.

As in *Skakel* and *Griffith*, where an adult charged with crimes committed as a juvenile cannot be subjected to adult jurisdiction because of a post-crime change of status (from juvenile to adult), Green, who is charged with crimes committed as member of the Armed Forces subject to the UCMJ, should not be subjected to civilian jurisdiction because of a post-crime change of status (from military to civilian). This is particularly true in Green's case where the post-crime change of status was not an inevitable event like aging, but instead was a volitional action taken by **the government** that is prosecuting him.

For all of the foregoing reasons, Green's prosecution under MEJA is unconstitutional. The final judgment must therefore be vacated and the case remanded with directions to dismiss the indictment with prejudice.

II. Appellant was subject to the Uniform Code of Military Justice (UCMJ) (10 U.S.C. §801 *et seq*.) because he was not properly discharged from the Army. The district court was therefore without jurisdiction to try him under the Military Extraterritorial Jurisdiction Act (MEJA) (18 U.S.C. §3261).

A. Standard of Review

The denial of a motion to dismiss for lack of personal jurisdiction is subject to *de novo* review. *Kroger Co. v. Malese Foods Corp.*, 437 F.3d 506, 510 (6th Cir. 2008).

B. Raising the Issue

Appellant filed a Motion to Dismiss for Lack of Jurisdiction (R. 99) in which he argued that his discharge was invalid because the Army failed to comply with Regulations pertaining to separation. Thus, Green was still subject to the UCMJ and could not be prosecuted under MEJA. *Id*. The government filed a response (R. 107, Response) to which Green replied (R. 124, Reply). The motion was denied.(R. 149 and 150, Opinion and Order Denying Motion to Dismiss).

C. Discussion

MEJA (18 U.S.C. §3261(d)) provides,

> No prosecution may be commenced against a member of the Armed Forces subject to chapter 47 of title 10 [UCMJ] 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.

Cortez, Barker, Spielman, and Howard were still in the military when they were charged with the Iraq crimes. Green had been discharged from the Army about six (6)

weeks prior to being charged. Thus, the prosecution of Green under MEJA rests on the assumption that he was **not** subject to the UCMJ and the military therefore no longer had jurisdiction over him. Green's discharge, however, as discussed below, was invalid.

"A 'discharge,' in military terms, is generally understood to be a 'complete termination' of military service ..." *Willenbring v. United States*, 559 F.3d 225 (4th Cir. 2009) *cert*. denied ___ U.S. ___, 130 S.Ct. 117 (2009). "[M]ilitary jurisdiction continues until a servicemember's military status is terminated by discharge from his enlistment." *United States v. Batchelder*, 41 M.J. 337, 338 (Ct.App. Armed Forces 1994); *Solorio v. United States*, 483 U.S. 435, 439 (1987). "[A] valid discharge can operate as a termination of court-martial *in personam* jurisdiction." *United States v. Harmon*, 63 M.J. 98, 101 (Ct.App. Armed Forces 2006). See also *Webb v. United States*, 67 M.J. 765, 771 (A.F.Ct.Crim.App. 2009).

"Generally, for a Soldier to be effectively discharged or released from active duty, "there must be: (1) a delivery of a valid discharge certificate; (2) a final accounting of pay; and (3) the undergoing of a 'clearing' process as required under appropriate service regulations to separate the member from military service." *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F.2006) (quoting and citing *United States v. King*, 27 M.J. 327, 329 (C.M.A.1989))." *United States v. Estrada*, 68 M.J. 548, 549

(Army Ct.Crim.App. 2009); See also *United States v. Williams*, 53 M.J. 316, 317 (Ct.App. Armed Forces 2000); *United States v. Hart*, 66 M.J. 273, 275-276 (Ct.App. Armed Forces 2008) *cert.* denied ___ U.S. ___, 129 S.Ct. 310, 172 L.Ed.2d 153 (2008). A discharge from the military is also addressed in 10 U.S.C. §§1168 [15] and 1169[16] and under §1168(a) "it would seem that separation orders contemplate the completion of certain formalities before the separation takes effect." *United States v. Meadows*, 13 M.J. 165, 168 (C.M.A.1982). The "clearing process" is not simply a ministerial function or formality but is a key component of a valid discharge[17] and is an essential element of properly establishing *in personam* jurisdiction. *King*, 27 M.J. at 329. See also *United States v. King*, 42 M.J. 79, 80 (Ct.App. Armed Forces 1995) and *United States v. Keels*, 48 M.J. 431, 432-433 (Ct.App. Armed Forces 1998) (military retained court-martial jurisdiction where the three *King* elements including

---

[15] 10 U.S.C. §1168(a) states, "A member of an armed force may not be discharged or released from active duty until his discharge certificate or certificate of release from active duty, respectively, and his final pay or a substantial part of that pay, are ready for delivery to him or his next of kin or legal representative."

