

**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 DISMISS
BERGDAHL, ROBERT BOWDRIE)	CHARGE II
(BOWE))	
SGT, U.S. Army)	6 June 2017
HHC, Special Troops Battalion)	
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	

I. RELIEF SOUGHT

The Government requests that the Court deny the Defense Motion to Dismiss Charge II. Each of the acts alleged in the Charge constitute intentional misconduct under the meaning of Article 99, UCMJ.

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

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).

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

No evidence is required to resolve the motion.

V. LAW AND ARGUMENT

a. Intentional misconduct does not need to be independently criminal

There is no requirement that misconduct be independently criminal in order to form the basis for the intentional misconduct element of Article 99, UCMJ. Article 99, UCMJ reads, in pertinent part, “[a]ny 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 Manual for Courts Martial (MCM) ¶ 23.b.(3).

“Intentional misconduct” does not include a mere error in judgment. MCM ¶ 23.c.(3)(b).

Nowhere in any of the plain text of the statute or the Manual does it require “intentional misconduct” be independently criminal in order to serve as the basis for a charge under Article 99, UCMJ. By comparison, Articles 80 and 81, 10 U.S.C.S. §§ 880 and 881, respectively, make it an offense to attempt or conspire to commit offenses “under this chapter,” which CAAF has held extends to delineated offenses under Article 134. See *United States v. Norwood*, 71 M.J. 204 (CAAF 2012). Had Congress intended to limit the scope of Article 99 to only independently criminal conduct, it surely would have used the same language.

The Defense relies on *United States v. Carey*, 15 C.M.R. 112 (1954), and *United States v. Miller*, 44 C.M.R. 849 (A.C.M.R. 1971), as the principle support for the proposition that intentional misconduct should be construed to only include conduct which is independently criminal.

The *Carey* Court cited to the Analysis and Proof discussion in the 1921 Manual for Courts-Martial regarding the definition of “misconduct.” Although the Court condensed the quoted material, the full text is significant and reads,

“Misconduct,” like misbehavior, implies a wrongful intention, and not a mere error of judgment. It means in general “a transgression of some established and definite rule of action, where no discretion is left, except what necessity

may demand”; whereas on the other hand carelessness and negligence and unskillfulness are transgressions of some established, but indefinite rule of action where some discretion is necessarily left to the actor.” “Misconduct” is a violation of definite law; “carelessness is a forbidden quality of an act and is necessarily indefinite.”

The clear distinction that the drafters were making was between carelessness, negligence and unskillfulness in situations where discretion is left to the actor. In that context, the use of the phrase “violation of a definite law” cannot be read to mean that only conduct which is specifically proscribed by another section of the Code can form the basis for intentional misconduct.

It is notable that the *Carey* Court’s reference to a “violation of a definite law” comes from the analysis section of the 1921 Manual for Courts-Martial. The Manual has been changed by way of Executive Order numerous times since the 1921 version, most recently with the publication of the 2016 version. The language concerning “violation of a definite law” no longer appears anywhere in either the statute or the manual. That is not to say that the President has not included any guidance on the meaning of the phrase “independent misconduct.” The current Manual specifies that “intentional misconduct does not include a mere error in judgment.” Surely, if the Defense position were correct, this language would not be included, and instead read “intentional misconduct means conduct which is independently criminal.”

The rationale of the *Carey* and *Miller* decisions also do not support the Defense’s reading of the phrase “violation of a definite law” to narrow the scope of “intentional misconduct” to mean “independently criminal.” In *Carey*, the Court determined that a tank commander who was drunk was engaged in intentional misconduct, writing “[t]hat such intoxication constitutes intentional misconduct there is no doubt, for drunkenness is a violation of Article 134 of the Code, supra, 50 USC § 728, and, when it occurs while on duty, it is a violation of Article 112 of the Code, 50 USC § 706.” 4 C.M.A. at 116, 15 C.M.R. at 116.” The Court’s conclusion is clear; because the conduct was a violation of two Articles of the Code, there was *no doubt* that it constituted intentional misconduct. That is not the same, however, as a finding that *only* conduct which violates the Code constitutes intentional misconduct; indeed, were that the case, there would be no need for the *Carey* Court to conduct any analysis at all, beyond simply ensuring that the misconduct alleged was found somewhere in the Code.

Similarly, in *Miller*, the Court rejected the conclusion that “playing dead” was intentional misconduct, writing that “playing dead” “is not much different from ‘taking cover’; neither is misconduct, per se. Suffice it to say that we are not convinced beyond a reasonable doubt that the behavior of the accused, under the attendant circumstances, constituted intentional misconduct within the meaning of Article 99 of the Uniform Code of Military Justice (10 U.S.C. § 899).” *Miller* at 853. Once again, were the Defense position correct, the *Miller* Court would surely not have had to engage in any of this analysis; they could simply have compared the alleged conduct to the Code, and there would certainly have been no need to consider “the attendant circumstances” in order to make that determination.

