

**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 <i>IN LIMINE</i>
BERGDAHL, ROBERT BOWDRIE	)	(INABILITY TO RETURN)
(BOWE)	)	
SGT, U.S. Army	)	
HHC, Special Troops Battalion	)	6 June 2017
U.S. Army Forces Command	)	
Fort Bragg, North Carolina 28310	)	

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**I. RELIEF SOUGHT**

The Government requests the Court deny the Defense Motion *in limine* (Inability to Return). The Government requests oral argument.

**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 preponderance of the evidence in accordance with RCM 905(c)(1).

**III. FACTS**

On 30 June 2009, the Accused deserted from his place of duty at Observation Post (OP) Mest, Afghanistan, while deployed as part of Task Force Yukon, Combined Joint Task Force-82/Regional Command East. As a result, a Duty Status-Whereabouts Unknown (DUSTWUN) report was initiated, which resulted in a massive search and recovery operation in an attempt to find the Accused.

The Accused was captured by the Taliban hours after deserting OP Mest and remained in captivity until 31 May 2014 when the Accused was returned to U.S. military control as part of a prisoner exchange. The Accused subsequently made a statement to then Major General (MG) Kenneth Dahl, the Army Regulation (AR) 15-6 investigating officer assigned to investigate the circumstances surrounding his departure, in which he admitted that he purposefully left OP Mest intending to miss his next guard shift at the OP, with full knowledge of the significant risk of capture by militants.

The Accused recognized the risk in leaving the OP by himself: "Now, the other interest I had with the .09 millimeter [pistol] was...I know that it's dangerous out there.

And I know I'm going to need a weapon. I'd be more comfortable with a weapon, obviously. I'm going out into a war zone." Enclosure (Encl), 183. He told MG Dahl that the "original plan was to run from TCP [tactical control point] to Sharana. I needed to go as light as possible. I also knew that the possibility of being caught out in the middle of the daytime, visually, I needed to look not out of place." Encl, 153. "So what I did was at a little local shop on the FOB, we called it the 'Hajji-Mart', the guy had clothes...that they would wear. The idea was if I put that on over my clothes and put the typical head-wrap on my head, at a distance, any of the locals would see an average guy walking through the desert." Encl, 160.

After the Accused returned, charges were preferred against the Accused on 25 March 2015. The case was referred to a General Court-Martial on 14 December 2015. The Accused is charged with one specification of desertion with intent to avoid hazardous duty or to shirk important service in violation of Article 85, Uniform Code of Military Justice (UCMJ) and one specification of misbehavior before the enemy-endangering the safety of the unit in violation of Article 99, UCMJ.

#### IV. EVIDENCE

Enclosure. Excerpts from the sworn statement of the Accused to then MG Dahl, the AR 15-16 investigating officer, 6 August 2014.

#### V. LAW AND ARGUMENT

The Defense has erroneously captioned their request as a motion *in limine*, however, they do not seek a determination concerning the admission or exclusion of evidence.<sup>1</sup> By asking the Court to determine whether a period of desertion or absence ends when a soldier is unable to return to military control because he has been taken prisoner by the enemy or abducted, the Defense is actually seeking a finding that the defense of physical inability has been raised by some evidence (despite the fact that no evidence has yet been presented) and that the Government has not established beyond a reasonable doubt that the defense does not apply.<sup>2</sup> This is not appropriate for the Court to determine pre-trial. The test for whether an RCM 916 defense has been established sufficiently to absolve an accused of responsibility is a determination that must be made by the fact finder after the presentation of evidence.

**a. The period of unauthorized absence is a matter for the fact finder to determine at trial, not an issue to be determined prior to trial.**

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<sup>1</sup> See Discussion of RCM 907(b)(2)(B) ("Questions concerning the admissibility of evidence on other grounds may be raised by objection at trial or by motions *in limine*."); and Discussion of RCM 906(b)(13) ("A request for a preliminary ruling on admissibility is a request that certain matters which are ordinarily decided during trial of the general issue be resolved before they arise, outside the presence of members.").

<sup>2</sup> "It is a defense to refusal or failure to perform a duty that the accused was, through no fault of the accused, not physically or financially able to perform the duty." RCM 916(i).

The Defense argues that the Court should determine now whether the Accused's unauthorized absence ended, due to his physical inability to return, when he was taken prisoner by the enemy. Determination of this issue, however, would decide an element of the charge which the Government is required to prove beyond a reasonable doubt to the fact finder at trial. "Due Process requires the prosecution to prove the defendant guilty of each element of a crime beyond a reasonable doubt." *In re Winship*, 397 U.S. 358 (1970). The duration of absence element in an unauthorized absence charge serves two purposes:

First, the length of an unauthorized absence is the essential element in determining the legal punishment for the offense. Under the Table of Maximum Punishments, depending upon the duration of the absence, one of three maximums applies. Secondly, an unauthorized absence that is 'single and uninterrupted' cannot be fragmented into two or more separate periods, with each part made separately punishable.