[16] 10 U.S.C. §1169 provides, "No regular enlisted member of an armed force may be discharged before his term of service expires, except (1) as prescribed by the Secretary concerned; (2) by sentence of a general or special court martial; or (3) as otherwise provided by law."

[17] *Webb v. United States*, 67 M.J. at 767; *United States v. Harmon*, 63 M.J. at 99.

a proper "clearing process" were not met). Moreover, the Discussion following the Rules of Courts-Martial (RCM) 202(c)(1) states, "a service member is subject to court martial jurisdiction until **lawfully** discharged ..." (emphasis added).[18]

Green received a copy of Department of Defense Form 214 (DD 214) which served as his discharge certificate [19] and he received a final accounting of his pay and allowances. Thus, he conceded that the first and second elements of a proper discharge were met. (R. 99, Motion to Dismiss for Lack of Jurisdiction, p. 4). However, the "clearing process" in his case failed to comply with Army Regulations. His discharge was therefore invalid and deprived the federal court of jurisdiction to try him.

Army Regulation (AR) 635-10 is entitled Personnel Separations, Processing Personnel for Separation. See http://www.army.mil/usapa/epubs/pdf/r635_10.pdf . AR 635-10, 3-14(b) states in part, "Immediately following final payment, the

---

[18] RCM 202(c)(1) states, " Court-martial jurisdiction attaches over a person when action with a view to trial of that person is taken. Once court-martial jurisdiction over a person attaches, such jurisdiction shall continue for all purposes of trial, sentence, and punishment, notwithstanding the expiration of that person's term of service or other period in which that person was subject to the code or trial by court-martial."

[19] The DD 214 form is attached to R. 99, Motion to Dismiss for Lack of Jurisdiction and R. 108, Response, GEX 1.

individual will surrender Identification Card (DD form 2A) or sworn statement of loss to the finance and accounting officer ... Installation commanders will establish appropriate control procedures for the destruction of ID cards." Green was still in possession of his military ID when he was arrested in North Carolina on June 30, 2006. (R. 99, Motion to Dismiss for Lack of Jurisdiction, p. 7; R. 107, Response, pp. 3, 15). The government argued in district court that the Army did not have an "affirmative obligation" to collect the ID prior to separation. (R. 107, Response, p. 15). The regulation, however, squarely places the burden of obtaining the ID on the Army. A soldier's receipt of his final pay is conditioned on surrender of his military ID or providing military authorities with a "sworn statement of loss." AR 635-10, 3-14(b) makes clear that final pay is not to be issued until either contingency is met. Thus, the burden of obtaining the ID or verifying its loss rests with the Army and Green's possession of the ID reflects the government's failure to comply with the regulation.

Green was also entitled to a departure ceremony. AR 635-10, 3-1 states in pertinent part, "During the pretransition processing and prior to a soldier's departure from the unit, the unit commander and/or the installation representative **will** conduct a command departure ceremony for each member transitioning with an honorable character of service ..." (Emphasis added). Again, the burden of compliance with the

regulation is placed on the military. There is no proof that Green received a departure ceremony. The government instead argued that it was reasonable to expect that given conditions in Iraq such a ceremony would yield to the "demands of war" and "operational readiness" (R. 107, Response, p. 15). The fact remains that the regulation is mandatory and there is no evidence of compliance. Like AR 635-10, 3-14(b), discussed above, AR 635-10, 3-1 is a component of military "outprocessing." Green received an honorable discharge and the Regulation does not contain any exception for combat conditions. Ceremonies are an important part of military tradition and the ceremony mandated by AR 635-10, 3-1, is conducted "to express the Army's appreciation and gratitude for the service rendered by the soldier." In light of that objective, the Regulation does not directly state or otherwise imply that the departure ceremony can be suspended or canceled if it is to take place near or in a battle zone. The ceremony requirement is mandatory and it was not shown to have occurred in Green's case.

