

1 [U.S. v. BERGDAHL - UNAUTHENTICATED TRANSCRIPT EXCERPT FROM
2 22 AUGUST 2016.]

3 MJ: Okay. So let's take up next -- if there's no objection,
4 then let's take up the 404(b) motion next. I guess I should go
5 through the whole litany here. So, first, we have Defense Appellate
6 Exhibit Number 29, which is the motion in limine with respect to the
7 404(b) notice; and

8 Then we have Government Appellate Exhibit 35, which is the
9 response to the defense motion in limine with respect to the 404(b)
10 notice; and

11 Then we have Defense Appellate 37, which is their reply to
12 the government's response to the motion in limine; and

13 Then, I believe, we have Defense Appellate 39, which is an
14 excerpt from the Article 32 [sic] hearing.

15 ATC: That's Government Appellate Exhibit 39, Your Honor.

16 MJ: I'm sorry -- Government Appellate 39.

17 Is that relevant on this motion?

18 ATC: Yes. It is, Your Honor.

19 MJ: Okay. So all of those things -- I've read all of those
20 things and will consider them all subject to objections of the
21 parties in deciding the issue.

1 Defense, do you have any other evidence to present on this
2 motion?

3 DC: Your Honor, no other evidence; but if the government, as
4 the proponent, was going to make any argument, we would respond to
5 that argument.

6 MJ: Well, sure. Yeah. Okay.

7 Government, any evidence to put on?

8 ATC: No, Your Honor.

9 MJ: Okay. So, Government, do you want to argue?

10 ATC: Yes, Your Honor. We ask that you deny the defense motion
11 to exclude the prior acts of the accused. 404(b) is an inclusive
12 rule with a very low threshold for admissibility unless the sole
13 purpose is to show criminal disposition.

14 Here, the prior acts that we wish to admit aren't criminal
15 acts, and we're not using them to show criminal propensity. We're
16 showing them to show that the -- Sergeant Bergdahl's motive during
17 the prior acts was the same motive that he had for the charged
18 offenses: to seek adventure and to become a special operations
19 soldier.

20 CDC: Excuse me. Could we consult at the defense table for one
21 moment, Your Honor?

1

2 MJ: Sure.

3 Pause.

4 CDC: I apologize, Counsel.

5 [Pause.]

6 CDC: Thank you very much, Your Honor. Sorry.

7 MJ: Okay.

8 ATC: As Sergeant Bergdahl ----

9 MJ: Say that last part again, "seek adventure and"?

10 ATC: "To become a special operations soldier," Your Honor. As
11 he told the movie producer Mark Boal, he wanted to show the world
12 that he was a super soldier and that he was like Jason Bourne. This
13 motive was present before Sergeant Bergdahl ever joined the Army.

14 You have a statement that's attached to the government's
15 motion, Your Honor, from Sergeant Bergdahl's brother-in-law who talks
16 about each of the four prior acts. He says that when Sergeant
17 Bergdahl worked at the weapons range that trained special operations
18 soldiers, that's when he decided what he wanted to do.

19 Sergeant Bergdahl then traveled to Paris to attempt to join
20 the French Foreign Legion; but as Sergeant Bergdahl explained to the

1 15-6 IO, he was turned away. But he wanted to do it because it was
2 an adventurous sounding idea.

3 His brother-in-law states that he then decided to join the
4 Army with the intent of going to Ranger School and becoming a special
5 operations soldier.

6 This same intent is present after he joins the Army.

7 MJ: Well, let's not conflate motive and intent.

8 ATC: Excuse me.

9 MJ: Those are two different things. Let me ask you this
10 question: You say in your pleadings that you think this evidence is
11 relevant to prove motive and intent.

12 ATC: Yes, Your Honor.

13 MJ: Are you eschewing your efforts to use this to prove intent?

14 ATC: Your Honor, we believe that his motive is circumstantial
15 evidence of his intent to purposefully leave his outpost. So
16 that ----

17 MJ: Well ----

18 ATC: ---- last sentence -- I misspoke.

19 MJ: Well, hold on ----

20 ATC: ---- I should have said that his motive was the same.

1 MJ: Hold on a minute. The term "quits" in Article 85 means,
2 "go absent without authority."

3 ATC: Yes, Your Honor.

4 MJ: So you don't have to prove that he had the motive or intent
5 to go absent without authority. You just have to prove that he went
6 absent without authority.

7 ATC: Yes, Your Honor.

8 MJ: You have to prove with respect to Article 85 that he
9 intended to remain away permanently at some point during the absence.

10 ATC: Not that he intended to remain away permanently, Your
11 Honor, but that he intended to shirk important service or hazardous
12 duty.

13 MJ: Okay.

14 ATC: Yes. And we believe that this motive shows that -- is
15 circumstantial evidence of his intent that he intended to leave
16 without authority. He was motivated to seek adventure and to show
17 others that he deserved to be a Special Forces soldier. That was his
18 motive, and that is circumstantial evidence of his intent to leave
19 without authority.

