

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

UNITED STATES)	
)	
v.)	GOVERNMENT MOTION <i>IN LIMINE</i> TO
)	DETERMINE THE STATEMENTS OF
BERGDAHL, ROBERT BOWDRIE)	THE ACCUSED TO LIEUTENANT
(BOWE))	GENERAL KENNETH DAHL ARE
SGT, U.S. Army)	ADMISSIBLE IN THE GOVERNMENT
HHC, Special Troops Battalion)	CASE IN CHIEF
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	

14 June 2017

I. RELIEF SOUGHT

The Government requests the Court grant the Government Motion *In Limine* to Determine the Statements of the Accused to Lieutenant General Kenneth Dahl are Admissible in the Government Case in Chief in accordance with Rule for Court-Martial (RCM) 906(b)13. The Government requests oral argument.

II. BURDEN OF PERSUASION AND BURDEN OF PROOF

The Government, 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, an Infantryman, deployed to Paktika Province, Afghanistan, as part of Task Force Yukon, Combined Joint Task Force-82/Regional Command-East, deserted from his place of duty at Observation Post Mest (OP Mest).

The Accused was captured by enemy forces shortly after he departed OP Mest. As the Accused intended, he created a crisis where Task Force Yukon and other elements of the United States armed forces engaged in extensive search and recovery operations to recover the Accused. The Accused was released in May 2014 pursuant to a prisoner exchange.

The Accused was interviewed by LTG (then Major General) Kenneth Dahl on 6 and 7 August 2014. The Accused had counsel present at the time of the interview. Both the Accused's civilian defense counsel, Mr. Eugene Fidell, and his previously

detailed military defense counsel, CPT Alfredo Foster, were present during the interview. A rights waiver in the form of a DA Form 3881 was executed by the Accused.

During the interview with LTG Dahl, the Accused admitted, "I knew that if DUSTWUN¹ was called from a Soldier disappearing, that call goes not [only] all the way up to Army command, it goes to Air Force, it goes to Marines. It goes all the way back to the states. It goes to every high point and everybody finds out about it." [Enclosure, Statement of the Accused, Page 119, Lines 13-23]. In doing so, the Accused said he hoped to prove that he deserved to be a Special Forces soldier and to raise his concerns about his chain of command, and in order to do so, he "came up with a fantastic plan." *Id.* [Enclosure, Page 119, Line 11]. The Accused stated that in creating the DUSTWUN, the Army and his unit would "...put everything on hold (when he shows up at FOB Sharana). They are going to have to freeze everything. Even if they didn't think that I had anything legitimate to say, they would still have to do." [Enclosure, Page 127, Lines 12-23].

The Accused planned to leave OP Mest on the platoon's last rotation there before Afghan forces would take responsibility for the OP. In preparation for his departure, the Accused mailed his personal belongings home to his godmother because "he did not want to lose control of his items." [Enclosure, Page 174, Lines 1-12]. He also purchased traditional Afghan clothing and withdrew \$300. [Enclosure, Page 174, Lines 18-19]. He withdrew some of the funds in Afghan currency and some in U.S. currency. [Enclosure, Page 175, Lines 17-19]. He wanted Afghan currency in case he needed to bribe an Afghan or was robbed by an Afghan. [Enclosure, Page 175, Lines 3-13].

The Accused knew he had a shift the night he left OP Mest and would not have another guard shift until the following morning which "left a gap of nobody knowing I was gone until that next morning." [Enclosure, Pages 167-168, Lines 6-23]. The Accused stated that they would discover that he was missing when "the guy who is on guard would be like, 'Bergdahl's got to replace me,' and he would either be the one to go wake me up or he would call to someone and say to wake Bergdahl up because it was his turn for guard shift. [Enclosure, Page 168, Lines 8-12].

The Accused detailed to LTG Dahl how he left OP Mest during the early morning of 30 June 2009: "There's a blind spot... They are focused on the front and I was focused on the back... I wouldn't have been stupid enough to try to go back, because going back looks bad and I'm not going to risk that; that is just stupid. I knew it was a one-way route. When I left it was quiet... So here is the hill and here is Malak [village adjacent to the OP]. I went out through and I headed out into the alleyways and it took me somewhere behind the OP, behind the hill the OP was set up on. From there I started out into the desert and it was out there that I changed directions." [Enclosure, Pages 156-158].

