

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 Clarify
v.)	AE 49 or, in the Alternative, for
)	Reconsideration, and Proposed
SGT Robert B. Bergdahl)	Instructions for Charge II and its
HHC, Special Troops Battalion)	Specification
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	21 July 2017

The Government asserts, at 2, that the required *mens rea* for Charge II and its Specification is “specific to the second element, in this case the intentional misconduct, and not to the third element, the resulting endangerment.” The words following “intentional misconduct” in the Specification, however, describe the intentional misconduct required to be proven under the second element. The Specification is silent regarding the specific manner by which the unit was endangered under the third element. A major change is required for the Specification to mean what the Government now claims. The Defense objects to such a change.¹

The Defense objects to the Government’s proposed instructions. In order to effectuate the major change they seek to make in the Charge sheet, the Government attempts to simplify their burden by describing the misconduct in element 2 of their proposed instructions as follows, “[t]hat the accused did leave Observation Post Mest”. G APP 87, at 4. The Government, thereby, pretends that the words “alone; and left without authority; and wrongfully caused search and recovery operations” do not exist. Its proposed instruction does not reflect what was actually referred and what the accused must defend against.

The Defense has no objection to the Government’s proposed expanded definition of “Enemy”.

The Defense objects to the addition of the words “or an engagement with the enemy is reasonably possible” in the definition of “Before the Enemy”. As support for the addition, the Government (at 5 n.4) provided only a partial quote from *United States v. Sperland*, 5 C.M.R. 89, 92 (1952). The omitted text shows that the proposed language was not meant to apply generally.

We need not concern ourselves with organizations in reserve, units in rear areas or troops not participating in tactical operations. In the instant case we need go no further than to say that a mortar unit in direct support of front line infantry

¹ This reply is without prejudice to the position set forth in D APP 65.

troops, with a reasonable possibility of being called on for fire support to repel an attack or assist an advance, is “before the enemy” . . .

Id. at 92. As the Court makes clear, the “reasonable possibility” language only applies to the specific type of unit in the specific circumstances described.



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MAJ, JA
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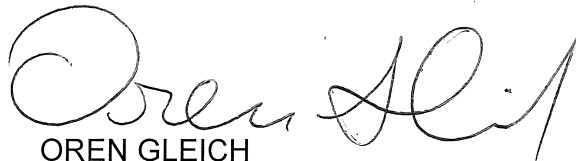
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CERTIFICATE OF SERVICE

I certify that I emailed the foregoing to the Court and Trial Counsel on 21 July 2017.



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