The Regulations also require that a transitioning solder "be advised .. [t]o apply for compensation from Veterans Administration ... if ... Soldier had undergone prolonged hospitalization, or suffered from wounds, injury, or disease while in service ..." AR 635-10, 2-4(f)(1)(a). Green received an honorable discharge due to a personality disorder. (See DD Form 214 attached to R. 99, Motion to Dismiss for

Lack of Jurisdiction and R. 107, Response, GEX 1). DD Form 214 is not adequate notice of the Regulation's requirement that Green could seek compensation for a service related illness or injury. Similarly, there is nothing in the Preseparation Counseling Checklist that advises Green of his rights under AR 635-10, 2-4(f)(1)(a). (R. 107, Response, GEX 6). Compliance with AR 635-10, 2-4(f)(1)(a) is mandatory. Although Green requested counseling about Disabled Transition Assistance Program and VA Disability Benefits (R. 107, Response, GEX 6, ¶18), one can only speculate whether that counseling complies with AR 635-10, 2-4(f)(1)(a).

Green received an honorable discharge due to a personality disorder. That brought him within the scope of AR 635-200, 5-13 which is entitled "Separation because of personality disorder" and provides in pertinent part,

> Under the guidance of chapter 1, section II, a soldier may be separated for personality disorder (not amounting to disability (see AR 635-40)) that interferes with assignment or with performance of duty when so disposed as indicated in a, below.
>
> a. This condition is a deeply ingrained maladaptive pattern of behavior of long duration that interferes with the soldier's ability to perform duty.(Exceptions: combat exhaustion and other acute situational maladjustments.) The diagnosis of personality disorder must have been established by a psychiatrist or doctoral-level clinical psychologist with necessary and appropriate professional credentials ...
>
> c. Separation because of personality disorder is authorized only if the diagnosis concludes that the disorder is so severe that the soldier's ability to function effectively in the military environment is significantly impaired...
>
> e. Separation processing may not be initiated under this paragraph

> until the soldier has been counseled formally concerning deficiencies and has been afforded ample opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. (See para 1–16.)...

See AR 635-200, 5-13. http://www.army.mil/usapa/epubs/pdf/r635_200.pdf.

The Army's mandate for counseling before a soldier is discharged for a personality disorder is implemented by AR 635–200, 1–16 which is entitled "Counseling and rehabilitative requirements" and states in pertinent part:

> a... Except as otherwise indicated in this regulation, commanders must make maximum use of counseling and rehabilitation before determining that a soldier has no potential for further useful service and, therefore, should be separated. In this regard, commanders will ensure that adequate counseling and rehabilitative measures are taken before initiating separation proceedings for the following reasons ... (2) Personality disorder. (See para 5–13.) ...
>
> b. Counseling. When a soldier's conduct or performance becomes unacceptable, the commander will ensure that a responsible official formally notifies the soldier of his/her deficiencies. At least one formal counseling session is required before separation proceedings may be initiated for one or more of the reasons specified in a, above. In addition, there must be evidence that the soldier's deficiencies continued after the initial formal counseling.
>
> (1) The number and frequency of formal counseling sessions are discretionary. Such factors as the length of time since the prior counseling, the soldier's performance and conduct during the intervening period, and the commander's assessment of the soldier's potential for becoming a fully satisfactory soldier, must be considered in determining if further counseling is needed...
>
> (3) Each counseling session must be recorded in writing. DA Form 4856 (General Counseling Form) will be used for this purpose.
>
> (4) The soldier's counseling or personal records must reflect that he/she was formally counseled concerning his/her deficiencies and given

a reasonable opportunity to overcome or correct them...

d. Waivers. (1) Waiver of the counseling requirement is not authorized.

AR 635–200, 1–16. The exhibits attached to the government's Response to Motion to Dismiss for Lack of Jurisdiction (R. 107) do not establish compliance with the mandatory counseling requirements of AR 635–200, 1–16 and AR 635–200, 5–13(e).