¹ DUSTWUN is a designation used when a servicemember is duty status-whereabouts unknown.

Court-martial 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, UCMJ, and one specification of misbehavior before the enemy-endangering the safety of the unit in violation of Article 99, UCMJ.

IV. EVIDENCE

Statement of the Accused, 2014 Army Regulation 15-6 Investigation.

V. LAW AND ARGUMENT

The Accused's statements to LTG Dahl are admissible because they are relevant, corroborated by independent evidence, and are not hearsay. An authorized motion for appropriate relief under RCM 906(b)(13) allows a party to receive a preliminary ruling on admissibility of evidence. Whether to rule on an evidentiary question before it arises during trial is a matter within the discretion of the military judge.² See RCM 906(b)(13) Discussion.

a. The Accused's statements are relevant.

The Accused's statements are relevant to both the charge of desertion³ and the charge of misbehavior before the enemy.⁴ See Military Rule of Evidence (MRE) 401.⁵ The Accused's statements are relevant to the elements of the charge of desertion because the Accused admits departing OP Mest at night and that he did so knowing he would miss his guard shift the next morning. For the misbehavior before the enemy charge, the Accused's statements also demonstrate that he knew that by intentionally leaving OP Mest, alone and without authority, he would cause a DUSTWUN in which others would be endangered by searching for him in a combat zone.

² It is appropriate to make the determination at this time because Defense counsel indicated in the electronic docketing request that they intend to submit a motion to suppress the statements of the Accused. Additionally, the Government sought a stipulation regarding the admission of the statement and the Defense declined to stipulate.

³ The offense of desertion with intent to avoid hazardous duty or to shirk important service, UCMJ Article 85, is comprised of the following elements: (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." *MCM*, 2016, Part IV, para. 9b(2).

⁴ The offense of misbehavior before the enemy by endangering the safety of a command, unit, place, ship or military property, UCMJ Article 99, is comprised of the following elements: (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. *Manual for Courts-Martial*, 2016 edition [*MCM*, 2016], Part IV, para. 23b(3).

⁵ Evidence is relevant if it has "any tendency to make a fact [of consequence in determining the action] more or less probable than it would be without the evidence."

The Accused's statements are relevant to the requisite intent for each of the charges. In *United States v. Apple*, 2 U.S.C.M.A. 592, 594, the court looked at whether the servicemember had the intent to avoid hazardous duty and stated that, "intent to avoid some particular service existed in an Accused is a subjective question of fact depending on proof of his direct statements or circumstances reflective of his state of mind." *Id.* Specific intent required "may be inferred from evidence of an intentional absence and knowledge of the hazardous or important duty to be performed." *Id.* at 593. In *United States v. Oliver*, the court determined that intent can be drawn from certain circumstantial evidence such as: the Accused disposed of military property; the Accused was dissatisfied with his unit or military service; the Accused made remarks indicating the intent to desert, the Accused made preparations indicative of an intent not to return. 70 M.J. 64, 66 (2011).

In this case, there is no stronger and more relevant evidence than the Accused's own statement to prove his intent. The Accused stated he was aware that he had a guard shift in the morning and that he was purposely going to skip his shift to create a DUSTWUN situation. In fact, he knew that the Soldiers would realize he was missing when they went looking for him at the start of his assigned guard shift, and he would not be there. By intentionally creating a DUSTWUN situation, the Accused knew that he would be endangering OP Mest, Task Force Yukon, and those involved in the search and recovery missions. In the Accused's statements to LTG Dahl, he acknowledges that he was aware that not only the Army would look for him, but other branches of the armed forces as well. The Accused knew that Afghanistan was an inherently dangerous place. His duties included pulling guard duty at a post protecting other Soldiers while they slept from enemy forces. Further, the Accused had recently been part of a fire fight where enemy forces attacked his unit. The Accused was aware that causing people to go outside the wire on search and rescue missions would put them in danger. Therefore, the Accused's statements are directly relevant to both charges and should be admissible on the merits.

b. Corroboration of evidence.

"An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence...has been admitted into evidence that would tend to establish the trustworthiness of the admission or confession." MRE 304(c)(1). "Not every element or fact contained in the confession or admission must be independently proven for the confession or admission to be admitted into evidence in its entirety." MRE 304(c)(2). The Accused's statement will be corroborated by witness testimony and documentary evidence.

