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PROCEEDINGS OF A GENERAL COURT-MARTIAL

The military judge called the Article 39(a) session to order at Camp Doha, Kuwait, at 1032, 15 November 2003, pursuant to the following orders:

Court-Martial Convening Order Number 6, Headquarters, Coalition Forces Land Component Command, Camp Doha, Kuwait, dated 3 July 2003.

[END OF PAGE]



REPLY TO
ATTENTION OF:

CORRECTED COPY

DEPARTMENT OF THE ARMY
COALITION FORCES LAND COMPONENT COMMAND
HEADQUARTERS THIRD UNITED STATES ARMY
UNITED STATES ARMY FORCES CENTRAL COMMAND
APO AE 09304

COURT-MARTIAL CONVENING ORDER
NUMBER 6

3 July 2003

A general court-martial is hereby convened with the following members and shall meet at
ARCENT/Kuwait, unless otherwise directed:

MEMBERS

- COL [REDACTED] SC, HHC, Third U.S. Army, CFLCC-C6
- COL [REDACTED] AG, HHC, 143d Transportation Group, DCS, G4
- LTC [REDACTED] IO, HHC, Third U.S. Army, CFLCC-C3
- LTC [REDACTED] IN, HHC, Third U.S. Army, CFLCC, C3
- MAJ [REDACTED] d, ADA, HHC, Third U.S. Army, CFLCC, C3
- *MAJ [REDACTED] AV, HHC, Third U.S. Army, CFLCC, C4
- *MAJ [REDACTED] IN, HHC, ARCENT-KU
- *CPT [REDACTED] AG, HHC, 335th Theater Signal Command
- *CPT [REDACTED] OM, HHC, Third U.S. Army, CFLCC, C4
- *CW3 [REDACTED] SC, HHC, Third U.S. Army, CFLCC-C6

(b)(6) 2 - (7)(c) - 2

*These members are excused when the accused requests to be tried by a panel consisting of
enlisted and officer members.

The following members are detailed to the court-martial when the accused requests enlisted
members under Article 25(C), UCMJ:

MEMBERS

- SGM [REDACTED] SA, HHC, Third U.S. Army, CFLCC, C7
- SGM [REDACTED] USA, HHC, 377th Theater Support Command
- SGM [REDACTED] USA, HHC, Third U.S. Army, CFLCC, C6
- SGM [REDACTED] USA, HHC, 377th Theater Support Command
- MSG [REDACTED] USA, HHC, 377th Theater Support Command

(b)(6) 2 - (7)(c) - 2

BY COMMAND OF LTG MCKIERNAN:

[REDACTED]
SSG, USA
Criminal Law NCOIC

DISTRIBUTION:
Each Member Selected

012817

1 MJ: This Article 39(a) session is called to order.

2 TC: This court-martial is convened by Court-Martial Convening
3 Order Number 6, Headquarters, Third United States Army, Coalition
4 Forces Land Component Command, dated 3 July 2003, copies of which
5 have been furnished to the military judge, counsel and the accused
6 and which will be inserted at this point in the record.

7 The charges have been properly referred to this court for
8 trial and were served on the accused on 9 November 2003.

9 The prosecution is ready to proceed with the arraignment in
10 the case of The United States versus Staff Sergeant Scott A.
11 McKenzie.

12 The trial counsel and the following persons detailed to
13 this court are present:

14 LIEUTENANT COLONEL [REDACTED] MILITARY JUDGE;
15 CAPTAIN [REDACTED] TRIAL COUNSEL; and
16 CAPTAIN [REDACTED] ASSISTANT TRIAL COUNSEL;
17 CAPTAIN [REDACTED] DEFENSE COUNSEL.

18 The members are absent.

19 ~~Master Sergeant [REDACTED] has been detailed reporter for~~
20 this court and has been previously sworn.

21 TC: All members of the prosecution have been detailed to this
22 court by Colonel [REDACTED]. All members of the prosecution are
23 qualified and certified under Article 27(b) and sworn under Article

all
(b)(b)-2; (7)(c) 2

1 42(a) of the Uniform Code of Military Justice. No member of the
2 prosecution has acted in any manner which might tend to disqualify us
3 in this court-martial.

