

IN A GENERAL COURT-MARTIAL
 SECOND JUDICIAL CIRCUIT, U.S. ARMY TRIAL JUDICIARY
 FORT BRAGG, NORTH CAROLINA

UNITED STATES)	Defense Reply to Government
)	Response to Defense Motion to
v.)	Dismiss Charge II
)	
SGT Robert B. Bergdahl)	
HHC, Special Troops Battalion)	
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	9 June 2017

TABLE OF CONTENTS

Introduction	1
Legal Authority	1
Argument.....	1
Conclusion	3
Certificate of Service	4

INTRODUCTION

The government’s response to the Motion to Dismiss Charge II and its specification is without merit. The motion should be granted.

LEGAL AUTHORITY

1. Art. 86, UCMJ
2. Art. 92(3), UCMJ
3. Art. 99, UCMJ
4. Art. 99(2), UCMJ
5. Art. 99(3), UCMJ
6. Art. 99(7), UCMJ
7. Articles of War
8. RCM 603(d)
9. *United States v. Carey*, 4 C.M.A. 112, 15 C.M.R. 112 (1954)
10. *United States v. Miller*, 44 C.M.R. 849 (A.C.M.R. 1971)
11. *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011)

ARGUMENT

The government asserts, at 6, that wrongfully causing search and recovery operations constitutes a breach of the custom of the service, which therefore makes it a crime.

Were this case tried under the Articles of War, the government would have an opportunity to prove that the conduct pleaded in the specification to Charge II was a violation of custom. But the Articles of War have not been the law for 66 years. As explained in *Carey*, UCMJ Article 99 recognized that proving custom was difficult and inexact, and in place of custom Congress did a wholesale revision of the field of misbehavior before the enemy, instead listing nine specific prohibitions and eliminating custom. It is instructive to consult the actual text:

Any member of the armed forces who before or in the presence of the enemy—

- (1) Runs away;
- (2) Shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend;
- (3) Through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property;
- (4) Casts away his arms or ammunition;
- (5) Is guilty of cowardly conduct;
- (6) Quits his place of duty to plunder or pillage;
- (7) Causes false alarms in any command, unit, or place under control of the armed forces;
- (8) Willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture, or destroy; or
- (9) Does not afford all practicable relief and assistance to any troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies when engaged in battle; shall be punished by death or such other punishment as a court-martial may direct.

Notably for this case, Article 99(3) employs the term “intentional misconduct.” If there were any doubt about what that term means, *Carey* (reaffirmed by *Miller*) resolved it. It must be a “violation of a definite law.” This is also the plain and commonsense meaning: misconduct refers to conduct that is prohibited, not that which is lawful but merely taboo or objectionable. *Carey* and *Miller* are good law. They do not cease to exist simply because the *Manual* was never updated to reflect them (an omission that is entirely understandable given that Article 99 remains a rare and obscure offense). While the Code and *Manual* have been repeatedly amended over the intervening decades, neither Congress nor the President have sought to amend either one so as to overturn *Carey* and *Miller*.

The government insists, at 4, that the specification to Charge II “encompasses both shameful abandonment under Article 99(a)(2) [*sic*] and causing [a] false alarm under Article 99(a)(7) [*sic*].” We assume this evinces a belated recognition that, as written, the specification cannot be sustained. Whether or not that is the explanation, a response to a motion to dismiss cannot amend a specification *sub silentio*, see RCM 603(d) (defense right to object to major changes), and the one at issue nowhere accuses SGT Bergdahl of either shameful abandonment or causing a false alarm. If anything, it alleges that he

caused a *real* alarm, which is obviously a different matter and is not a listed offense. See D APP 65 at 14.

The government attempts to hedge its bets (and wriggle off the plain meaning of the specification) by contending (at 4) that SGT Bergdahl's conduct actually amounts to dereliction of duty in violation of Article 92(3). But "wrongfully caus[ing] search and recovery operations" does not sound in dereliction. As the *Manual* states: "A person is derelict in the performance of duties when that person willfully or negligently fails to perform that person's duties or when that person performs them in a culpably inefficient manner." A wide gulf separates the pleaded offense and dereliction, which entails a failure to act. The government in any event invoked only the intentional misconduct clause of Article 99(3), and not the separate neglect clause.

Finally, the government tries (at 6 n.1) to spin a comment it attributes to SGT Bergdahl into a recognition that his conduct was criminal. No one disputes that it is an offense to go AWOL. Art. 86, UCMJ. The government's problem is that it failed to plead it. See *generally* D APP 65 at 13. *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), was a watershed in military pleading. The era when an element could simply be read in and omissions overlooked is over.

CONCLUSION

Charge II and its specification should be dismissed.

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CERTIFICATE OF SERVICE

I certify that I emailed the foregoing Defense Reply to Government Response to Defense Motion to Dismiss Charge II to the Court and Trial Counsel on 9 June 2017.

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