20 And, Your Honor, the case *Huet-Vaughn* speaks to this. This
21 is the Desert Storm case of the doctor who refused to deploy. And,

1 in that case, it says that motive can be used as circumstantial
2 evidence of intent.

3 MJ: Okay. You can proceed.

4 ATC: Yes, Your Honor.

5 So these motives that were present before he ever joined
6 the Army continue to be present once he's in the Army. Before he
7 deploys, he tells Specialist ----

8 MJ: Now, that's a big logical leap there that you just made.
9 These motives -- say that again.

10 ATC: Yes. The motives to seek adventure and the motives to
11 become a special operations soldier, they're present after he joins
12 the Army and continuing to the time that he actually commits the
13 offenses.

14 MJ: Okay. Now, you say that, but that's a big logical leap.

15 ATC: Yes, sir. But ----

16 MJ: How do we know that? How are you going to establish that?

17 ATC: They're supported by what he tells others. He tells
18 Specialist Fry that if the deployment's lame, he's going to walk off
19 into the mountains and work for whoever's out there. That, once
20 again, shows his motive to seek adventure ----

21 MJ: So you're going to put ----

1 ATC: ---- and he tells ----

2 MJ: You're going to put -- what's this Specialist?

3 ATC: Specialist Fry was in his platoon, Your Honor.

4 MJ: Specialist Fry is going to be one of your witnesses to

5 prove this intent?

6 ATC: Yes, Your Honor.

7 MJ: Okay.

8 ATC: And then he also told the 15-6 investigating officer that,

9 in his words, Your Honor, that he thought that the deployment was

10 going to be bullshit, because he should go immediately to becoming a

11 Special Forces soldier.

12 MJ: And you're going to offer that -- was that a sworn

13 statement to the 15-6 investigating officer?

14 ATC: It is, Your Honor; and it's part of G App 39, which is

15 before you.

16 MJ: You're going to offer that as a prosecution exhibit in your

17 case-in-chief?

18 ATC: Yes, Your Honor.

19 MJ: Okay. Go ahead.

20 ATC: And so -- and his motive for adventure is also supported by

21 -- the night before he deserted, he says to Sergeant Cross that, if

1 he were to become a hitman, he would just walk through the mountains
2 of Pakistan and into India to become a member of the Russian mob.

3 So it's present throughout his time in the Army. And, Your
4 Honor, once he comes back, he tells the 15-6 IO that this motive to
5 become a Special Forces soldier was part of the reason that he left
6 his outpost. He said that he didn't want to show up at the Special
7 Forces Qualification School and be like all the other soldiers that
8 wanted to be super-cool soldiers and him have some bullshit Article
9 15. He said that he wanted to show that not only could he do what
10 Special Forces do today, but that he could do what the original
11 Special Forces did -- not rely on technology, not rely on maps but
12 only use his own skill and common sense. And that was the motivating
13 factor for him to leave his outpost is that he wanted to show that he
14 deserved to be a Special Forces soldier.

15 MJ: Okay.

16 ATC: So because these prior acts, Your Honor, aren't -- we're
17 not seeking to introduce them to demonstrate criminal propensity.
18 We're demonstrating them to show his motives and that there's a low
19 threshold for 404(b) evidence. We ask you to deny their motion, Your
20 Honor.

21 MJ: Okay. Defense?

1 DC: Your Honor, these four acts are not relevant. And the
2 government should be prohibited from using them. They're going to
3 waste time, confuse the issue, mislead the trier of fact, and
4 unfairly prejudice Sergeant Bergdahl.

5 Looking at the charge sheet, the intent is he quits his
6 place of duty with the intent to shirk important service for Charge I
7 and, with Charge II, that he left OP Mest alone.

8 When you look at these four acts that they're wanting to
9 use: his attempt to join the Foreign Legion, his participation on a
10 fishing boat trip from New York to Seattle through the Panama Canal
11 -- these are summer jobs that he had when he was in his late teens
12 and earlier twenties.

13 I don't see how this will assist the government in showing
14 motive. It looks to me like they're trying to show acts in
15 conformity. Obviously, this rule is usually used for prior wrongs,
16 but it can also be used for acts.

17 They're trying to say that he likes adventurous jobs so,
18 therefore, he went off to have this adventure. That's the prohibited
19 use of 404(b). You're not allowed to use it for that purpose. And I
20 think, in attempting to use it to try to get into motive, is a little
21 much of a stretch.

1 In all of these jobs, Sergeant Bergdahl either had a term
2 of service; or, in one of the jobs, he did quit the job, but he gave
3 notice to the employer -- a month's notice before he left that job.