(b)(6)-2; (7)(C)-2

4 MJ: Thank you. All right, Staff Sergeant McKenzie, you have
5 the right to be represented by Captain [REDACTED] She is your
6 military defense counsel, she's detailed to your case and provided to
7 you free of charge. You also have the right to request a different
8 military lawyer to represent you and if that person were reasonably
9 available then he or she would be made available to represent you
10 free of charge. If your request for another military lawyer were
11 granted, however, you would not have the opportunity to keep the
12 services of Captain [REDACTED] normally because you're only entitled
13 to one military lawyer. You could ask her superiors to let you keep
14 your detailed counsel, but your request would not have to be granted.

(b)(6)-2; (7)(C)-2

16 In addition, you have the right to be represented by a
17 civilian lawyer. If you are represented by a civilian lawyer, that
18 civilian lawyer would have to be provided by you at no expense to the
19 government. ~~If you are represented by a civilian lawyer, you can keep~~
20 Captain [REDACTED] on your case to assist your civilian lawyer, or
21 you could excuse her and be represented solely by a civilian lawyer.

22 Do you understand everything I've talked to you about?

23 ACC: Yes, Your Honor.

ALL
(b)(6)2 - (7)(e)2

1 MJ: Do you have any questions about your rights to counsel?

2 ACC: No Your Honor.

3 MJ: By whom do you wish to be represented?

4 ACC: Captain [REDACTED] Your Honor.

5 MJ: By Captain [REDACTED] alone then?

6 ACC: Yes, Your Honor.

7 MJ: Captain [REDACTED] please state your detail and
8 qualifications.

9 DC: I was detailed to represent Sergeant McKenzie by Lieutenant
10 Colonel [REDACTED] Regional Defense Counsel Region VIII U.S.
11 Army Trial Defense Services. I am qualified and certified under
12 Article 27 Bravo and sworn under Article 42 Alpha Uniform Code of
13 Military Justice. I have not acted in any manner which might tend to
14 disqualify me at this court-martial.

15 MJ: Thank you. I too have been properly certified, detailed,
16 and sworn. Counsel for both sides appear to have the requisite
17 qualifications and all personnel required to be sworn have been
18 sworn. Trial counsel, please announce the general nature of the
~~19 charges in this case.~~

20 TC: The general nature of the charges in this case is violation
21 of Article 92 UCMJ, failure to obey a lawful order; violation of
22 Article 93 UCMJ, dereliction of duty, five Specifications; violation

all (b)(6)-2; (7)(c)-2

1 of Article 107 UCMJ, a false official statement; violation of Article
2 128 UCMJ, assault consummated by a battery; five Specifications.

3 These charges were preferred by First Lieutenant [REDACTED]
4 [REDACTED] and forwarded with recommendations as to disposition by
5 Lieutenant Colonel [REDACTED] and investigated by Lieutenant
6 Colonel [REDACTED]. The general nature of the additional
7 charges, is violation of Article 134 UCMJ, obstruction of justice and
8 violation of Article 81 UCMJ, conspiracy to obstruct justice. These
9 charges were preferred by Major [REDACTED] and forwarded with
10 recommendations as to disposition by Lieutenant Colonel [REDACTED]
11 [REDACTED]

12 Your Honor, are you aware of any matter which might be a
13 ground for challenge against you?

14 MJ: I am not. Does either side desire to either question me or
15 challenge me?

16 DC: No, Your Honor.

17 TC: No, Your Honor.

18 MJ: Okay. Captain [REDACTED] you indicated that there were five
19 ~~assault specs. My referred charge sheet indicates four, is that~~
20 correct at charge four?

21 DC: I have a continuation sheet three that has a fifth
22 Specification on it, Your Honor.

1 MJ: Okay, I don't have a copy of that, would you make sure I
2 get a copy of that please?

3 TC: If I can, Your Honor, I'll approach with this.

4 [[Trial counsel hands document to reporter.]

5 MJ: Okay, great. That just didn't come through in the fax
6 transmission to Germany apparently. All right.

7 MJ: All right. Sergeant McKenzie, at this general court-
8 martial, you have the right to be tried by a court consisting of at
9 least five officer members. They would be commissioned and or
10 warrant officers. Also, if you request it you would be tried by a
11 court consisting of at least one-third enlisted members, but none of
12 those enlisted members would come from your company and none of them
13 would be junior in rank to you.

