

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

UNITED STATES)	
)	
v.)	GOVERNMENT RESPONSE TO
)	DEFENSE MOTION TO CLARIFY AE 49
BERGDAHL, ROBERT BOWDRIE)	OR, IN THE ALTERNATIVE, FOR
(BOWE))	RECONSIDERATION, AND PROPOSED
SGT, U.S. Army)	INSTRUCTIONS FOR CHARGE II AND
HHC, Special Troops Battalion)	ITS SPECIFICATION
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	

20 July 2017

I. RELIEF SOUGHT

The Government respectfully requests that the Court deny the Defense Motion to Clarify AE 49 or, in the alternative, for Reconsideration, and Proposed Instructions for Charge II and its Specification. The Defense's erroneous interpretation of Charge II amounts to nothing more than an attempt to transform Article 99 from a general to a specific intent crime.

II. BURDEN OF PERSUASION AND BURDEN OF PROOF

The Defense, as the moving party, has the burden of persuasion in accordance with RCM 905(c)(2), and the burden of proof is a preponderance of the evidence in accordance with RCM 905(c)(1).

III. FACTS

The Government incorporates by reference the facts as referenced in prior filings.

IV. EVIDENCE

No additional evidence is required to resolve the motion.

V. LAW AND ARGUMENT

Article 99, UCMJ reads, in pertinent part,

Any member of the armed forces who before or in the presence of the enemy through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property shall be punished by death or such other punishment as a court-martial may direct.

The elements of Article 99, UCMJ are that,

- (a) That it was the duty of the accused to defend a certain command, unit, place, ship, or certain military property;
- (b) That the accused committed certain disobedience, neglect, or intentional misconduct;
- (c) That the accused thereby endangered the safety of the command, unit, place, ship, or military property; and
- (d) That this act occurred while the accused was before or in the presence of the enemy.

2016 MCM ¶23.b.(2)(c)

“[A] general intent crime does not require that the defendant intend the precise purpose or results of the crime but only that the defendant intentionally engage in the actus reus of the crime.” *United States v. White*, 670 F.3d 498 (4th Cir. 2012). As the text of the statute and the elements as laid out in the Manual make clear, Misbehavior Before the Enemy is a general intent crime, where the required mens rea is specific to the second element, in this case the intentional misconduct, and not to the third element, the resulting endangerment.

Further support for this conclusion is found in the explanation section which reads that “‘Intentional misconduct’ does not include a mere error in judgment.” 2016 MCM ¶ 23.c.(3)(b). As the Court recognized in AE 49, while there is no additional legal guidance as to what is or is not “intentional misconduct” in the statute, the absence of explicit language defining intentional misconduct as meaning specific intent is significant. Throughout the Manual, where a crime requires specific intent that requirement is explicitly referenced.

The Defense’s interpretation of Charge II and proposed instruction would effectively transform the crime of Misbehavior Before the Enemy from a general to a specific intent crime, by requiring the Government to not only establish that the Accused intended to engage in the physical act of leaving OP Mest, but that he further intended the resulting endangerment.

The Court’s Findings of Fact, Conclusions of Law and Ruling -- Defense Motion to Dismiss - Failure to State an Offense, Appellate Exhibit 49, appropriately concluded that the three clauses alleged in the specification “are dependent clauses that mean: The Accused left OP Mest alone and without authority and, thereby, wrongfully caused search and recovery operations.”

Despite the acknowledged inartful use of semicolons, it is apparent that the Government is only alleging a single act by the Accused - physically leaving OP Mest, which then resulted in endangerment to OP Mest and Task Force Yukon. The act of leaving, however, is not, in and of itself, misconduct. A Soldier, for instance, who left OP Mest to participate in a patrol has certainly not engaged in any misconduct. Thus, while the intentional act alleged in the specification is the physical act of leaving OP Mest, the surrounding circumstances - doing so without authority and doing so alone - are what establish that act as misconduct under the third element. Furthermore, because that act under these surrounding circumstances wrongfully caused search and recovery operations, OP Mest and Task Force Yukon were thereby endangered, which establishes the fourth element. However, the Government is not required to prove that the Accused had the specific intent to leave without authority, leave alone, or wrongfully cause search and recovery operations. The Government must only prove that the Accused intended to leave OP Mest. The Government must then separately prove the circumstances that make the Accused's act amount to intentional misconduct and the resulting endangerment.

