

**UNITED STATES ARMY TRIAL JUDICIARY
SECOND JUDICIAL CIRCUIT, FORT BRAGG, NORTH CAROLINA**

UNITED STATES OF AMERICA)

v.)

SGT Robert B. Bergdahl)
HHC, STB, U.S. Army FORSCOM)
Fort Bragg, NC 28310)

**Findings of Fact, Conclusions of Law
and Ruling -- Admissibility of Injury
Evidence on Sentencing**

30 June 2017

1. The Court asked the parties to brief the issue: Whether evidence of injuries to service members suffered while participating in search and rescue operations for the accused would be relevant and admissible in sentencing, should there be a finding of guilty to Charge II and its specification. I considered the written briefs of the parties¹, all matters appended thereto, if any, other written evidence submitted on the issue, the testimony of witnesses, and oral arguments of counsel.

FINDINGS OF FACT

2. I find the following facts by a preponderance of the evidence:

a. On 25 March 2015, the accused was charged with one charge, one specification of misbehavior before the enemy in violation of Article 99, UCMJ.²

b. On or about 8/9 July 2009, SFC Mark Allen³ and SCPO James Hatch were injured while conducting two different operations in search of and/or in an attempt to rescue the accused.

LAW AND ANALYSIS

3. During sentencing, a "(t)rial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. (This) includes but is not limited to, evidence of . . . psychological, and medical impact on . . . any person . . . who was the victim of an offense committed by the accused . . ." Rule for Courts-Martial (RCM) 1001(b)(4). The

¹ G App 81 and D App 64 and 73.

² The accused was also charged with one charge, one specification of desertion with the intent to avoid hazardous duty or to shirk important service in violation of Article 85, UCMJ.

³ Other soldiers were also injured in this mission. The Court refers to SFC Allen for convenience of expression and because his were the most serious injuries.

Military Rule of Evidence (MRE) 403 balancing test applies to all sentencing evidence. *United States v. Glover*, 53 MJ 366 (2000). While evidence of "victim" impact is relevant and admissible as long as its probative value is not substantially outweighed by the danger of unfair prejudice, an accused should not be held responsible for a "never-ending chain of causes and effects." *United States v. Witt*, 21 MJ 637 (ACMR 1985). The accused's conduct must play a "material role in bringing about (the injury)" and the evidence should not be admitted if an independent, intervening event played the only important part in bringing about the (injury)." *United States v. Stapp*, 60 MJ 795, 801-02 (CAAF 2004).

4. In the context of the law and the proffered evidence in this case, a couple of cases are instructive. First, in *United States v. Rust*, 41 MJ 472 (1995), the Court of Appeals for the Armed Forces (CAAF) considered a case of a physician found derelict in his duty for failing to properly treat a pregnant woman who later delivered the baby prematurely and the baby died. Afterwards, and apparently because of the anguish from this traumatic event, the father/boyfriend killed the mother and then himself. His murder-suicide note referred directly to the death of the child as the reason for his horrible actions. During sentencing, the government sought to admit the evidence of the death of the child as well as the murder-suicide note from the father. The trial court allowed both. Major Rust was sentenced to a dismissal, a \$5000 fine, and a reprimand. On appeal, the Air Force Court ruled that the evidence of the suicide note should not have been admitted. The Judge Advocate General for the Air Force, certified the issue to the CAAF. The CAAF affirmed the Air Force Court finding that the murder-suicide note was too attenuated even if the government could establish a link between the accused's actions and the murder-suicide, and that the evidence clearly failed the MRE 403 balance test. *Id.* at 478.

5. In *United States v. Scott*, 42 MJ 457 (1995) the Court considered a case where the accused, though initially charged with and convicted of involuntary manslaughter, assault with a dangerous weapon, and carrying a concealed weapon, had the manslaughter and assault charges set aside on appeal at the service court level. The only conviction remaining was for the concealed weapon charge. The Army Court reassessed the sentence and, in doing so, considered the evidence of death and injuries to the victims of the offenses for which the findings of guilty were set aside. The CAAF found that the evidence of death and injuries was "directly related to or resulting from" the accused carrying a concealed weapon, even though this offense did not directly cause the death and injuries. *Id.* at 460.

6. The defense contends that there are simply too many factors between the actions of the accused and the injuries to Allen⁴ and Hatch for the accused's actions, should he be convicted of Charge II, to be the cause of those injuries. They contend there are simply too many intervening, superseding causes for those injuries to be said to have been "directly related to or resulting from" the actions of the accused. Even if

⁴ And others.

they were "directly related to or resulting from" the actions of the accused, the defense contends that the danger of unfair prejudice substantially outweighs the probative value of the evidence -- the danger being that the sentencing authority will be so inflamed by the horrible nature of the injuries that the accused will be forced to shoulder an unfair portion of the blame for those injuries. The government contends the opposite.

7. The evidence of injuries to Allen and Hatch is more like the evidence of the death of the child in *Rust*, which was properly admitted, and not like the evidence of the murder-suicide note, which was not. Possible evidence of a type similar to that which was determined to be too attenuated in *Rust* would be, if it existed, evidence that a person close to Allen or Hatch harmed themselves or others because of dealing with the grief or stress from the injuries to Allen and/or Hatch. The evidence of the injuries to Allen and Hatch is exactly like the evidence of the death of the premature child in *Rust*. Who is to say that in *Rust* there might not have been some other factor that contributed to the child's premature birth and death, just as there may be contributing causes in this case -- such as the actions of the enemy or the risk assumed with the hasty planning process or insufficient tactical air support? Nevertheless, none of those things, even if they occurred⁵, can be said to have played the "only important part" in causing the injuries. The bottom line is: Neither Allen nor Hatch would have been where they were doing what they were doing but for the actions of the accused, assuming he is found guilty of Charge II.

8. The contention by the defense that this evidence is not admissible because the accused is not charged with causing injuries is, likewise, unpersuasive. In *Rust* the accused was charged with dereliction of duty, not with dereliction of duty causing death or grievous bodily harm. Nevertheless, the CAAF found that evidence of the death of the prematurely born infant was admissible under RCM 1001(b)(4) even though the further attenuated murder suicide was not.

RULING

9. The evidence of injuries to U.S. military personnel during the Allen and Hatch missions is admissible in sentencing under RCM 1001(b)(4), if the accused is found guilty of Charge II. However, the government will limit its evidence to the minimum necessary to describe the general nature of the missions and the general nature of the injuries and future prognosis for the injured service members. If the defense desires, they may inquire further into the mission and injuries on cross examination or they may offer evidence in mitigation concerning the nature of the missions and

⁵ To the extent they did occur, they go to the weight, and not the admissibility of the evidence. Additionally, the danger of confusion of the members as to the issues before them by taking evidence concerning the relative blameworthiness of the participants to these recovery missions will be mitigated by the court. The court will carefully control the amount and character of evidence from both the government and the defense and will instruct the members carefully on the matter. The court welcomes recommended instructions from the parties on the matter.

the risks taken that might be considered partly responsible for the injuries to the personnel in question. The Court cautions both parties to tailor their questions so as to prevent a trial within a trial -- understanding, of course, that the degree of defense inquiry will be dictated by the degree of detail the government offers.



JEFFERY R. NANCE

COL, JA

Military Judge