14 Do you understand what I've said?

15 ACC: Yes, Your Honor.

16 MJ: If you are tried by a court with members, the members will
17 vote by secret written ballot and two-thirds of the members must
18 agree before you could be found guilty of any offense. If you were
~~19 found guilty then two-thirds must also agree in voting on a sentence~~
20 and if that sentence included confinement for more than 10 years,
21 then three-fourths would have to agree. You also have the right to
22 request a trial by military judge alone, and if approved there will
23 be no court members and the judge alone will decide whether you are

1 guilty or not guilty and if you are found guilty then the judge alone
2 will determine your sentence.

3 Do you understand the differences between trial before
4 members and trial before a military judge alone?

5 ACC: Yes, Your Honor.

6 MJ: Do you understand the choices you have then?

7 ACC: Yes, Your Honor.

8 MJ: Captain [REDACTED] are you prepared to enter a choice of
9 forum today? (b)(6) -2 (FC) -2

10 DC: Yes, Your Honor.

11 MJ: You are?

12 DC: Yes. Sergeant McKenzie wishes to be tried by an enlisted
13 panel.

14 MJ: All right. Sergeant McKenzie is that right, you want to be
15 tried by a court consisting of both enlisted soldiers and officer
16 members?

17 ACC: Yes, Your Honor.

18 MJ: Very well. Government, I expect then that on the dates

~~19 that we set for trial that you'll arrange for an enlisted panel, all~~
20 right?

21 TC: We will, Your Honor.

22 MJ: The accused will now be arraigned.

1 TC: All parties to the trial have been furnished with a copy of
2 the charges. Does the accused want them read?

3 DC: The accused waives reading of the charges.

4 MJ: The reading may be omitted.

5 [END OF PAGE]

(b)(6)-2; (7)(C)-2

1 TC: The charges are signed by First Lieutenant [REDACTED]
2 [REDACTED] a person subject to the Code as accuser; are properly sworn to
3 before a commissioned officer of the Armed Forces authorized to
4 administer oaths; and are properly referred to this court for trial
5 by Lieutenant General David D. McKiernan, the Convening Authority.

6 The additional charges are signed by Major [REDACTED] (b)(6)-2; (7)(C)-2
7 [REDACTED], a person subject to the Code as accuser, are properly sworn
8 to before a commissioned officer of the Armed Forces authorized to
9 administer oaths; and are properly referred to this court-martial--
10 to this trial-- to this court for trial by Lieutenant General David
11 D. McKiernan, the Convening Authority.

12 MJ: Thank you. Before we get to plea in this case, I will note
13 for the record that Appellate Exhibit I, you'll have to get Appellate
14 Exhibit I, I need the referral sheet for Staff Sergeant McKenzie
15 please.

16 TC: Your Honor I'm handing the Appellate Exhibit I for Staff
17 Sergeant McKenzie to the court reporter at this time.

18 [Trial counsel hands AE I to reporter.]


19 ~~[Reporter hands AE I to military judge.]~~

20 MJ: Thanks. All right, Appellate Exhibit I is entitled
21 Direction of the Convening Authority and is dated 8 November 2003.
22 It specifically states that he has considered the recommendations of
23 the Staff Judge Advocate and that Lieutenant General David D.

1 McKiernan, the Commander of Third Army is directing that the Charges
2 and Specifications against Staff Sergeant McKenzie be referred to
3 trial by general court-martial, convening order number 6, this
4 headquarters, dated 3 July 2003. I don't normally ask the government
5 for this document but in this case I want to be satisfied that the
6 Convening Authority's desire was indeed to try both the original
7 charges and the additional charges at the same court-martial. On 8
8 November when he took that action, I note for the record that the
9 charges then pending against Staff Sergeant McKenzie included the
10 original charges preferred against him on the 13th of July 2003 and
11 the additional charges preferred against him on the 27th of September
12 2003 and therefore I am satisfied that it was the intent of General
13 McKiernan to try both the additional charges and the original charges
14 in the same court-martial. Although normal practice would be to
15 include that language in the referral portion of the charge sheet and
16 that language has not been specifically included.

