

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 14, 2011
CORRESPONDENTS' REPORTS

UNITED STATES OF AMERICA¹

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Overview – United States Enforcement of International Humanitarian Law Violations by Its Service Members

2011 saw the end of Operation New Dawn, the US military’s deployment to Iraq, while Operation Enduring Freedom, the US military’s deployment to Afghanistan, remained ongoing. Of note, the US withdrawal from Iraq stemmed in significant part from disagreements between the United States and Iraq over which sovereign should exercise a primary right of criminal jurisdiction over US service members for offenses they committed in Iraq.

These two operations represented the vast majority of US military involvement in armed conflict in 2011, the remainder being smaller special operations missions – for example, the capture of Ahmed Warsame, a suspected member of the al Shabaab terrorist group,

off the coast of Somalia in April 2011, a May 2011 raid in Pakistan to kill Osama Bin Laden, and drone strikes in Yemen throughout the year. Accordingly, combat operations in Iraq and Afghanistan were where US service members were applying, and in the cases described below, violating, IHL/the law of armed conflict.

The US policy for responding to service members violating IHL is that ‘efforts should be made to maximize the exercise of court-martial jurisdiction over persons subject to the [Uniform Code of Military Justice] to the extent possible.’² As a result, with one exception, the cases that follow are examples of the US military exercising court-martial jurisdiction over its service members, as opposed to jurisdiction exercised by US Federal or State Courts. The cases are illustrative of how the US utilizes its military justice system during armed conflict in response to offenses by its service members against protected persons, most often Iraqi and Afghan nationals.

Authority for the US military justice system derives from the US Constitution, which allows the US Congress to ‘make rules for the government and regulation of the land and naval forces.’³ Prior to the Constitution, in 1776 the Continental Congress issued Articles of War, which were almost exclusively based on the British Articles of War of 1774. Following the Revolutionary War with Great Britain that yielded the United States, the US Congress continued to revise and reissue the Articles of War until they were superseded by the Uniform Code of Military Justice (‘UCMJ’) in 1951.⁴ The UCMJ is federal law and codified in Title 10 of the US Code, Chapter 47. The US military implements the UCMJ through the

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² *Manual for Courts-Martial*, United States Rule for Court-Martial 201(d) (discussion) (2012) (‘MCM’).

³ *United States Constitution* art I § 8 C 14.

⁴ *Uniform Code of Military Justice*, 10 USC § 801 et seq <<http://www.law.cornell.edu/uscode/text/10/subtitle-A/part-II/chapter-47>>.

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Manual for Courts-Martial ('MCM'), which is a combination of a series of Executive Orders issued by the President of the United States and revised as needed.⁵

As the MCM explains: 'The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.'⁶ The US military strives to achieve these goals by vesting various levels of military command with different types and levels of responsibility and authority within the military justice system. Lower level commanders address the vast majority of service member misconduct with administrative sanctions or non-judicial punishment. The ramifications of these sanctions and punishment should not be overlooked. Through these mechanisms service members lose rank, pay, perform extra duty, receive informal and formal reprimands, and are administratively separated from the US military. Often, these separations result in a characterization of service besides 'honorable', which can mean the loss of some or even all veterans benefits.⁷

For more serious, criminal, misconduct, these commanders will initiate or prefer charges. The charges are forwarded through the chain of command, stopping where an intermediate commander elects to take action ranging from more severe non-judicial punishment up to and including lower levels of court-martial (summary and special), which can result in confinement for up to one year. The cases described below, however, are of charges forwarded to the highest level, a General Court-Martial Convening Authority, which, as the title suggests, has the authority to convene a general court-martial. The most serious charges, carrying the most severe possible penalties (including the death penalty), are referred to a general court-martial. The referral process transfers the case from the military command to a separate, independent, military judge.

Service members facing court-martial may elect to be tried by a military judge or by a panel, the military equivalent of a jury. They are provided military defense counsel at no charge and may elect to plead guilty or not guilty. A unique aspect of the US military justice system is that service members are able to enter into a pretrial agreement with the convening authority through which the service member agrees to plead guilty and the convening authority agrees to limit or cap the possible punishment. The service member then pleads guilty in front of a military judge, who conducts a lengthy and rigorous providency inquiry to ensure the service member understands the ramifications of the plea and that they are in fact guilty of the offense to which they are pleading.⁸ If the military judge accepts the plea, which is not a foregone conclusion, a sentencing hearing is held before either the military judge or a panel. They determine an appropriate sentence without knowing the terms of the pretrial agreement between the accused and the convening authority. Once the sentence is announced, then, and only then, does the military prosecutor inform the military judge of the terms of the agreement. The accused then receives the lesser punishment of the sentence cap from the agreement or the sentence determined following the guilty plea. This is reflected in several of the cases below.

⁵ MCM.

⁶ MCM pt I-1(3).

⁷ Characterization of service following administrative separation range from the highest, honorable, to general under honorable conditions, to other than honorable.

⁸ Some criminal justice systems, including US federal court, allow an accused to plead guilty while not acknowledging their guilt. This option is not available in the US military justice system. And the providency inquiry referenced above is a colloquy between the military judge and with a few exceptions the accused service member, not his defense counsel.

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Following trial, the case is returned to the convening authority to approve the findings and sentence. The convening authority may alter findings and/or the sentence but only in a way beneficial to the accused service member, which is also reflected in the cases below. Service members who receive a punitive discharge (meaning the characterization of the military service is either a bad conduct or a dishonorable discharge) and/or are sentenced to a year or more of confinement are entitled to automatic appellate review of their court-martial by a service specific appellate court (Air Force Court of Criminal Appeals ('AFCCA'), Army Court of Criminal Appeals ('ACCA'), and Navy-Marine Corps Court of Criminal Appeals ('NMCCA')). Following action by a service appellate court, service members may petition for review by first the Court of Appeal for the Armed Forces ('CAAF') and then by the United States Supreme Court, but both those levels of appeal are discretionary.