First, GEX 3 merely provides Green with notice that he was being separated from the Army due to a personality disorder and while it may have advised Green of his right to contest the separation, it did not fulfill the counseling requirement mandated by AR 635–200, 1–16. (R. 107, Response, GEX 3).

Second, GEX 12 acknowledges that "Paragraph 1-16 counseling is required and is attached with the soldier's counseling packet." (R. 107, Response, GEX 12). The acknowledgment, however, does not, reflect that Green was "afforded ample opportunity to overcome [his] deficiencies as reflected in appropriate counseling or personnel records" (AR 635–200, 5–13(e)) or that he was "formally counseled concerning his ... deficiencies and given a reasonable opportunity to overcome or correct them." AR 635–200, 1–16(b)(4). The tone of GEX 3 and 12 is that of a *fait accompli*. - Green is going to be discharged period. Neither GEX 3 nor GEX 12 gives any hint of compliance with AR 635–200, 5–13(e) and therefore cannot be found to comply with AR 635–200, 1–16.

The government argued in district court that the General Counseling Form (DA 4856) was destroyed on separation at ETS (expiration of term of service) as provided by the instructions on the form. (R. 107, Response, p. 16; GEX 11; see also AR 635-200, Glossary, §1, Abbreviations). The government therefore concluded that compliance with those instructions supported the validity of Green's discharge. The government, however, assumes too much. While destruction of the form may be intended to protect confidentiality of the substantive discussion between a soldier and a psychiatric professional, that protection is unnecessary to show that Green was given an opportunity to overcome perceived deficiencies in his performance as required by AR 635–200, 1–16(b)(4) and AR 635–200, 5–13(e). Thus, the destruction of DA Form 4856 does not establish a presumption of compliance with those Regulations.

AR 635-200, 5-13(b) states, "Commanders will not take action prescribed in this chapter in lieu of disciplinary action solely to spare a soldier who may have committed serious acts of misconduct for which harsher penalties may be imposed under the UCMJ."[20] As discussed earlier, Green told Sgt. Yribe on March 12, 2006, about his involvement in the crimes. (R. 92, Motion to Dismiss, EX 5). Green

[20] AR 635-200, 5-13(g) refers to AR 635-200, 1-19 which describes those commanders who have authority to approve or disapprove separation.

reiterated his involvement to Yribe on March 13, 2006. *Id*. Yribe's response was to tell Green that he was going to be discharged - "either get out of the Army or I'm going to help you do it." *Id*.

Although Yribe may not have squarely fit within the term "Commander" as used in AR 635-200, 1-19, he was undoubtedly Green's superior and in that capacity he was bent on covering up the crimes by quickly getting Green out of the Army. It is unlikely that Yribe thought Green could be prosecuted by civilian authorities for crimes committed while Green was in the Army and by initiating a coverup, Yribe - Green's superior - clearly intended that Green be spared the harsh penalties he would face under the UCMJ. Yribe's deception in covering up the crimes initiated Green's discharge and it was only through that deception that Green avoided the military prosecution to which Cortez, Barker, Spielman, and Howard were subjected. Yribe's deception coupled with the "clearing process" defects previously noted support the conclusion that Green's discharge was invalid.

The district court, however, focused on the Army's **intent** as the decisive factor regarding Green's discharge and it overemphasized the delivery of the DD 214 form as the point at which a serviceman's military status is terminated. (R. 149, Opinion, pp. 8-10). Although the Army may have intended to discharge Green, it failed to comply with the clearing process prescribed by Army Regulations and thus rendered

the discharge invalid. The issuance of a facially proper DD 214 form therefore cannot validate an otherwise invalid discharge because that form is merely one of three essential elements of a valid discharge and, as shown by *King*, 27 M.J. at 329, *Webb*, 67 M.J. at 767, and *Harmon*, 63 M.J. at 99, the "clearing process" is a fundamental component of a valid discharge.

Relying on *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), the district court held that Green would not be entitled to relief even if he were correct about the invalidity of his discharge. (R. 149, Opinion, pp. 13-15). As the court saw it, "the key issue under *Toth* was that court-martial jurisdiction could not be extended to an ex-soldier who had severed his relationship with the military." *Id*. at p. 14. The court found that post-discharge there was no connection between Green and the military that would extend court-martial jurisdiction to Green. *Id*.