17 Defense you're on notice that if that becomes an issue,
18 look into it and make sure that you're satisfied as am I that his
~~19 intent was to try them all together and if there is a defective~~
20 referral I expect a motion for lack of jurisdiction. All right?

21 DC: Yes, Your Honor.

22 MJ: All right. Staff Sergeant McKenzie, Captain 
23 please rise.

1 [Accused and counsel did as directed.]

2 MJ: Staff Sergeant Scott A. McKenzie, how do you plead? Before
3 receiving your plea, I advise you that any motions to dismiss or
4 grant any other appropriate relief should be made at this time. Your
5 defense counsel will speak for you.

6 DC: Your Honor, Sergeant McKenzie requests to defer entry of
7 plea.

8 MJ: Very well, please be seated.

9 [The accused and counsel did as directed.]

10 TC: Your Honor, is there also a deferment on motions that may
11 be made at this time?

12 MJ: Yes, you're deferring motions as well, right?

13 [Defense counsel nods affirmatively.]

14 MJ: That was a nod from Captain [REDACTED]

15 MJ: All right. Prior to trial in an 802 session held in
16 chambers, present were Captain [REDACTED] Captain [REDACTED] Captain
17 [REDACTED] and also present were Captain [REDACTED] who represents a co-
18 accused and Major [REDACTED] who represents another co-accused. The
19 ~~primary purpose of the 802 session was to develop trial dates for~~

20 both motions and the trials themselves. I asked defense counsel what
21 motions they anticipated and have discerned that there are a couple
22 of issues that may need immediate litigation so that we can prepare
23 for trial. Those two issues are that the defense anticipates raising

1 a motion for a new Article 32 investigation and defective referral in
2 that the convening authority ignored the recommendation of the 32
3 investigating officer to dismiss four specifications against Staff
4 Sergeant McKenzie. He apparently also recommended against
5 dismissing-- excuse me, he also recommended dismissing specifications
6 against the co-accused, Master Sergeant [REDACTED] and Specialist [REDACTED]
7 and those recommendations were similarly ignored. So that's the
8 first issue. (b)(6)-5; (7)(C)-5

9 The second issue is that the defense intends to serve the
10 government today with a request for investigative assistance that is,
11 someone to be detailed to the defense case to investigate and cloaked
12 with attorney-client privilege under United States v. Toledo to
13 investigate both here in Kuwait and also back in Pennsylvania for
14 the----

15 DC: Kentucky, ma'am----

16 MJ: ----Kentucky for the purpose of developing potential
17 character evidence. If the government grants that request then
18 there'll be no issue. If they don't grant that request, then the
19 ~~defense will need to litigate that as quickly as possible as well.~~

20 So as to those two issues, I specifically told the defense that I
21 expect to see a motion from them not later than the 24th of November
22 and a government response not later than the 1st of December and we
23 will plan to litigate those on the 3rd and 4th of December here in Camp

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1 Doha, Kuwait. It is my understanding also that the defense intends
2 to serve an additional discovery request on the government today and
3 to the extent that any of those issues are ripe for litigation on the
4 3rd and 4th, then we'll do those as well. Again, that's kind of
5 premature at this point. I was also notified that the defense
6 anticipates raising an issue regarding multiplication of charges-- an
7 unreasonable multiplication of charges under Quiroz and or
8 multiplicity under Teeters and Blockburger. That they will also
9 raise an Article 13 motion regarding Staff Sergeant McKenzie not
10 performing his MP duties and possible derogatory comments and any
11 other issues that arise. And that the defense is looking into,
12 though they're not convinced yet whether or not there is an issue
13 with unlawful command influence. And that's all my notes show, there
14 may be other motions, at any rate. For all other motions, your
15 deadline, defense counsel, is the 10th of December; government your
16 deadline for response is the 17th of December.

17 Government informed me that they prefer to try United
18 States versus ^{b6-5, b7(c)5} [REDACTED] then United States versus McKenzie second, and
19 lastly United States versus [REDACTED] third. Government also

20 anticipates seventeen witnesses from the United States and the need
21 for a bifurcated trial given that the victims and possibly some of
22 the witnesses are Iraqi citizens. Is that right?