Pinpointing examples of US enforcement of its obligations under various IHL agreements and treaties is challenging, both legally and practically. Legally, there are questions of how the conflicts are characterized and which agreements apply.⁹ Practically, the US military will ordinarily charge an individual subject to the UCMJ with a specific violation of that code rather than a violation of the law of war. Thus, where a US service member is alleged to have wrongfully killed an Iraqi or Afghan, that service member is charged with murder in violation of Article 118, an enumerated punitive article of the UCMJ.

This charging decision hampers the ability to separate out examples of where the US has enforced its IHL obligations – court-martial of a US service member under Article 118 for killing an Iraqi civilian for example – from other actions under the UCMJ – court-martial of a US service member under Article 118 for killing another US service member. But the US position remains that its efforts, however styled, 'provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the [Geneva Conventions]'.¹⁰ The task of explaining US (or any State's) enforcement efforts is further complicated by the fact that the appropriate response to lower level IHL violations is through mechanisms other, and less, than criminal prosecution for which there are few, if any, publicly available records. These actions include having offending service members undergo corrective training, issuing informal or formal reprimands (with formal reprimands effectively ending a service member's career), non-judicial punishment (which as previously discussed can result in demotion in rank, loss of pay, extra duty and restriction) and/or administrative separation proceedings. The key to whether these lesser responses fulfil the US' IHL enforcement obligations is whether the actions are considered 'measures necessary for the suppression of all acts contrary to the provisions of the [Geneva] Convention[s]'.¹¹

⁹ The US answer is largely policy based. Pursuant to a directive, 'members of the DoD components comply with the law of war during all armed conflicts however such conflicts are characterized, and in all other military operations', Department of Defense Directive 2311.01E, 'DoD Law of War Program' ¶4.1. <<http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf>>. Under this policy, the law of war is defined as 'encompass[ing] all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.' ¶3.1. This policy results in the application of international armed conflict standards of conduct to all conflicts 'no matter how characterized.' This approach also provides criminal sanctions for those actions that could be characterized as 'grave breaches' of the Geneva Conventions or Common Article 3 [accord the *US War Crimes Act* 18 USC 2441]; other violations of the law or armed conflict may result in criminal or administrative sanctions: see eg, *Geneva Conventions Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287, (entered into force 21 October 1950) art 146 [Geneva Convention IV].

¹⁰ Geneva Convention IV, art 146.

¹¹ Geneva Convention IV, art 146.

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Cases — United States Federal Court

- *United States v Green* [2011] 654 F 3d 637 United States Court of Appeals for the Sixth Circuit

The US Department of Justice (DOJ) prosecuted Green, a former enlisted soldier (Private First Class) in the US Army, in federal district court in 2009 for sexual assault and murders he committed near Mahmudiyah, Iraq in 2006 while an active duty member of the Army. The DOJ's jurisdiction over Green's crimes was pursuant to the Military Extraterritorial Jurisdiction Act ('MEJA'), which the US enacted in 2000 to extend federal criminal jurisdiction to service members who committed a criminal act while in the military but who are subsequently beyond the military's court-martial jurisdiction due to having been discharged.¹²

Green enlisted in the Army in February 2005 and was deployed to Iraq in September. On 12 March 2006, Green and four other US soldiers were drinking alcohol while performing checkpoint duty. Green convinced three of the soldiers (Barker, Cortez, and Spielman) to join him in walking to the nearby house of an Iraqi family so the soldiers could rape a 14-year-old Iraqi girl (Abeer Qassim Hamza al-Janabi) they knew resided there. A fourth soldier, Sergeant Yribe (the ranking individual ostensibly in charge) remained at the checkpoint. At the house, the soldiers separated Abeer from her parents and six-year-old sister. Green guarded the family and Spielman served as a lookout while Barker and Cortez took turns raping Abeer. Green opened fire on the three family members, killing them. He exited the room, bragged that he had killed the family, and took a turn raping Abeer. He then put a pillow over Abeer's face and shot her in the head, killing her. The group attempted to cover up their crimes by dumping kerosene on Abeer's body and lighting her and the house on fire before returning to the checkpoint. Relatives living nearby responded to the fire, observed the bodies and reported the incident to the Iraqi Army, which in turn reported it to the closest US checkpoint, staffed by Green and his cohorts. The US soldiers blamed the incident on insurgents.

In May 2006, the US Army diagnosed Green with a personality disorder and redeployed him to the US where he was honorably discharged. In June 2006, insurgents attacked a checkpoint manned by Green's former unit as purported retaliation for Abeer's rape and murder. The insurgents killed one member of Green's unit at the checkpoint and kidnapped two others, torturing and killing them. This led Yribe to tell another member of the unit, Watt, of the rape and murder and that in Yribe's view, Green was responsible for the subsequent deaths of the US service members. As a result of the insurgent attack on the checkpoint, the US military sent combat stress (psychological health) personnel to counsel Green's former unit. During one such counseling session, Watt disclosed the rape and murders.¹³ The US military investigated and subsequently prosecuted the individuals who were still members of the Army¹⁴ while the DOJ prosecuted Green.