*United States v. Francis*, 15 M.J. 424, 427 (C.M.A 1983) (internal citation omitted); See also *MCM*, 2016, Part IV, para. 10c(4) (describing the aggravated forms of AWOL based on duration of the absence); *MCM*, 2016, para. 10c(8) ("Duration of the absence is a matter in aggravation for the purpose of increasing the maximum punishment authorized for the offense."). Since the Government is required to prove the duration of the Accused's absence at trial, the Court should not decide the matter now.

**b. Determination of the issue is not needed to assist the Defense in advising the Accused on the potential maximum punishment of the lesser included offense (LIO) of absent without leave (AWOL).**

The Defense states that determination of the issue would "resolve uncertainty about the maximum punishment that could be imposed" if the Accused were to plead guilty to the LIO of AWOL. D APP 66, 4. The Accused is free to plead guilty to the LIO of AWOL and, by exceptions and substitutions, plead to a one day duration. It would then be left to the Government to attempt to prove the remaining period of absence. The Manual is replete with examples of crimes which have varied maximum punishments based on what findings are made at the conclusion of trial. That is not a basis for the Defense to seek a pre-trial determination from the Court of matters that must be decided by the fact finder.

**c. Physical inability to return only stops an unauthorized absence when it was "through no fault of the accused".**

The Defense's argument that the accused's capture by the Taliban should end the Accused's period of absence simply fails to address any of the applicable case law. While physical inability can constitute a defense to an unauthorized absence charge, the physical inability must be "through no fault of [the accused's] own." *United States v. Barnes*, 39 M.J. 230, 232 (CMA 1994) citing *United States v. Williams*, 21 M.J. 360, 362 (CMA 1986), quoting para. 165, *MCM*, 1969 (Revised edition).

The Court of Military Appeals in *United States v. Lee*, 16 M.J. 278, 280-281 (C.M.A. 1983) held:



In analyzing the facts surrounding a failure to return from an authorized absence, the phrase in the Manual provision 'through no fault of his own' should not be treated lightly. The courts have rather strictly construed the defense of impossibility to include only those cases in which the absence truly was, as a practical matter, for a reason which was out of the accused's hands. While it might well apply to situations involving illness or injury (*United States v. Amie*, 7 U.S.C.M.A. 514, 22 C.M.R. 304 (1957)), natural disasters, or the intervention of third parties (*United States v. Calpito*, 18 U.S.C.M.A. 450, 40 C.M.R. 162 (1969)), it may not be available even in those situations where, for instance, the illness or injury was self-induced (*United States v. Irving*, 2 M.J. 967 (A.C.M.R. 1976), *pet. denied*, 2 M.J. 197 (C.M.A. 1977)), the natural disaster or occurrence was foreseeable, or the intervention by third parties was caused by the accused's fault. (*United States v. Myhre*, 9 U.S.C.M.A. 32, 25 C.M.R. 294 (1958))."

In *Myhre*, the court found that while on authorized leave "the accused voluntarily engaged in a prohibited act which resulted in his apprehension and detention by civilian authorities [H]is own willful and deliberate conduct...led to the events which resulted in overstaying his leave...[T]he accused's inability to return to his place of duty was the result of his own willful misconduct. Consequently, he is responsible for the period of time that he remained away from his station without authority." 9 U.S.C.M.A. 32, 33 (1958)(internal citation omitted). Like the accused in *Myrhe*, it can hardly be said that SGT Bergdahl's inability to return due to intervention by a third party was due to no fault of his own. In this case, the risk of capture by the Taliban in a combat zone was evident to everyone including the Accused who attempted to avoid detection by the enemy by wearing Afghan clothes over his uniform and leaving in the dark. He told MG Dahl: "I know that it's dangerous out there...I'm going out into a war zone." Encl, 183. Despite that risk, the Accused walked off his post, knowing he would miss his guard shift the next morning, because he wanted to prove that he should be part of the Special Forces, he wanted to voice his complaints about his unit to a general officer. Assuming that some evidence of the accused being captured is presented, thus giving rise to an instruction on physical inability, the question of whether that inability is through no fault of the accused will be a matter that must be determined. That determination, however, must be made after the presentation of evidence on the merits and by the fact finder.