This analysis is neither new nor unique to this Charge. The same analysis is used to evaluate a variety of general intent crimes. For example, to establish Absence Without Leave (AWOL) under Article 86, the Government must establish that the Accused went from or remained absent from his unit or place of duty. The physical act of going from or remaining away from a place of duty is not in and of itself criminal. Just as a Soldier leaving OP Mest on a patrol is not engaging in misconduct, a Soldier remaining away from his unit during a period of approved leave is not engaging in misconduct. As a general intent crime, the Government must prove that the Accused simply failed to remain at or return to his unit. The Government must then separately prove that the absence was without proper authority from someone who could give the Accused leave. However, the Government does not have to prove that at the time the Soldier left or remained away, he intended to do so without proper authority. That element can be proved through testimony of a member of the chain of command who states that the Accused did not have authority to leave or remain absent.

Similarly, the Government in this case will offer testimony and evidence that the Accused left alone and without authority, which caused recovery and search operations to be conducted, and thus endangered OP Mest and Task Force Yukon. Like an AWOL offense, the Government must only prove the Accused intended to leave in the second element, not that he had a specific intent to leave without authority or to bring about a certain result. The surrounding circumstances go to the third and fourth elements of whether the act of leaving under these circumstances constitute intentional misconduct and whether the act resulted in endangerment to OP Mest and Task Force Yukon.

Far from providing clarity, the Defense's interpretation and proposed instruction would create significant confusion. The search and recovery operations are the mechanism by which the Government alleges the Accused endangered both OP Mest and Task Force Yukon under the third element of the specification. As this element

does not include any intent requirement, the Defense's interpretation and instruction, which attempts to require a finding that the Accused specifically intended to cause such search and recovery operations, the fact finder would be presented with the same question twice, but under two different standards, one requiring intent and one not.

Based on this established interpretation of general intent crimes, the Government proposes the following instruction to Charge II and its Specification:

1. That on or about 30 June 2009, at or near Observation Post Mest, Paktika Province, Afghanistan, it was the duty of the accused to defend a certain place and command, namely, Observation Post Mest and Task Force Yukon;
2. That the accused did leave Observation Post Mest;
3. That such act amounted to intentional misconduct;
4. That thereby the accused endangered the safety of the Observation Post Mest and Task Force Yukon; and
5. That this act occurred while the accused was before the enemy.

Definitions and Other Instructions:

"Intentional misconduct" implies a wrongful intention and not mere negligence.

The Benchbook instruction for "enemy"¹ should be modified as follows to reflect that the term is not restricted to situations where there is a formal declaration of war: "Enemy" includes not only organized opposing forces in time of war but also any other hostile body that our forces may be opposing and includes civilians as well as members of military organizations *and is not restricted to situations where there is a formal declaration of war.*²

The Military Judges' Benchbook instruction for "before the enemy"³ should be tailored as follows to reflect case law addressing the term:

"Before the enemy" refers to the tactical relationship with the enemy rather than distance. A unit is considered "before the enemy" if it is actually engaged with the enemy in a tactical operation or an engagement with the enemy is imminent *or an engagement with the enemy is reasonably possible*. To determine whether or not the accused was "before the enemy," you should consider all the circumstances, including the duty

¹ U.S. Dep't of Army, PAM. 27-9, Military Judges' Benchbook, instr. 3-23-3, p. 303.

² The italicized additional language is from *United States v. Terry* which states, "[t]he term 'enemy' applies to any forces engaged in combat against our own forces and is not restricted to situations where there is a formal declaration of war." 36 C.M.R. 756, 761 (1965).

³ U.S. Dep't of Army, PAM. 27-9, Military Judges' Benchbook, instr. 3-23-3, pp. 302-303.

assignment of the accused, the mission of the accused's organization, and the tactical relationship of the accused and his organization with the enemy.⁴

VI. CONCLUSION

The Government respectfully requests that the Court deny the Defense Motion to Clarify AE 49 or, in the alternative, for Reconsideration, and Proposed Instructions for Charge II and its Specification.

//Original signed//
JUSTIN C. OSHANA
MAJ, JA
Trial Counsel

I certify that I have served or caused to be served a true copy of the above on the Defense Counsel on 20 July 2017.

//Original signed//
JUSTIN C. OSHANA
MAJ, JA
Trial Counsel

⁴ "The italicized additional language is from *United States v. Sperland* which states, "...a mortar unit in direct support of front line infantry troops, with a *reasonable possibility* (emphasis added) of being called on for fire support to repel an attack or assist an advance, is 'before the enemy' as that phrase is used in Article 99..." 5 C.M.R. 89, 92 (1952).