4 His attempt to join the Foreign Legion -- he went and
5 tried, and they didn't accept him.

6 The trip from New York to Seattle, that was a trip where he
7 was contracted to be on a boat. It was a purchase that had been made
8 by somebody on the West Coast. So he was a part of a crew that was
9 going to do repairs on the boat, paint, things like that to get the
10 boat ready. And he did that for the trip. He did that along the
11 route. So there they call it a fishing boat trip, but it wasn't a
12 fishing boat trip.

13 The accused's participation in an Alaskan fishing boat
14 trip, there he was on a 3-month term where he went fishing. He went,
15 and he completed the task and, when it was done, it was over with.

16 And then, finally, his time on the weapons range, again,
17 that was a job that he went down to Texas to do. And that was the
18 job that he did quit, but he gave notice before he left.

19 So, in all four of these acts, I don't know how it fits
20 into the charges that are currently before the court that he quit his

1 place of duty to shirk important service or that he just walked off
2 to have an adventure. In none of these instances does that fit.

3 So for those reasons, Your Honor, we would ask that the
4 Court prohibit these four acts.

5 MJ: Anything else, Government?

6 ATC: Yes, Your Honor. We would just show that these motives
7 show that he acted intentionally without authority, necessity, or
8 mistake and that typically for this type of evidence, since there is
9 a low threshold for it to be kept out under 403, Your Honor, that in
10 this case there's little risk that the fact finder could use the
11 prior acts to find that the accused was a bad person and thus
12 committed the crime ----

13 MJ: Well, yeah ----

14 ATC: ---- or that the prior acts were so shocking that they
15 would have a prejudicial impact.

16 MJ: Yeah. I mean, none of this stuff sounds like that. It
17 sounds pretty fun to me -- some of it -- especially if I were 19
18 years old.

19 But the danger to me is the confusion of the issues, which
20 403 talks about -- waste of time and confusion of the issues.

1 Let me ask you this, Government: How do these prior acts
2 -- how was it -- how are these prior acts -- I'm still struggling to
3 understand how these prior acts are circumstantially probative of his
4 motive to shirk important service?

5 ATC: Yes, Your Honor. As his brother-in-law explains each of
6 these acts that Sergeant Bergdahl did, he says that Sergeant Bergdahl
7 saw himself as a warrior and a wandering monk and that these -- that
8 he was motivated by adventure to seek each of these. And that's the
9 same type of motive that he demonstrates right before he takes off.
10 He says, "I would just like to go exploring in the mountains." This
11 is the same motive, the same adventure seeking. And that motive
12 shows that he intentionally took off, Your Honor, that this wasn't by
13 accident. It wasn't a mistake that he acted ----

14 MJ: Okay. Okay. I mean, but that's not intent. That's not
15 intent to shirk important service. That's just -- it's not an
16 accidental taking off. The defense hasn't raised the defense, at
17 this point of, you know, accidental taking off. So I'm not quite
18 clear how it's relevant at this point.

19 ATC: Well, it also goes that he acted -- that he knew that he
20 was acting without authority, Your Honor. And those statements that
21 he made to the investigating officer that he was doing this to

1 demonstrate to people that he should be a Special Forces soldier,
2 that he was capable of traversing from one outpost to a FOB 30
3 kilometers away ----

4 MJ: But don't you already have ----

5 ATC: ---- without any technology ----

6 MJ: Don't you already have his statements to that exact
7 effect ----

8 ATC: Well, Your Honor ----

9 MJ: ---- that you can use as evidence and statements to other
10 people that he's made that you can use as evidence?

11 ATC: We do, Your Honor. But the motive -- and to some extent
12 that these ideas are so fantastic that, in isolation, they could be
13 almost unbelievable ----

14 MJ: Well, what?

15 ATC: ---- but this motive has been there for ----

16 MJ: What? Going on a fishing boat?

17 ATC: No, no, no. What he's telling people -- that he wants to
18 be like Jason Bourne, Your Honor.

19 MJ: Oh, okay.

20 ATC: Or that he's going to do this to show people that he should
21 be Special Forces. But this ----

1 MJ: But none of this has to do with Jason-Bourne-type things.
2 This is just ----
3 ATC: Well, Your Honor, working at the weapons range ----
4 MJ: I mean, youthful larks. How old was he when all of this
5 happened?
6 ATC: These were in the years immediately before he joins the
7 Army, Your Honor.
8 MJ: Well, that doesn't tell me anything.
9 ATC: Well, Your Honor ----
10 MJ: I was in high school in the years immediately before
11 joining the Army, too.
12 ATC: Yes, Your Honor.
13 ATC: We think these are late teens and early twenties.
14 MJ: Okay. And how old was he when he joined the Army?
15 ATC: He was approximately, 22, Your Honor. So it's ----
16 MJ: How old was he -- more importantly, how old was he when he
17 left -- allegedly left from his place of duty in Afghanistan?
18 ATC: That was in 2009, Your Honor. It was, I believe, shortly
19 before his 23rd birthday.
20 MJ: Okay. Go ahead.