## VI. CONCLUSION

The Defense motion is premature and seeks a pre-trial judicial determination that the defense of physical inability has been raised and is sufficient to make a finding on one of the elements of an offense. This is, of course, a matter for the fact finder that

can only be determined after trial. The Court should therefore deny the Defense motion.

FUSSNECKER.JE Digitally signed by  
RROD.BERNAR   
D.   
JERROD B. FUSSNECKER  
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 6 June 2017.

FUSSNECKER.JE Digitally signed by  
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MAJ, JA  
Trial Counsel

1 Q. Sometime before noon, the next morning?

2 A. Yes. It might have been a sheep herder, a goat herder. It  
3 was a goat herder, but at a distance. After that, everything kind of  
4 falls into a steady blur. I knew what I had gotten into. After that  
5 point everything just settles into a survival thing.

6 Q. So the dress and the headgear you bought at Sharana, you  
7 brought it to COP Mest with you and you just carried it with you when  
8 you went off?

9 A. Yeah.

10 Q. Let me ask you, can you go back and tell me about what you  
11 brought with you and how you made those elections, and what you left  
12 behind? There is a lot of speculation out there of what you had,  
13 what you didn't have, what you brought, or what you didn't bring.  
14 You can kind of clear all that up by just giving us the facts.

15 A. The original plan was to run from TCP to Sharana. I needed  
16 to go as light as possible. I also knew that the possibility of  
17 being caught out in the middle of the daytime, visually, I needed to  
18 look not out of place. A guy walking through with a giant weapon,  
19 obviously is going to look out of place. Guy walking through the  
20 desert with a uniform on is going to look out of place. The point  
21 was being lightweight and bare essentials. Whatever my pants had in  
22 the pockets and that was it. I pulled out the bladder to my CamelBak  
23 so I had water. I knew that if I was going to be exerting myself in

1           A.    Yeah, I had a one-man tent. In the daytime, because of the  
2 sun, shade was needed and we didn't have too much shade. So it was  
3 good for shade during the daytime.

4           Q.    I will take this, because I don't want you to draw on it,  
5 but you can use this to point. Give me an idea of, around midnight  
6 or so, you left your truck or your tent and you headed which way?

7           A.    So, I left the truck and went to about here and the other  
8 truck was parked about right here. I got up [inaudible] got up  
9 through here behind the OP, in between that, so here, down here.

10          Q.    Okay, that's what I thought.

11          A.    Then I just hugged the hill and so this is the original OP  
12 where we were first set up, then they turned that over to the  
13 Afghans. So I came out somewhere around here and I could see them  
14 flashing their flashlights around, but they never saw me. Then I got  
15 into here, I think, I remember I got right into an alleyway here.  
16 There's a school here. I got into here, then here. Somewhere in  
17 here I made sure [inaudible]. Somehow I ended up--I started--  
18 darkness--I just started to slowly follow the terrain. I would dodge  
19 the mass civil lights at the night knowing that there are some walls  
20 or something.

21                At about here I'm going off of my natural direction.  
22 Direction just kind of meandered and it was to take me around because  
23 that direction was--that's the direction of FOB Sharana. We take

1           A.     Give me a .09 millimeter because if we're going to be doing  
2 close quarters and it gets bad, I'd be more comfortable if I had a  
3 side arm but they weren't doing that. So I was sitting there and I  
4 saw him. He basically just--you know, when we got to the TCP, he  
5 took it off and just chucked [he actually just placed it in the truck] it  
6 into the MRAP and it was just sitting there. I'm going, "Dude, what--you  
7 just--why don't you have it on you? Because if I had a handgun like that,  
8 I'd have it on me." So, I'm like, "Why don't you have it on you?" And he's  
9 like, "I don't need it on me." And I said, "Well, what if it disappears?  
10 What if someone takes it? It's a .09 millimeter. You know, we've got Afghan  
11 guys walking past here." So I was like, "Why don't you keep it on  
12 you?" He's like, "I don't need to keep it on me." Now, the other  
13 interest I had with the .09 millimeter was, that briefly crossed my  
14 mind was I'm not stupid enough to know--I know that it's dangerous  
15 out there. And I know I'm going to need a weapon. I'd be more  
16 comfortable with a weapon, obviously. I'm going out into a war zone.  
17 I wish I had a .09 millimeter. Had I had a .09 millimeter, I would  
18 have made it to the FOB or I would have made it to Sharana because I  
19 would have been able to--or maybe not. But I would have had a----

20           Q.     You could have killed the two guys on the motorcycle.

21           A.     Yeah. Yeah, it was because--when they approached me it was  
22 like I couldn't do anything. If I ran, they would--but when they  
23 approached me, they didn't know what they were dealing with when the