

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

UNITED STATES	)	Defense Proposed Instruction
	)	on Specific Intent (Charge I)
v.	)	
	)	
SGT Robert B. Bergdahl	)	
HHC, Special Troops Battalion	)	
U.S. Army Forces Command	)	
Fort Bragg, North Carolina 28310	)	21 July 2017

RELIEF REQUESTED

The defense requests the following instruction, in addition to those set forth in the *Military Judges' Benchbook*, with respect to the specification of Charge I. Oral argument is not requested.

PROPOSED INSTRUCTION

To convict SGT Bergdahl of desertion (Charge I), the prosecution must prove beyond a reasonable doubt that his specific intent was to shirk important service and avoid hazardous duty. It is not sufficient for the prosecution simply to prove that he left his place of duty knowing that remaining there would require him to participate in combat operations, guard duty, or combat patrol duties, as alleged in the specification. Rather, you must find that he specifically intended to avoid hazardous duty and shirk important service.

If you find that SGT Bergdahl left OP Mest without authority, you must consider any and all evidence relating to his specific intent in doing so. By "specific intent" I mean his actual, subjective purpose in acting as he did, regardless of whether that purpose was naïve or unrealistic. SGT Bergdahl's mental processes are relevant to that determination. In weighing the evidence of those mental processes, you should consider whether he believed circumstances in the unit were such that higher echelons should be made aware of them so corrective action could be taken. Again, whether such a belief was naïve or unrealistic is not the question. Rather, the question is whether the prosecution has proved, beyond a reasonable doubt, that SGT Bergdahl's subjective intent was to avoid hazardous duty and shirk important service, or something else. Evidence of different intents – that is, intents other than to avoid hazardous duty and shirk important service – can raise a reasonable doubt as to whether he had the specific intent that is legally required for desertion. You must therefore take into

account any and all evidence that would tend to reveal SGT Bergdahl's subjective intent in acting as he did.

### BASIS FOR PROPOSED INSTRUCTION

The specification of Charge I reads as follows:

In that Sergeant Robert (Bowe) Bowdrie Bergdahl, United States Army, did, on or about 30 June 2009, with the intent to shirk important service and avoid hazardous duty, namely: combat operations in Afghanistan; and guard duty at Observation Post Mest, Paktika Province, Afghanistan; and combat patrol duties in Paktika Province, Afghanistan, quit his place of duty, to wit: Observation Post Mest, located in Paktika Province, Afghanistan, and did remain so absent in desertion until on or about 31 May 2014.

Article 85(a)(2), UCMJ, criminalizes "short desertion" and reads as follows:

(a) Any member of the armed forces who—

\* \* \*

(2) quits his unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service;

\* \* \*

is guilty of desertion.

Paragraph 9.b.(2) of the *Manual for Courts-Martial* lists the elements of short desertion:

(2) Desertion with intent to avoid hazardous duty or to shirk important service.

(a) That the accused quit his or her unit, organization, or other place of duty;

(b) That the accused did so with the intent to avoid a certain duty or shirk a certain service;

(c) That the duty to be performed was hazardous or the service important;

(d) That the accused knew that he or she would be required for such duty or service; and

(e) That the accused remained absent until the date alleged.

Short desertion is a specific intent offense. This is clear from the statutory text, the initial clause of ¶ 9.b.(2), and the second element set forth in the MCM. As a result, it is not sufficient for the government merely to prove that the alleged quitting was intentional; it must prove that the quitting was done with the specific purpose to avoid and shirk. Unlike the characterization of duty as hazardous or important (which is judged under an objective standard), the accused's specific intent is "a subjective question of fact depending on proof of his direct statements or circumstances reflective of his state of mind." *United States v. Gonzalez*, 42 M.J. 469, 472 (C.A.A.F. 1995) (citing *United States v. Apple*, 2 U.S.C.M.A. 592, 10 C.M.R. 90 (1953)).

*Gonzalez* was decided unanimously. It confirms that Article 85(a)(2) “does not prohibit absence without leave from a unit engaged in hazardous duty; rather it prohibits absence without leave *with an intent to avoid* hazardous duty.” 42 M.J. at 474 (citing *Apple*, 2 U.S.C.M.A. at 593, 10 C.M.R. at 91). *Apple*, in turn, holds that it is error not to submit the question of the accused’s subjective intent to the members. Judge Brosman’s opinion is clear: “If the accused’s story on the stand was true, he did not desert his unit *with intent to avoid hazardous duty*. Although he may in fact have avoided it, his object instead was to secure clarification of his confused rotation point situation.” 2 U.S.C.M.A. at 593-94, 10 C.M.R. at 91-92 (emphasis in original). Judge Latimer noted that the court was not free to reject the accused’s account even if it was improbable. *Id.* at 595, 10 C.M.R. at 93 (Latimer, J., concurring).