The Government will introduce independent evidence sufficient to establish the trustworthiness of the admissions to corroborate that the Accused did quit his assigned place of duty and had knowledge that doing so would endanger others. Witnesses from his unit will testify concerning the circumstances of his departure including the guard roster being posted, the Accused performing guard duty the evening before he went

missing, the discovery that the Accused was missing the following morning, and the dangers encountered by the witnesses in the subsequent search for the Accused. Witness testimony and documentary evidence of preparatory actions taken by the Accused will also be introduced, to include shipping home his laptop computer, leaving his personally assigned weapon in his tent, and withdrawing U.S. and Afghan currency from his bank account prior to his departure. Therefore, the Accused's statement is properly admissible because independent evidence will establish the trustworthiness of the statement.

c. The Accused's statements are not hearsay.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. MRE 801(c). An opposing party's statement offered against that party made in either the party's individual or representative capacity or adopted by the party is not hearsay. MRE 801(d)(2). A self-incriminating statement falling short of an acknowledgement of guilt, even if intended by its maker to be exculpatory, constitutes an admission. MRE 304(a)(1)(C). The Accused made the statements directly to LTG Dahl, the statements were given pursuant to an investigation into the circumstances of his departure from OP Mest, and the Government intends to offer the statements against the Accused. Therefore, the Accused's statements fall squarely into MRE 801(d)(2), as an opposing party's statement and are not hearsay.

VI. CONCLUSION

The statements of the Accused to LTG Dahl are relevant, corroborated by independent evidence, and not hearsay. Therefore, the Government respectfully requests this Court grant the Government Motion *In Limine* to Determine the Statements of the Accused to Lieutenant General Kenneth Dahl are Admissible in the Government Case in Chief.

FUSSNECKER.JE: Digitally signed by
RROD.BERNARD
[Redacted]
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 14 June 2017.

FUSSNECKER, JERROD B. Digitally signed by
JERROD B. FUSSNECKER
D. [REDACTED]
JERROD B. FUSSNECKER
MAJ, JA
Trial Counsel

1 instead of giving them that_[reasons not to trust us], then we should be
2 doing what we are telling these guys that we are here to do, then we should
3 go out and do it.

4 Q. Okay.

5 A. And as a private first class, from where I was standing, I
6 wasn't seeing that. And as a private first class, where I was
7 standing, I was seeing around me all this just stupid bullshit. And
8 I was seeing things heading in a very dangerous direction. So, I had
9 to do something. It had to be me doing it. And so I came up, happily
10 with my ignorance of a young--from a young man's mind and my
11 imagination, I came up with a fantastic plan.

12 One of the things that I talked about with one of the guys
13 was "DUSTWUN" because I saw it written somewhere and I said, "What is
14 DUSTWUN" because I didn't know what DUSTWUN was. And he said,
15 "DUSTWUN is what is called out when a Soldier is taken or when a
16 Soldier disappears or is taken." And I knew--so, I knew that if
17 DUSTWUN was called from a Soldier disappearing, that call goes not [only]
18 all the way up to Army command, it goes to Air Force, it goes to
19 Marines. It goes all the way back to the states. It goes to every
20 high point and everybody finds out about it. So, the idea was--the
21 question--the theory started out like this: What happens--if that
22 happens when a Soldier disappears, then that can be utilized.
23 Because I was looking at an environment. We were 10 to 20 miles

1 Pakistan, the distance is what? You know, it is ridiculous. You
2 can't cover that distance by natural physical body. I mean, the
3 people that used to travel the Silk Road had caravans where they came
4 from. Caravans of pack animals that carried everything with them.

5 So, the ideas was to--it was--literally, it was a
6 sacrificial--it was a self-sacrifice thing. I knew I was going to
7 get hit. I knew that when I showed up at that FOB, they were going
8 to hit me with everything. I was a PFC. I didn't care about losing
9 rank. I wasn't going to lose anything. But, what they were going to
10 do, they were going to charge me. Yeah, they could charge me. But,
11 what they were going to be forced to do was, they were going to be
12 forced to investigate the entire situation. What they were going to
13 be forced to do is, they were going to be forced to adjust my
14 platoon's command. What they were going to be forced to do is, they
15 were going to be forced to stop allowing my platoon to continue to
16 follow orders from this guy. They are going to have put everything
17 on hold. They are going to have to freeze everything. Even if they
18 didn't think that I had anything legitimate to say, they would still
19 have to do. Protocol would say, "This is a situation. You can't
20 just let that unit continue functioning as a normal unit. There is
21 issues here that have to be addressed, even if this guy doesn't have
22 anything to say. Even if he is completely delusional, we still have
23 to investigate it. We still have to figure out what is going on."