23 TC: That's correct, Your Honor.

1 MJ: All right; and that we will have to hear their testimony in
2 Iraq. I have set aside 12 January for an additional motions hearing
3 if we need it. I expect counsel to let me know whether or not that's
4 necessary. Primary I'm thinking that may be necessary for purposes
5 of deciding whether or not certain overseas witnesses need to be
6 brought if the defense requests and the government is inclined to
7 decline. We will for sure have a motions hearing on the 20th of
8 January, where I anticipate litigating the multiplicity motion, the
9 Article 13 motion and unlawful command influence if that pans out to
10 be true and I will of course ask you whether or not that panned out
11 to be true. We will then try United States versus McKenzie beginning
12 at 1300 on Sunday, the 25th of January. I expect and hope to at least
13 seat a panel that day and then start with witnesses Monday the 26th,
14 whether that be here in Kuwait or up north in Iraq. And government
15 you have the responsibility, obviously, of getting all the parties
16 wherever they need to be, so. All right, that's all my notes state
17 in regard to the 802, do counsel have anything to add?

18 DC: No, Your Honor.

~~19 TC: Not from the government, Your Honor.~~

20 MJ: All right, Staff Sergeant McKenzie what we've done here is
21 an arraignment. It's the legal term for the first pretrial hearing
22 in any court-martial. As the accused in a court-martial you have an
23 absolute right to be present in all sessions of your court. The one

1 caveat to that is if you were to absent yourself without leave, go
2 AWOL between now and the dates that we've set either the 3rd and 4th of
3 December, possibly the 12th of January, certainly the 20th of January
4 and then from the 25th through the 29th which I anticipate will be the
5 actual trial dates, then the government could go ahead and elect to
6 try the case even if you weren't here. It would be a really bad
7 situation for Captain [REDACTED] (b)(6)-2-(7)(c)-2 he'd be defending an empty chair,
8 all right? I would enter a plea of not guilty for you and we would
9 have a panel case and we would go forth. Obviously I don't expect
10 that you're going to go AWOL and again, I tell you that like I tell
11 every soldier who I am arraigning because I want you to understand
12 that you've got a lot of work to do between now and those dates that
13 I've set with Captain [REDACTED] so that you can assist her in
14 defending your case. (b)(6)-2;(7)(c)-2

15 All right?

16 ACC: Yes, Your Honor.

17 MJ: Is there anything further we can take up at this
18 arraignment?

~~19 TC: Your Honor, I would just ask that I know that there may be~~
20 some issues of requesting leave by the accused between now and the
21 time of trial and I just want to know if the court had any issues or
22 concerns about the leave and going back to the states.

1 MJ: I don't. That's completely a command decision. I've seen
2 commanders grant leave up to the day before trial. Captain
3 [REDACTED] understands Article 138 if she needs it; okay?

4 TC: Thanks ma'am.

5 MJ: That's not my issue.

6 TC: Nothing more from the government.

7 MJ: Anything else? Captain [REDACTED]

8 DC: No, Your Honor.

9 MJ: Very well, court is in recess.

10 [The court-martial recessed at 1051, 15 November 2003.]

11

[END OF PAGE]

all
(b)(6) - 2 - (7)(c) - 2

ABATEMENT

1

2 The proceedings were terminated on 7 January 2004 when all
3 charges and additional charges and their specifications were
4 dismissed with prejudice by the convening authority.

5 //NOTHING FOLLOWS//
6

AUTHENTICATION OF RECORD OF TRIAL

In the case of

(b)(6)-5; (7)(c) 5

MCKENZIE, Scott A. [REDACTED] Staff Sergeant

U.S. Army, HHC, 320th Military Police Battalion,

Camp Bucca, Iraq 09375

[REDACTED] (b)(6) 2 - (7)(c) - 2

[REDACTED]
LTC, JA
(Military Judge)

20 July, 2004

I have examined the record of trial in the foregoing case.

[REDACTED] (b)(6) 2 - (7)(c) - 2
CPT, JA
(Defense Counsel)

_____, 2004