

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

UNITED STATES	)	Motion to Clarify AE 49 or, in the
	)	alternative, for Reconsideration, and
v.	)	Proposed Instructions for Charge II
	)	and its Specification
SGT Robert B. Bergdahl	)	
HHC, Special Troops Battalion	)	
U.S. Army Forces Command	)	
Fort Bragg, North Carolina 28310	)	13 July 2017

RELIEF SOUGHT

The Defense respectfully moves for clarification of Appellate Exhibit (AE) 49. If our understanding of that ruling is incorrect, then we move in the alternative for reconsideration. We also submit proposed instructions to address the confusion caused by the poor drafting of Charge II and its Specification. Oral argument is not requested.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The Defense, as moving party, has the burden of proof. The standard of proof is a preponderance of the evidence.

FACTS, LAW, AND ARGUMENT

In a nutshell, the Defense believes that the Government must prove beyond a reasonable doubt that SGT Bergdahl *intentionally* caused search and recovery operations.

In AE 49, the Court rejected the Defense’s contention that the Government pleaded three independent allegations of misconduct in Charge II and its Specification. It found that “the use of the ‘and’ conjunction after each semi-colon and the interrelated dependence of the ideas expressed in each allegedly erroneously created independent clause, controls the meaning.” AE 49, at 4. Without prejudice to the position set forth in D APP 65, the Defense believes that the correct formulation of how the Charge should be understood is found on page 5 of AE 49: “[t]he government avers that the accused left his combat outpost intentionally, without authority and for the *purpose* of causing search and recovery operations, which he ultimately did cause.” (Emphasis added.) The Defense agrees that the Government must prove that SGT Bergdahl acted with the purpose of causing search and recovery operations.

The Defense's request for clarification is occasioned by paragraph 11 on page 4, in which the Court suggests that the Specification consists of ". . . dependent clauses that mean: The accused left OP Mest alone and without authority and, *thereby*, wrongfully caused search and recovery operations." (Emphasis added.) In an abundance of caution, the Defense wants to ensure that the word 'thereby' is not understood to make "wrongfully caused search and recovery operations" a mere byproduct of the alleged misconduct, leaving OP Mest alone and without authority.

If our understanding of the Court's ruling is mistaken, we respectfully request reconsideration in accordance with RCM 905(f). Leaving aside the incorrect use of semi-colons, as the Court noted, the Specification makes use of the "and" conjunction. The Specification does not, as is found in the model specification, contain the term "thus." Like the specification in *United States v. Carey*, the Government has chosen to omit the specific language of how the unit and location were endangered. See *United States v. Carey*, 15 C.M.R. 112, 114 (C.M.A. 1954). From the litigation of the case thus far, the Defense understands that the endangerment alleged emanates from the search and recovery operations that the accused is alleged to have intentionally caused. Adding omitted language to the Specification would produce something along the following lines: ". . . by intentional misconduct in that he left Observation Post Mest alone, and without authority, and wrongfully caused search and recovery operations, *thus exposing the unit to contact with enemy forces.*" If the Government wanted the phrase "wrongfully cause search and recovery operations" to be indicative of the endangerment rather than the *actus reus* of the pleaded offense, the Specification should have been framed as follows: ". . . by intentional misconduct in that he left Observation Post Mest alone and without authority, *thus causing search and recovery operations.*"

Changing "and" to "thus" or 'thereby' in the Specification would be a major change to which the Defense objects. The misconduct alleged would require a different *mens rea* and the Government's burden to prove the new formulation would be materially reduced. To defend against such a specification would add a substantial matter not fairly included in the Specification as previously preferred, misleading the accused. See RCM 603.

In *United States v. Reese*, an accused was charged with committing a lewd act in a specific manner. *United States v. Reese*, No. 17-0028, 2017 CAAF LEXIS 621, at \*4 (C.A.A.F. 2017). Two days prior to trial, the victim testified in deposition that the accused committed the act with his hand rather than his mouth, as had originally been charged. *Id.* at \*4. The Court granted the Government's request for a minor change over objection. *Id.* On appeal, finding a major change, the Court of Appeals noted that the changed lewd act with a hand could have readily been argued as accidental and that there was no such defense to the charge as initially alleged. *Id.* at \*9. The Court went on to state that, "[g]iven the different nature of the two offenses and the dissimilar defenses available for each, we are not persuaded the change was minor." *Id.* In this case, as noted above, the *mens rea* would be entirely different with the altered charge. As the Specification was originally cast, it was open to the Defense to argue that although SGT Bergdahl intended to leave OP Mest, he did not do so for the purposes of

causing search and recovery operations. That defense would not be available to him under the possible reformulation. As the Court found in *Reese*, “[w]hile changing the means by which a crime is accomplished may constitute a slight error under the appropriate circumstances, those circumstances are not present here.” *Id.*

In light of the above and the invitation the Court extended in AE 49 to make suggestions on how best to address the confusion the poor drafting may cause, the Defense proposes the following modifications to the instructions set forth in the *Benchbook*.

1. On or about 30 June 2009, at or near Observation Post Mest, Paktika Province, Afghanistan, it was the duty of the accused to defend Observation Post Mest and Task Force Yukon;
2. That the accused left Observation Post Mest alone, without authority, and caused search and recovery operations;
3. That such acts amounted to intentional misconduct;
4. That the accused thereby endangered the safety of the Observation Post Mest and Task Force Yukon;
5. That these acts occurred while the accused was before the enemy.

Definitions:

“Intentional misconduct” implies a wrongful intention and not mere negligence.

The Government alleges that the accused intentionally left Observation Post Mest alone, that he intentionally left without authority, and that he intentionally caused search and recovery operations. These acts must be considered as interrelated and dependent upon one another.

It is not enough for the Government to prove that search and recovery operations were caused or that it was foreseeable that search and recovery operations could have been caused. The Government must prove beyond a reasonable doubt that SGT Bergdahl intentionally caused search and recovery operations. If the Government does not prove that he intentionally caused search and recovery operations, you must find him not guilty of Charge II and its Specification.

The Defense suggests using the standard instructions for the definitions of “Before the Enemy” and “Enemy”.

CONCLUSION

For the foregoing reasons, if the Defense misunderstands the Court's ruling in AE 49, we respectfully request reconsideration. We also request the indicated proposed instructions.



OREN GLEICH  
MAJ, JA  
Defense Counsel

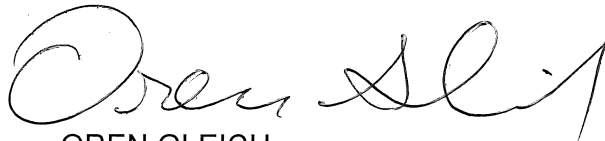
*For*

EUGENE R. FIDELL  
LTC FRANKLIN D. ROSENBLATT  
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  
Morgan, Lewis & Bockius LLP  
One Federal Street  
Boston, MA 02110-1726  
(617) 951-8775

CERTIFICATE OF SERVICE

I certify that I emailed the foregoing to the Court and Trial Counsel on 13 July 2017.



OREN GLEICH  
MAJ, JA  
Defense Counsel