In November 2006, Green was indicted in federal court under the MEJA. Contrary to his pleas, a federal jury convicted Green of murder, conspiracy to murder, and sexual assault. While the federal prosecutor argued for the death penalty, the federal district court judge sentenced Green to five consecutive life terms in prison. Following his conviction, Green appealed to the US Court of Appeals for the Sixth Circuit claiming that the federal district court that tried him lacked jurisdiction because the Army had not properly discharged him.

¹² *United States v Green* [2011] 654 F 3d 637, 640–641.

¹³ *Ibid*, 641–644.

¹⁴ The 2010 report addressed the US Army's prosecutions of the other Soldiers involved.

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Green also argued that the MEJA was unconstitutional because it violated a host of US Constitutional provisions including those concerning the separation of powers, the delegation of powers principles, the Equal Protection Clause, and the Due Process Clause.¹⁵

After explaining that the MEJA filled the “jurisdictional gap” that allowed former service members to escape prosecution for crimes committed on foreign soil while a member of the Armed Forces,¹⁶ the Sixth Circuit rejected Green's jurisdiction claims. First, the court noted Green was covered by the MEJA because the Army complied with the separation process contemplated by *United States v King* [1989] 27 MJ 327 United States Court of Military Appeals (subsequently renamed the Court of Appeals for the Armed Forces). The Sixth Circuit also dismissed Green's separation of powers claim, commenting that the ‘MEJA’s expansion of the executive branch’s power to prosecute [did] not come at the expense of’ the legislative or judicial branches.¹⁷ The court found that the delegation of powers principles did not apply to Green’s case. The court rejected Green’s equal protection argument because he ‘was not similarly situated to his co-conspirators at the charging decision’ and because the MEJA prosecution was neither arbitrary nor animated by an ‘illegitimate motive.’ The court also rejected Green's due process MEJA claim, reasoning that prosecutorial discretion to indict Green in federal criminal court was not subject to attack as ‘arbitrary’ under substantive due process.

The Sixth Circuit affirmed the district court's decision.¹⁸

Cases — United States Military Courts – United States Air Force

- ☛ *United States v Flores* [2011] 69 MJ 366 United States Court of Appeals for the Armed Forces

The US Air Force court-martialed Flores, a noncommissioned officer (Staff Sergeant), in 2007 for failing to obey lawful orders regarding detainee treatment. Then-Staff Sergeant Flores was a shift leader at a detention facility in Camp Bucca, Iraq, when she became sexually involved with one detainee and made an inappropriate video of another. Flores was charged with multiple specifications of disobeying a lawful order and making false official statements. Flores pleaded guilty to two specifications of disobeying a lawful order and not guilty to the remaining counts. Contrary to her not guilty pleas, the military judge found her guilty of all charges. The military judge sentenced Flores to a bad conduct discharge, confinement for six months, and reduction to the lowest enlisted rank. The AFCCA affirmed the findings and sentence.¹⁹

Flores appealed her case to the CAAF, raising claims related to the government's closing argument. The CAAF concluded that the five comments Flores objected to were either not error or, where they were, that the error was harmless beyond a reasonable doubt. In affirming the findings and sentence, the CAAF concluded that ‘the evidence of Flores’ guilt was indeed overwhelming.’²⁰

Cases — United States Military Courts – United States Army

- ☛ *United States v Girouard* [2011] 70 MJ 5 Court of Appeals for the Armed Forces

¹⁵ Ibid, 644.

¹⁶ Ibid, 645.

¹⁷ Ibid, 650.

¹⁸ Ibid, 653.

¹⁹ *United States v Flores* [2011] 69 MJ 366, 368–369.

²⁰ Ibid, 369–373.

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In 2007, the US Army court-martialed Girouard, a noncommissioned officer (Staff Sergeant), for conspiracy to commit premeditated murder and premeditated murder in connection with the shooting of detainees in Iraq in 2006. Then-Staff Sergeant Girouard, a squad leader, participated in an air assault of an area thought to be an al Qaeda training camp, and raided a house occupied by several military-age males, killing one and detaining three others. Girouard directed members of his squad to secure the three detainees with zip ties and to place them facedown outside the house. After one of the US soldiers, Hunsaker, expressed a desire to kill the detainees, Girouard held a meeting following which he assigned Hunsaker and another soldier, Clagett, to guard the detainees. Girouard and other members of the squad then left the house and continued their mission. Hunsaker and Clagett cut the detainees' restraints, told them to run, and then opened fire, killing two outright and mortally wounding the third.²¹ Girouard returned to the house and after meeting with Hunsaker and Clagett, the three decided to fabricate an escape story to cover up the detainees' deaths.²² The story did not hold up long and the US Army prosecuted all three.

At the conclusion of Girouard's court-martial before a military panel, the defense requested instruction on the lesser-included offense ('LIO') of negligent homicide, to which the military judge agreed. However, throughout the trial neither the government nor defense counsel once addressed or presented evidence on a negligent homicide theory. Contrary to his pleas, the panel found Girouard guilty of conspiracy to obstruct justice, obstruction of justice, violating a lawful general order, and negligent homicide and not guilty of premeditated murder and conspiracy to commit premeditated murder. The panel sentenced Girouard to a dishonorable discharge, confinement for ten years, total forfeiture of all pay and allowances and reduction in rank to the lowest enlisted grade. He appealed the findings and sentence to the ACCA, which affirmed them. Girouard then appealed to the CAAF.²³

Days before the ACCA decision, the CAAF issued *United States v Jones* [2010], 68 MJ 465, which reinstated the 'elements test approach' to defining LIO. Under the *Jones* framework, LIO instructions are permissible only where an indictment contains the elements of both offenses and the defendant has notice that he may be convicted on either charge. On appeal to the CAAF, Girouard argued that negligent homicide required two elements that premeditated murder did not. Based on the *Jones* test, the CAAF agreed. The court rejected the Government's claims that because Girouard requested the negligent homicide instruction, he waived or invited the error. The court also rejected the Government's suggestion that Girouard was not prejudiced by his conviction because he was on notice.²⁴