1 little knoll over, so that were within site of the TCP, of our guys.
2 There was a gap there, kind of, not really a saddle but a slow
3 incline from the top down to towards this OP. Then there was a small
4 ravine that was where the road was where they drove cars up. That
5 was one of the roads. There was another road that went onto the
6 side. So there was a little ravine there and that was the road out
7 to the top. The OP here that our guys were manning, it had view of
8 this area--here's Hesco barriers, here's the OP, they had a view out
9 here. The ravine went down here and there was a road that cut that
10 way. Now, guards at the OP, if they were off the sandbags that they
11 sat on, leaning out the window with their NODs, they had a fuller
12 view of what's out there. Sitting on the sandbags, slouching, and
13 staring out the window, your view doesn't pick-up for about a hundred
14 yards out. Maybe a little less. There's a blind spot. It's a huge
15 blind spot. They are focused on the front and I was focused on the
16 back. I know my platoon and I know the amount of the alertness that
17 was going on at that TCP. I knew the capabilities of the NODs, so I
18 knew that was a blind spot and I knew the Afghan guys didn't have
19 NODs and I knew that those guys in that particular bunker thing,
20 they're not going to be paying attention. I knew that from knowing
21 them and watching them from our OP or watching them from the TCP. I
22 could just see the way they conducted themselves. The only way that
23 they could be searching the area down in front of them was by

1 flashlight. So you could see them flinging the flashlight about.
2 The guys over here weren't worried about it because they had the
3 Americans right there and they knew we had NODs, so they weren't
4 worried about this part of it, because Americans were there. These
5 guys were obviously asleep and they weren't out there with
6 flashlights. That was--they blinded themselves by being relaxed, as
7 the Americans were there. We blinded ourselves because of the way
8 the OP was situated, the way the sandbags inside were situated, and
9 then falling into the habit of not being too concerned about what was
10 going on out there because that is just what happened. That is was
11 what was going on. So it was a one-way route. I wouldn't have been
12 stupid enough to try to go back, because going back looks bad and I'm
13 not going to risk that; that is just stupid. I knew it was a one-way
14 route. When I left it was quiet. I went up the hill. I got out
15 from----

16 CDC: What do you mean, "It looks bad?"

17 A. It looks bad, somebody coming towards the OP in the dark.
18 That looks bad [an enemy trying to get close].

19 CDC: Okay, I just wanted to clarify.

20 A. Whereas someone leaving the OP would look like [a friendly
leaving the OP]----

21 CDC: A good way to get shot, is what you're saying.

22 Q. So if you're on the U.S. OP and you're looking out over the
23 road at the fields you were walking to the left of that?

1 A. Looking out, I would have gone down to the left and hung a
2 left.

3 Q. Down the road and towards that----

4 A. The little town.

5 Q. Malak was the name of that town.

6 A. The closest--it was the closest place.

7 I would have gotten into the labyrinth of alleyways, but I
8 had a pretty good idea of what direction to keep going in. So I just
9 kept going through there and it took me out. So here is the hill and
10 here is Malak. I went out through and I headed out into the alleyways
11 and it took me somewhere behind the OP, behind the hill the OP was
12 set up on. From there I started out into the desert and it was out
13 there that I changed directions. I swung further north because that
14 was the belief----

15 I/O: Hold on a second, let me just grab one of these--I was
16 going to do this later, but we will do it now.

17 CDC: Should we just come in with it?

18 I/O: No, I'll just bring it out.

19 This is Exhibit 6. [Viewing Exhibit 6] This is your--the
20 COP, so down here is where you guys were. You had the HLZ, and you
21 had the vehicles, and this is route Audi, behind this one is Dodge
22 going this way. So, up here on the top of the hill is the U.S. OP
23 and there's the two Afghan OPs back this way. This was that dirt

1 A. I believe that truck had a .240 mount. It was either a
2 .240 or a .50 cal. We didn't have a .203 up there.

3 Q. Do you recall when your last shift was? You remember
4 leaving around midnight or so. How soon after your last shift was it
5 that you made your way up over the--through the--over the hill?