*Apple* reflected settled law. *E.g.*, *United States v. McIntyre*, 2 U.S.C.M.A. 559, 10 C.M.R. 57 (1953); *United States v. Cline*, 2 U.S.C.M.A. 411, 9 C.M.R. 41 (1953); *United States v. Shull*, 1 U.S.C.M.A. 177, 2 C.M.R. 83 (1952) (evidence of different intents other than to avoid hazardous duty and shirk important service are relevant to disprove the required intent for desertion). It was treated as good law by both the majority and the partial dissent in *United States v. Huet-Vaughn*, 43 M.J. 105 (C.A.A.F. 1995), decided only six days after *Gonzalez*. In that case, the accused’s motive – expressing a political view about the legality of Operation Desert Storm – was perfectly consistent with a specific intent to avoid hazardous duty. Her very goal was to make a political point regarding Operation Desert Shield, which she considered unlawful and therefore wanted no part of. Far from casting doubt on a specific intent to avoid hazardous duty, that goal was direct evidence of her intent *not* to perform that duty.

In essence, CPT Huet-Vaughn contended that her specific intent to avoid hazardous duty was excused by a morally-grounded motive. It is no surprise that the Court of Appeals rejected that claim:

CPT Huet-Vaughn did not contest the fact that she intentionally quit her unit with knowledge that it was about to deploy to the Persian Gulf. The evidentiary contest arose from her desire to introduce evidence of her motives and reasons for refusing to support Operation Desert Shield. She tendered several reasons: that war crimes would be committed, that the war would be an environmental catastrophe, and that support of the war would be morally and ethically wrong. The defense conceded at trial that service in the Persian Gulf was hazardous duty and important service. The sole factual issue was CPT Huet-Vaughn’s intent when she went AWOL.

43 M.J. at 113.

Judge Gierke analyzed the claim as one of excuse – an effort to argue that CPT Huet-Vaughn’s specific intent to quit her unit was necessary to avert a greater evil. This

theory, he concluded, did not support a necessity defense. *Id.* at 114.\* By the same token, any disobedience was irrelevant because “the so-called ‘Nuremburg defense’ applies only to individual acts committed in wartime; it does not apply to the Government’s decision to wage war.” *Id.* Contesting the mission itself was to no avail because that presented a non-justiciable political question. *Id.*

Chief Judge Sullivan, who wrote *Gonzalez*, concurred in part and dissented in part. In his view, “it was error for the military judge to prevent CPT Huet-Vaughn from explaining her state of mind at the time she left her unit. *United States v. Huff*, 7 U.S.C.M.A. 247, 250, 22 C.M.R. 37, 40 (1956) (‘An accused cannot be denied every opportunity to present evidence at the trial to negate the existence of every element of the offense charged.’).” The error was harmless, however, because she had not been “prevented from explaining her reasons for leaving her unit to the members.” 43 M.J. at 116-17.

The defense believes that Chief Judge Sullivan had the better of the argument. In a prosecution for an offense that requires a specific intent, an accused is free to try to raise a reasonable doubt even on bases that otherwise, for example, might not be justiciable. See 43 M.J. at 115. The question under *Apple* and *Gonzalez* is simply the factual one of what the accused’s subjective intent was, not its legal viability, moral grounding, or even its plausibility. Because the instant case is readily distinguishable from *Huet-Vaughn*, there is no occasion for the court to address this point. We note it here solely to preserve the issue.

SGT Bergdahl is entitled to have the trier of fact consider any and all evidence that calls into question the government’s evidence, whatever that may be, of specific intent, and thereby potentially raise a reasonable doubt as to his guilt on Charge I and its specification. “The rule as to reasonable doubt extends to every element of the offense.” R.C.M. 919(c) (Discussion). Every accused therefore has a fundamental right to raise a reasonable doubt as to any required specific intent. The proposed instruction seeks to vindicate that right.

  
For EUGENE R. FIDELL  
Civilian Defense Counsel

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\* If this part of *Huet-Vaughn* were read as permitting the specific intent element to morph into an examination of the viability of a defense, see 43 M.J. at 114-15, implicitly shifting the burden to the accused, it would run counter to *United States v. Prather*, 69 M.J. 338, 344 (C.A.A.F. 2011) (disapproving permissive instruction “where there is an overlap between the evidence pertinent to an affirmative defense and evidence negating the prosecution’s case”). The mandatory language in the proposed instruction avoids such an unconstitutional shift of the burden.

*With the defense team*

LTC FRANKLIN D. ROSENBLATT  
MAJ OREN GLEICH  
MAJ JASON D. THOMAS  
MAJ LOUIS SCAPICCHIO  
CPT JENNIFER D. NORVELL  
CPT NINA S. BANKS  
CPT LORENA M. MAREZ

P. SABIN WILLETT  
CAITLIN M. SNYDACKER  
CHRISTOPHER L. MELENDEZ

CERTIFICATE OF SERVICE

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



OREN GLEICH  
MAJ, JA  
Defense Counsel