The CAAF reversed and dismissed the portion of Girouard's conviction pertaining to negligent homicide, and affirmed his convictions on the remaining charges. The CAAF remanded to the ACCA for reassessment of Girouard's sentence.²⁵

• *United States v Girouard* [2011] 70 MJ 5 2011 WL 2092740 (per curiam) (not reported)
Army Court of Criminal Appeals

²¹ Shortly after the shooting, a US Army medic came to look at the detainees' bodies. At that time, the third detainee was still breathing, but the medic noted that '[t]here's nothing I can do for him.' Another US Army soldier, Graber, proceeded to fire his rifle into the detainee's head to, in his own words, 'ease the suffering.' *United States v Girouard* [2011] 70 M J 5, 5. The US Army also prosecuted Graber.

²² *Ibid.*

²³ *Ibid.*, 8–9.

²⁴ *Ibid.*, 9–12.

²⁵ *Ibid.*, 12.

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On remand to the ACCA, the court ordered a rehearing on Girouard's sentence.

- *United States v Spielman* [2011] (unpublished) 2011 WL 2638746 United States Army Court of Criminal Appeals

The US Army court-martialed Spielman, an enlisted soldier (Private First Class (PFC)) in 2007 for his role in the March 2006 rape and murder of 14 year old Abeer Qassim Hamza al-Janabi and the murder of her family. Spielman was one of the group of four US soldiers "led" by PFC Green, whose prosecution in US federal district court is described above. Spielman's unique contributions to the crimes included lifting Abeer's shirt and touching her breasts after Green murdered her and then disposing of the AK-47 rifle Green used to murder Abeer and her family by throwing it in a nearby canal.²⁶

Spielman pleaded and was found guilty by a military judge of conspiracy to obstruct justice, violation of a lawful general order, wrongful endeavor to impede an investigation, arson, and wrongful touching of a corpse. Contrary to his pleas, a military panel then found Spielman guilty of conspiracy to rape, felony murder, unpremeditated murder, negligent homicide, rape, and housebreaking with intent to commit rape. The panel sentenced Spielman to a dishonorable discharge, confinement for 90 years with eligibility for parole, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. Spielman appealed to the ACCA for a new trial, raising three assignments of error as well as alleging the admission of fraudulent testimony prejudiced the outcome of trial.²⁷

At trial, the government introduced evidence showing that just prior to the rape and murders Spielman had struck a detainee, used derogatory terms to describe Iraqis, and suggested that all Iraqis be killed. The ACCA rejected Spielman's assertions that the military judge erred in admitting this evidence, concluding the evidence was logically and legally relevant to the charges, and that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Likewise, the ACCA dismissed Spielman's claims that his conviction was legally and factually insufficient. Lastly, the ACCA disagreed with Spielman that he was prejudiced by the testimony of one of his co-conspirators at trial. The appellate court commented that it found 'no fraud on the part of [the co-conspirator],' finding '[a]t most ... minor discrepancies that are not unexpected after the passage of almost two years from the time of [Spielman's] trial and three years from the date of the offenses.'²⁸ The ACCA concluded by noting that, all evidence considered, the outcome of trial would not have been any different if the co-conspirator had testified the same way at Spielman's trial as he had at another co-conspirator's trial.

The ACCA affirmed both the findings of guilt and the sentence.

- *United States v Spielman* [2011] (unpublished) No 11-0629/AR CCA 20070883 CAAF

Spielman appealed his case to the CAAF, which vacated the ACCA decision. The CAAF returned the trial record to The Judge Advocate General of the Army for reconsideration in light of *United States v Fosler*, 70 MJ 225 [2011] CAAF.

- *United States v Behenna* [2011] 70 MJ 651 ACCA

²⁶ *United States v Spielman* [2011] 2011 WL 2638746, *1-2.

²⁷ *Ibid*, *1.

²⁸ *Ibid*, *5.

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The US Army court-martialed Behenna, a commissioned officer (Lieutenant) in 2009 for murdering a recently released Iraqi detainee, Ali Mansur. Two weeks after an improvised explosive device (IED) claimed the lives of two of his soldiers, Behenna's unit raided a suspected insurgent safe house, captured Mansur, and seized a machine gun and ammunition. After some 10 days of questioning US military intelligence personnel did not believe there was sufficient evidence to continue to detain Mansur and directed that he be released. Behenna was detailed to transport Mansur back to his village but, convinced that Mansur was responsible for the IED attack, Behenna pulled over, marched Mansur into a culvert at gunpoint and demanded he admit his involvement. When Mansur claimed to not have any additional information Behenna shot him twice, killing him. Behenna claimed that he shot Mansur in self-defense. Contrary to his pleas, a military panel found Behenna guilty of unpremeditated murder and assault, but found him not guilty of making a false official statement. Behenna was sentenced to dismissal from the Army (the officer equivalent of a dishonorable discharge), confinement for 25 years and total forfeiture of all pay and allowances. The convening authority subsequently reduced the period of confinement to 20 years.

On appeal to ACCA, Behenna raised several assignments of error, arguing among other things that the military judge: erred by denying a motion for a mistrial, or alternatively a new trial, based on trial counsel's failure to disclose 'favorable information' to the defense; erred by giving improper self-defense instructions; and erred by failing to *sua sponte* instruct the jury on voluntary manslaughter. The ACCA disagreed and affirmed the findings and the sentence.