6 A. I think I finished my shift. It was Corporal Gaughan on
7 shift, about the time his shift was ending. It was after that ending
8 that the next person went up that I had left. What happened was, I
9 think I had finished my shift two hours before Corporal Gaughan's
10 shift. So that left a gap before it came to be my turn again. I

11 left a gap of--they wouldn't be calling for me until five or six the
12 next morning. That left a gap of nobody knowing I was gone until
13 that next morning.

14 Q. So you were on shift, Gaughan replaced you, Gaughan came
15 off shift, somebody replaced him, and that's about when you departed
16 and you would have had a good six or eight hours before anyone was
17 going to come looking for you for your next shift. It probably would
18 have been daylight by then. They wouldn't have seen you absent
19 because everybody would have been sleeping, or doing their own thing.
20 So we know when you were on guard.

21 You don't recall when your next shift was?

22 A. It was just the next morning.

23 Q. 0600? 0800? Something like that?

1 A. I think it was like five or six, possibly.

2 Q. Just to go back to the whole--you mentioned DUSTWUN
3 earlier. While you were putting together your plan and thinking all
4 the things you were thinking, you're also, I don't want to put words
5 in your mouth, but you're thinking at some point they are going to
6 know you are missing. You are expecting that point to come about the
7 time you are coming on guard shift.

8 How would they discover you are missing?

9 A. I wouldn't show up--basically, the guy who is on guard
10 would be like, "Bergdahl's got to replace me," and he would either be
11 the one to go wake me up or he would call to someone and say to wake
12 Bergdahl up because it was his turn for guard shift.

13 CDC: Just bear with me, when did the unit realize you weren't
14 there? Because that would disclose when the shift was.

15 I/O: Right.

16 CDC: I forget, we quickly looked at the AR 15-6----

17 Q. If you read the 15-6, you got a variety of answers and
18 that's because when they were asked the question it was like 11 days
19 later. In that 11 days, they had a very high OPTEMPO. So, when the
20 investigating officer was asking them, it was everywhere between 0630
21 and 0830.

22 A. That's about the right time.

1 steal from me. So my personal belongings were going to be one of the
2 first things I would lose control of is who deals with my personal
3 belongings. My computer, my journal, and a couple books. I had a
4 couple books that had sentimental value for me, just in the sense
5 that they had meaning to me. I took those and I mailed them home to
6 my Godmother, Kim. I understood that once I come to the FOB
7 entrance, they will come pick me up and right there I am going to be
8 arrested. I'm going to be in-processed from there and I am going to
9 lose all control over my own effects and anything else that I had.
10 The idea was to send those home, get them out of the way, so that
11 they were not stolen. That was just maintaining control over my
12 things that I had--that had sentimental value.

13 Q. So you mailed one box of stuff home to Kim.

14 A. I mailed one box----

15 Q. It was that stuff.

16 A. Yeah, my laptop, journal, a couple books, and my Kindle.

17 Q. You have read the open source reports as well as I have,
18 and some of it was in the 15-6, but you went to finance and withdrew
19 \$300?

20 A. Yeah.

21 Q. What was the plan--the purpose of that?

22 A. The plan was--running the simulation you try to take in--
23 one of the things I learned from reading is having cash to bribe

1 never hurts. When you are in a third-world country, dealing with
2 people, whether it's local or whether it's a sergeant, having cash
3 that you could use to bribe somebody for one reason or another never
4 hurts. Withdrawing that money was basically me covering a "what-if"
5 scenario. What if I'm walking along and some guy sees me, stops and
6 goes, "What are you doing?" I need options at that point. Having a
7 bunch of money and giving him a bunch of money, you know. Or if he
8 has a gun and wants to rob me, then if he gets a lot of money he is
9 going to be happy with himself and he's not going to be mad or
10 disappointed. He is going to take everything from me and he's going
11 to go, "Look what I got." And then he is going to go his way, not
12 wanting to tell anyone because he has a whole bunch of money. It was
13 to cover that, "what-if" situation.

14 Q. Did you leave it in dollars or did you convert some to
15 Afghani?

16 A. I got some Afghani.

17 Q. When you withdrew it from finance, you got some in Afghani
18 and some in U.S.

19 A. Some in U.S., yes.

20 Q. Was that all in your wallet when you departed then?

21 A. Yes.