In *Toth*, 350 U.S. at 14, the Court found that Article I, §8, Clause 14 of the Constitution, which grants Congress the power to "make rules for the government and regulation of the land and naval forces," sets the outer limit of court-martial jurisdiction over discharged soldiers. The plain language of the Constitution "would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces." *Toth*, *Id*. See also *Vanderbush v. Smith*, 45 M.J. 590, 593 (Army Ct.Crim.App.1996) affirmed 47 M.J. 56, 59 (Ct.App. Armed Forces1997) ("A soldier

who violates military law while a member of the Army, but who is **discharged** prior to any action being taken with a view toward court-martial, is a civil person and may not be subjected to court-martial jurisdiction.") (emphasis added). *Toth* and *Vanderbush*, however, assume the validity of a serviceman's discharge. Thus, the district court's reliance on *Toth* is misplaced not only because Green's discharge is invalid but because it also pre-dates MEJA which (if it does not violate the non-delegation doctrine, etc., see Argument I) also assumes that the defendant has been validly discharged from the Armed Forces. See 18 U.S.C. §3261(c) and (d). Furthermore, Green, unlike the defendant in *Toth*, was willing to subject himself to the UCMJ but his offer to re-enlist was rejected. (See fn. 10, p. 16). *Toth* is therefore inapposite.

The Army's failure to comply with Regulations governing the "clearing process" resulted in an invalid discharge and thereby created a fatal jurisdictional defect in the proceedings. That flaw adversely affected Green's substantial rights by exposing him to harsher laws and punishments than those faced by his military co-accused. Under the circumstances, the district court did not have *in personam* jurisdiction over Green. The final judgment must therefore be vacated and the case remanded with directions to dismiss the indictment with prejudice.

Conclusion

For the foregoing reasons, appellant Steven Dale Green, respectfully submits that the final judgment must be reversed with directions to dismiss the indictment with prejudice.

s/ Frank W. Heft, Jr.
s/ Scott. T. Wendelsdorf
s/ Patrick J. Bouldin
Office of the Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, Kentucky 40202
(502) 584-0525
Counsel of Record for Appellant.

s/ Darren C. Wolff
2615 Taylorsville Rd.
Louisville, Kentucky 40205
(502) 451-3911
Of Counsel (*Pro Bono)*

Certificate of Compliance

I certify that this brief complies with the type-volume limitation under Sixth Cir. Rule 32(a)(7)(B) by containing 12,905 words.

s/ Frank W. Heft, Jr.

Certificate of Service

I hereby certify that on November 30, 2009, I electronically filed the foregoing brief with the clerk of the court by using the ECF system. I also certify that on November 30, 2009, the foregoing brief was served on the following counsel of record at their email addresses through ECF: Monica Wheatley, Assistant United States Attorney at Monica.Wheatley@usdoj.gov., Terry M. Cushing, Assistant United States Attorney at Terry.Cushing@usdoj.gov., and Marisa J. Ford, Assistant United States Attorney at Marisa.Ford@usdoj.gov.

s/ Frank W. Heft, Jr.

Appellant Green's Addendum and Designation of District Court Documents

Record No.	Description of Document
1	Complaint
6	Order on Initial Appearance
36	Indictment
70	Notice of Intent to Seek Death Penalty
92	Defendant's Motion to Dismiss
99	Defendant's Motion to Dismiss for Lack of Jurisdiction
107	United States' Response to Motion to Dismiss for Lack of Jurisdiction
108	United States' Response to Motion to Dismiss
124	Defendant's Reply to Response to Motion to Dismiss for Lack of Jurisdiction
125	Defendant's Reply to Response to Motion to Dismiss
127	Defendant's Motion for Oral Argument
128	United States' Response to Defendant's Motion for Oral Argument
136	Memorandum Opinion re Motion to Dismiss
137	Order Denying Motion to Dismiss
149	Memorandum Opinion re Motion to Dismiss for Lack of Jurisdiction

150	Order Denying Motion to Dismiss for Lack of Jurisdiction
242	Jury Verdict (Instructions)
257	Special Jury Verdict Forms
263	Verdict Order
282	Judgment and Commitment Order
283	Notice of Appeal
284	Presentence Investigation Report (PSR) (sealed)
286	Amended Notice of Appeal