• *United States v Hatley* [2011] 2011 WL 2782023 (not reported) ACCA

The US Army court-martialed Hatley, a noncommissioned officer (NCO) (Master Sergeant) in 2009 for conspiracy to commit premeditated murder and the premeditated murder of four detainees in Baghdad, Iraq. In 2007, then-Master Sergeant Hatley was serving as the First Sergeant (highest ranking NCO) of an infantry company (approximately 120 soldiers). Hatley accompanied a subordinate unit on a patrol in an area in which insurgents had repeatedly attacked the unit. During the patrol, the unit captured several suspected insurgents. After loading them for transport, Hatley suggested the detainees should be killed. After learning that their higher headquarters were not yet tracking the detainees, Hatley directed the patrol to a canal area and asked his NCOs who would help him 'take care' of the detainees. Hatley had the detainees moved to the edge of the canal, where Hatley and two NCOs shot each of the detainees in back of the head. Following the shooting, Hatley gathered the patrol and stated that '[w]hat was done was done for [two NCOs in the unit killed in action] ... and for all the motherfuckers who think they can shoot us and get away with it. If anyone asks any questions, direct them to me.'

After the unit's redeployment to Germany in 2008, a unit member reported the murders. In January, the command placed Hatley under the supervision of his command sergeant major for three days until criminal investigators interviewed him and barred him from traveling outside of Germany. In September, Hatley's command preferred court-martial charges against him.²⁹

Contrary to his pleas, a military panel found Hatley guilty of conspiracy to commit premeditated murder and premeditated murder. The panel sentenced Hatley to a dishonorable discharge, confinement for the duration of his natural life with the possibility of parole, total

²⁹ *United States v Hatley* [2011] 2011 WL 2782023, *1-2.

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forfeiture of all pay and allowances and reduction to the lowest enlisted grade. The convening authority disapproved the forfeitures and reduced the confinement to 40 years but otherwise approved the remainder of the adjudged sentence. Hatley appealed to the ACCA, asserting three assignments of error: denial of a speedy trial, denial of the right to confront a witness on cross-examination, and failure to receive appropriate relief for unlawful pretrial punishment.³⁰

On appeal, Hatley argued that his right to a speedy trial was triggered by his 'confinement' when the unit placed him under the supervision of his command sergeant major. Hatley reasoned that because his court-martial was outside the statutory speedy-trial limit as triggered by his 'confinement', he was denied a speedy trial. The ACCA dismissed this argument by noting that Hatley's direct supervision lasted only three days, after which Hatley was allowed to return to his lodgings and was still allowed to move freely within Germany. The ACCA also rejected Hatley's pre-trial punishment claim, pointing to a lack of punitive intent in the unit's pre-trial treatment of Hatley. Lastly, the ACCA concluded that the limits the military judge placed on the cross-examination of one of Hatley's accomplices was not in error. Specifically, the court observed, asking the additional question Hatley's counsel sought to ask "would not have yielded a significantly different impression of [the accomplice's] testimony."³¹

The ACCA affirmed both the findings and the sentence.³²

☛ *United States v Lawrence* [2011] Ft Carson, Colorado

The US Army court-martialed Lawrence, an enlisted soldier (Private First Class) in 2011 for the 2010 premeditated murder of a shackled, sleeping detainee in Afghanistan. Lawrence pleaded and was found guilty by a military judge of murder. The Army prosecuted Lawrence despite the results of an Army sanity board³³ determination that Lawrence had a severe mental disease or defect – a combination of schizophrenia and post-traumatic stress disorder – such that he was not able to appreciate the nature and quality or wrongfulness of his actions when he shot the detainee. A second such board found Lawrence did not suffer from severe mental illness sufficient to constitute legal excuse.³⁴

The military judge sentenced Lawrence to a dishonorable discharge, confinement for the duration of his natural life with the possibility of parole, and reduction to the lowest enlisted grade. However, under the terms of a pre-trial agreement between Lawrence and the convening authority, in exchange for pleading guilty the length of confinement was capped at 12 and a half years.³⁵ During the post trial process the convening authority reduced the length

³⁰ Ibid, *2.

³¹ Ibid, *2–9.

³² Ibid, *10.

³³ An inquiry into the mental capacity or mental responsibility of the accused - See MCM, Rule for Court Martial 706.

³⁴ 'Pfc. David Lawrence, Soldier in Taliban Slaying Case, Tries Suicide in Prison', *Huffington Post, Associated Press*, 27 October 2011, <http://www.huffingtonpost.com/2011/10/27/soldier-in-taliban-slayin_0_n_1035442.html> ('Lawrence Tries Suicide').

³⁵ 'Pfc. David Lawrence, Mentally Ill Fort Carson Soldier, Pleads Guilty to Murdering Afghan Detainee', *Huffington Post*, 23 May 2011 <http://www.huffingtonpost.com/2011/05/23/david-lawrence-fort-carson-soldier_n_865491.html>.

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of confinement to 10 years.³⁶ Within six months of pleading guilty, Lawrence attempted suicide while in military confinement, but his mental state purportedly improved once officials changed his medications.³⁷

☛ *United States v Miller* [2011] Ft Campbell, Kentucky

The US Army court-martialed Miller, a noncommissioned officer (Sergeant) in 2011 for the 2010 premeditated murder of an Afghan civilian, Atta Mohammed. After Mohammed entered a security perimeter, Miller stopped and questioned him. Government witnesses claimed that Miller threatened to shoot the man if he failed to cooperate, and that he straddled the man before shooting him in the head. Miller claimed the shooting was in self-defense, but witnesses disputed Miller's claim that the man had reached for his weapon. Contrary to his pleas, a military panel found Miller guilty of premeditated murder. The panel sentenced Miller to a dishonorable discharge, confinement for the duration of his natural life with the possibility of parole and reduction to the lowest enlisted grade.³⁸

Cases — United States Military Courts – United States Army – Stryker Brigade 'Kill Team' Cases

The following cases involve members of the same US Army unit (B Company, 2nd Battalion, 1st Infantry Regiment, 5th Stryker Brigade Combat Team, 2nd Infantry Division, Ft Lewis, Washington) who informally established what came to be known as the 'kill team' during their 2010 deployment near Kandahar, Afghanistan. Members of the team murdered three unarmed Afghan civilians (Gul Mudin, January 2010, Marach Agha, February 2010 and Mullah Adahdad, May 2010) for sport and then planted weapons on or near the bodies in an effort to make the killings appear legitimate. They also removed body parts and took pictures of the corpses. When a member of the unit complained to military authorities about rampant drug use in the unit, the resulting investigation uncovered the kill team's activities. This led to members of the 'kill team' threatening and assaulting the whistleblower. First *Der Spiegel*³⁹ and, later, *Rolling Stone*⁴⁰ ran stories on the 'kill team' and included some of the pictures of Afghan corpses. In response to *Der Spiegel* publishing pictures of members of the 'kill team' posing with the bodies of Afghans they had murdered, the US Department of Defense issued the following statement:

Today *Der Spiegel* published photographs depicting actions repugnant to us as human beings and contrary to the standards and values of the United States Army. We apologize

³⁶ 'Pfc. David Lawrence Case: Army Trims Soldier's Sentence in Killing of Taliban Suspect Detainee', *Associated Press*, 20 October 2011 <http://www.huffingtonpost.com/2011/10/21/pfc-david-lawrence-case-a_n_1023974.html>.

³⁷ Lawrence Tries Suicide.

³⁸ 'Guardsman Found Guilty in Afghan Man's Murder', *Army Times*, 27 July 2011 <<http://www.armytimes.com/article/20110727/NEWS/107270318/Guardsman-found-guilty-Afghan-man-s-murder>>.

³⁹ 'The 'Kill Team' Images: US Army Apologizes for Horrific Photos from Afghanistan', *Der Spiegel*, 21 March 2011 <<http://www.spiegel.de/international/world/the-kill-team-images-us-army-apologizes-for-horrific-photos-from-afghanistan-a-752310.html>>.

⁴⁰ 'The Kill Team: How U.S. Soldiers in Afghanistan Murdered Innocent Civilians', *Rolling Stone*, 27 March 2011 <<http://www.rollingstone.com/politics/news/the-kill-team-20110327>>.

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for the distress these photos cause. The actions portrayed in these photographs remain under investigation and are now the subject of on-going US court-martial proceedings, in which the accused are presumed innocent unless and until proven guilty. These court-martial proceedings speak for themselves. The photos appear in stark contrast to the discipline, professionalism and respect that have characterized our soldiers' performance during nearly 10 years of sustained operations. It would be improper to comment further on these photographs at this time. The United States Army is committed to adherence to the Law of War and the humane and respectful treatment of combatants, non-combatants, and the dead. When allegations of wrongdoing by soldiers surface, to include the inappropriate treatment of the dead, they are fully investigated. Soldiers who commit offenses will be held accountable as appropriate.⁴¹

☛ *United States v. Bram* [2011] Ft Lewis Washington

The US Army court-martialed Bram, a non-commissioned officer (Staff Sergeant), in 2011 for soliciting a junior soldier to join in a conspiracy to kill unarmed Afghan civilians, impeding an official investigation, photographing and possessing photos of war casualties, and assaulting a fellow US service-member-turned-whistleblower. Contrary to his pleas, a military panel found Bram guilty of all but two of nine counts, including solicitation to commit murder, conspiracy to commit assault, assault, and impeding the investigation. The panel found Bram not guilty of abusing detainees and participating in a cover up of the murder of one Afghan civilian. The panel sentenced Bram to five years confinement.⁴²

☛ *United States v Gibbs* [2011] Ft Lewis Washington

The US Army court-martialed Gibbs, a non-commissioned officer (Staff Sergeant) in 2011 for the 2010 murders of three unarmed Afghan civilians. The government alleged that Gibbs was the kill team's ringleader.⁴³ At trial, Gibbs admitted to removing fingers and teeth from corpses to keep as war trophies but not to any wrongful killings. Contrary to his pleas, a military panel found Gibbs guilty of all charges, including three counts of murder, conspiracy to commit murder, and removing fingers and teeth from the dead. The panel sentenced Gibbs to a dishonorable discharge, confinement for the duration of his natural life with the possibility of parole, total forfeiture of all pay and allowances and reduction to the lowest enlisted grade.⁴⁴

⁴¹ US Department of Defense, 'Statement by the Army on Photographs Published by Der Spiegel', US Department of Defense (News Release, 21 March 2011)

<<http://www.defense.gov/releases/release.aspx?releaseid=14353>>.

⁴² 'Soldier Gets 5 Years For War Crimes,' *The News Tribune* (Tacoma, WA, USA) 19 November 2011 <<http://www.thenewstribune.com/2011/11/19/1912303/soldier-gets-5-years-for-war-crimes.html>>.

⁴³ 'Soldier Found Guilty of Murdering Afghans, Sentenced to Life', *CNN*, 11 November 2011 <<http://www.cnn.com/2011/11/10/justice/soldier-murder-rial>>.

⁴⁴ 'US Soldier Gets Life Sentence in Afghan Killings', *Associated Press*, 10 November 2011 <http://seattletimes.com/html/localnews/2016739592_apusafghanprobe10thldwritethru.html>.

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☛ *United States v Holmes* [2011] Ft Lewis, Washington

The US Army court-martialed Holmes, an enlisted soldier (Private First Class) in 2011 for the murder of an unarmed Afghan civilian.⁴⁵ Specifically, Holmes fired a squad automatic weapon (light machine gun) at an unarmed child 15 feet away. Holmes pleaded and was found guilty by a military judge of committing an inherently dangerous act, possessing a finger bone of or from his victim and of smoking hashish. The military judge sentenced Holmes to a dishonorable discharge, confinement for seven years, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.⁴⁶

☛ *United States v Jones* [2011] Ft Lewis, Washington

The US Army court-martialed Jones, a non-commissioned officer (Sergeant) in 2011 for firing on an unarmed Afghan civilian in 2010.⁴⁷ A military panel acquitted Jones of shooting at unarmed Afghan civilians while on a patrol and of participating in the 'kill team' discussions on covering up the shootings. The panel found Jones guilty of assaulting a fellow US service member who had complained to the command of wide spread drug use within the unit. The panel sentenced Jones to confinement for seven months and reduction to the lowest enlisted grade.

☛ *United States v Kelly* [2011] Ft Lewis, Washington

The US Army court-martialed Kelly, an enlisted soldier (Specialist) in 2011 for punching and spitting on the whistleblower who alerted investigators of service member' misconduct leading to the discovery of the kill team's activities. A military judge found Kelly guilty of assault and conspiring to assault the whistleblower but acquitted him of using drugs while deployed and obstructing an Army investigation. The military judge sentenced Kelly to a bad conduct discharge and 60 days hard labor.⁴⁸

☛ *United States v Moore* [2011] Ft Lewis, Washington

The US Army court-martialed Moore, an enlisted soldier (Specialist) in 2011 for desecrating a corpse and conspiring to silence the whistle-blower who raised drug use allegations against his unit. Moore pleaded guilty and was found guilty by a military judge of stabbing the corpse, an offense under the UCMJ as its commission was prejudicial to good order and discipline, of assaulting the whistleblower and of using illegal drugs. The military judge acquitted Moore of charges that he conspired to assault the whistleblower and that he

⁴⁵ 'Afghan Thrill Kill: Third US Soldier Pleads Guilty', *ABC News*, 22 September 2011 <<http://abcnews.go.com/Blotter/afghan-thrill-kill-us-soldier-pleads-guilty/story?id=14583062#.UeVswFO9yMg>>.

⁴⁶ 'Soldier, 21, Gets 7 Years in Murder of Afghan Teen', *The News Tribune* (Tacoma, WA, USA) 24 September 2011 <<http://www.thenewstribune.com/2011/09/24/1836966/soldier-21-gets-7-years-in-murder.html>>.

⁴⁷ 'Army Sergeant Guilty in Beating of Fellow Soldier', *Reuters*, 8 July 2011 <<http://www.reuters.com/article/2011/07/09/us-army-trial-idUSTRE76800520110709>>.

⁴⁸ 'Montesano Soldier Discharged, Sentenced to 60 Days of Hard Labor', *The Olympian* (Olympia, WA, USA) 24 February 2011 <<http://www.theolympian.com/2011/02/24/1554886/montesano-soldier-discharged-given.html>>.

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obstructed an Army investigation. The military judge sentenced Moore to a bad-conduct discharge and 60 days hard labor.⁴⁹

☛ *United States v Morlock* [2011] Ft Lewis, Washington

The US Army court-martialed Morlock, an enlisted soldier (Specialist), in 2011 for murdering three Afghan civilians. Morlock pleaded and was found guilty by a military judge of three specifications of murder, and one specification each of conspiracy, obstructing justice and drug use. Prosecutors labeled Morlock's misconduct 'acts of unspeakable cruelty.' Morlock admitted to devising the scenarios by which the 'kill team' would kidnap and murder Afghan civilians, remove body parts, take pictures of the corpses then plant weapons on or near the bodies.⁵⁰ One exchange between Morlock and the military judge went as follows:

'You'd select a target, you'd kill them, and then you'd use a "drop" weapon to establish later that, "They had a weapon, and that's why I killed them,"' said the judge, Lt Col Kwasi Hawks. 'Yes, sir,' Morlock replied. 'Were you going to shoot at people to scare them, and it got out of hand, or was the plan to kill people?' Hawks asked. 'The plan was to kill people,' Morlock said.⁵¹

As a part of his pre-trial agreement with the convening authority, Morlock agreed to testify as a government witness against several other members of his unit. The military judge sentenced Morlock to a dishonorable discharge, confinement for the duration of his natural life with the possibility of parole, and reduction to the lowest enlisted grade.⁵² However, pursuant to his agreement with the convening authority, the period of confinement was limited to 24 years.⁵³

☛ *United States v Quintal* [2011], Ft Lewis, Washington

The US Army court-martialed Quintal, an enlisted soldier (Specialist) in 2011 for taking photos of murdered Afghan civilians, assaulting a fellow US service member and for illegal drug use. Quintal pled guilty and was found guilty by a military judge of possessing digital images of the bodies of Afghan civilians the 'kill team' murdered, conspiring to assault the US service member who reported unit drug use to authorities, assaulting that service member and for using hashish. The military judge sentenced Quintal to a bad conduct discharge, 90 days hard labor, and reduction to the lowest enlisted grade. As part of Quintal's pretrial agreement with the convening authority he is required to testify against other members of the 'kill team.'⁵⁴

⁴⁹ '5th Soldier Convicted in Afghan War Case', *The News Tribune* (Tacoma, WA, USA) 3 March 2011 <<http://www.thenewstribune.com/2011/03/03/1567755/5th-soldier-convicted-in-afghan.html>>.

⁵⁰ Video of Morlock describing the kill team's actions to military investigators is publically available.

⁵¹ 'U.S. Soldier Pleads Guilty to Murder of Three Afghans,' *Los Angeles Times*, 24 March 2011 <<http://articles.latimes.com/2011/mar/24/nation/la-na-afghan-murders-20110324>>.

⁵² *Ibid.*

⁵³ 'Jailed for 24 years: The U.S. soldier who was part of "death squad" which murdered three Afghan civilians', *Daily Mail*, 23 March 2011 <<http://www.dailymail.co.uk/news/article-1369280/US-soldier-Jeremy-Morlock-jailed-24-years-Afghan-murders.html>>.

⁵⁴ 'After Plea, Soldier Out of Army', *The Olympian* (Olympia, WA, US), 6 January 2011 <<http://www.theolympian.com/2011/01/06/1496347/after-plea-soldier-out-of-army.html>>.

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☛ *United States v Wagon* [2011] Ft Lewis, Washington

The US Army's prosecution of Wagon, enlisted Soldier (Specialist), for his role on the 'kill team' remained ongoing at the end of 2011. The Army preferred court-martial charges against Wagon for murder, conspiracy to commit murder, conspiracy to commit assault, assault with a dangerous weapon, possessing a portion of the skull of one of the murdered Afghan civilians, and obstructing justice. An investigating officer who presided over a fall 2010 pre-trial hearing recommended that there was insufficient evidence to prosecute Wagon. The convening authority stressed that the investigating officer's recommendation was just that, a recommendation, decided to drop the charges of possessing a portion of the skull and obstructing justice, but referred the remaining charges to a general court-martial.⁵⁵ At the close of the 2011 calendar year, Wagon's court-martial had not yet commenced.

☛ *United States v Winfield* [2011] Ft Lewis, Washington

The US Army court-martialed Winfield, an enlisted member (Specialist) in 2011 for his role on the 'kill team.' The Army charged Winfield with three specifications of murder, but the convening authority reached a pretrial agreement with Winfield through which he pleaded and was found guilty by a military judge of manslaughter and drug use. Winfield claimed he fired his weapon away from an Afghan man so as 'to pretend to have taken part' in the murder.⁵⁶ However, Winfield admitted he did nothing to stop his fellow soldiers from the attacks, in part because he was afraid he might be targeted for speaking out. The military judge sentenced Winfield to a bad conduct discharge, confinement for three years and reduction to the lowest enlisted grade. As a part of his plea bargain, Winfield is required to testify against other soldiers connected to the killings.⁵⁷

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☛ *United States v Hutchins* [2011] 69 MJ 282 CAAF

The US Marine Corps court-martialed Hutchins, a non-commissioned officer (Sergeant) in 2007, for leading a squad of US Marines in kidnapping and murdering a retired policeman in 2006 in Hamdania, Iraq. Contrary to his pleas, a military panel found Hutchins guilty of making a false official statement, unpremeditated murder, conspiracy and larceny. The panel sentenced Hutchins to a dishonorable discharge, confinement for 15 years and reduction to the lowest enlisted grade. Thereafter, Hutchins appealed his case to the United States Navy-Marine Corps Court of Criminal Appeals ('NMCCCA'). On appeal, the NMCCCA determined that the record of trial failed to adequately address 'the process by which one of [Hutchins'] three defense counsel terminated his participation in the case.'⁵⁸ Upon further review of the record, the NMCCCA found a procedural error that 'warranted a presumption of prejudice' and a setting aside of the trial court's findings and sentence.⁵⁹ Specifically, the NMCCCA concluded that Hutchins' attorney-client relationship was wrongfully severed without good cause when his counsel withdrew. The Judge Advocate of the Navy certified the decision for consideration to the CAAF, petitioning for review of the NMCCCA findings

⁵⁵ 'Lewis-McChord Soldier Will Face Trial on Murder Charge', *Seattle Times*, 31 January 2011
<http://o.seattletimes.nwsourc.com/html/localnews/2014093662_wagon1m.html>.

⁵⁶ 'Soldier Gets 3 Years For Part He Played in Deaths of Afghan Civilians', *CNN*, 5 August 2011
<<http://www.cnn.com/2011/CRIME/08/05/washington.winfield/index.html>>.

⁵⁷ *Ibid.*

⁵⁸ *United States v Hutchins* [2011] 69 MJ 282, p.283.

⁵⁹ *Ibid.*

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of severance and asserting that the NMCCCA erroneously set aside the trial findings and sentence.⁶⁰

On appeal to the CAAF, the government argued that the NMCCCA erred in finding severance of the attorney-client relationship and the presumption of prejudice attached to the finding. The CAAF held that the trial record lacked a basis for the NMCCCA's severance conclusion because it lacked fully developed reasons for defense counsel's absence and departure. In its assessment of prejudice, the CAAF determined that a 'standard formula for assessing prejudice against the defense' must apply, under which 'the defense must establish that the error produced material prejudice to the substantial rights of the accused.'⁶¹ Here the severance error did not 'materially prejudice' Hutchins' substantial rights.⁶²

The CAAF reversed and remanded the case to the NMCCCA.⁶³

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⁶⁰ Ibid, 283–284.

⁶¹ Ibid, 292.

⁶² Ibid, 293.

⁶³ Ibid.