In *United States v. Gross*, 38 C.M.R. 408 (CMR 1968), the Court held that where an Article 99, UCMJ specification implicates multiple forms of misbehavior the fact finders may be instructed on and consider each. Here, the specification encompasses both shameful abandonment under Article 99(a)(2) and causing false alarm under Article 99(a)(7). It would be an absurd result to find that the conduct alleged is sufficient to form the basis of an alternate form of misbehavior, but does not constitute “intentional misconduct” such that engaging the same conduct in a manner that has the added element of endangerment is not criminal.

b. Each of the acts alleged in Charge II constitute independent criminal misconduct

Even assuming that there is a requirement that intentional misconduct be independently criminal, each of the three acts specified in the Charge - that the accused left OP Mest alone, that he left without authorization, and that he wrongfully caused search and recovery operations - allege criminal misconduct.

Leaving OP Mest alone and wrongfully causing search and recovery operations both constitute dereliction of duty in violation of Article 92, UCMJ, and leaving without authorization constitutes desertion in violation of Article 85, UCMJ and absence without leave in violation of Article 86, UCMJ. More significantly, all three specifications are independently violations of other forms of Misbehavior Before the Enemy.

The Defense’s claims that these do not constitute intentional misconduct are based on requirements that they have simply invented, namely that the Government must allege each element of the underlying misconduct and, in an even stranger (but still wholly unsupported) assertion, that only specific intent crimes can constitute intentional misconduct.

“A charge and specification are sufficient if they, first, contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend, and, second, enable him to plead an acquittal or conviction in bar of future prosecutions for the same offense. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication.” RCM. 307(c)(3).

In the context of inchoate offenses (which, as discussed above and unlike Article 99, UCMJ, expressly do require that the misconduct at issue be an offense under the Code) CAAF has held that “[i]t is not essential to the validity of an inchoate charge that the offense that is the object of the agreement be described with technical precision.” *United States v. Norwood*, 71 M.J. 204 (CAAF 2012). “In order to state the elements of an inchoate offense under Articles 80 and 81, UCMJ, a specification is not required to expressly allege each element of the predicate offense.” *Id.*

The Defense claims that “[f]inally (and dispositively), because simple AWOL is not a specific intent offense, MCM ¶ 10.c.(3), it cannot, by definition, constitute *intentional* misconduct.” D App 65 at 13 (emphasis in original). The Defense offers no explanation for

why a general *intent* crime does not constitute intentional misconduct. Indeed, as drunk on duty is not a specific intent crime, were the Defense's position correct, the *Carey* court would have reached the entirely opposite result. In short, neither specifying each element of underlying misconduct nor limiting misconduct to specific intent crimes are actual requirements for Article 99, UCMJ.

c. Article 99, UCMJ is not void for vagueness as applied

There is a strong presumption that an Act of Congress is valid and the Supreme Court has "consistently sought an interpretation which supports the constitutionality of legislation." *Parker v. Levy*, 417 U.S. 733, 757 (1973). "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *Id.*

Parker also recognized that the UCMJ "cannot be equated to a civilian criminal code. It, and the various versions of the Articles of War which have preceded it, regulate aspects of the conduct of members of the military which in the civilian sphere are left unregulated. While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice essays more varied regulation of a much larger segment of the activities of the more tightly knit military community." *Id.* at 749. The existence of the general article under Article 134, UCMJ (which *Parker* upheld as constitutional) speaks to the scope of the UCMJ. Article 134, UCMJ reads,

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces
all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Additionally, under Article 134,

A breach of a custom of the service may result in a violation of clause 1 of Article 134. In its legal sense, 'custom' means more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by common usage have attained the force of law in the military or other community affected by them.

MCM ¶ 60.c.(2)(b). The fact that the general article of Article 134 exists, and has been held to be constitutional, makes clear that conduct which is not specifically enumerated by statute can nevertheless be criminal under the Code.

It strains credulity to suggest that the accused, or any soldier for that matter, would not

understand that abandoning a combat outpost alone, without authorization, and with the intent of causing search and recovery operations, is proscribed.¹ First, as discussed above, each of the acts alleged in Charge II fall within enumerated criminal articles under the Code. Second, each of these acts represent a failure to follow the most fundamental responsibilities of servicemembers. Appearing for, and carrying out, an assigned duty is the most basic function of a soldier, and the notion that failing to do so constitutes misconduct is blatantly obvious. Similarly, wrongfully causing search and recovery operations in a combat zone, which necessarily exposes other servicemembers to the dangers inherent in such areas, is a clear breach of a custom of service, and it cannot be rationally argued that it does not rise to the level of misconduct.

VI. CONCLUSION

The plain language of Article 99 does not require that intentional misconduct be independently criminal, and the holdings in *Carey* and *Miller* do not support that conclusion. Even assuming that there is such a requirement, all three allegations contained in Charge II are covered by other sections of Code. Finally, as applied, Article 99, UCMJ, is not void for vagueness, as the accused (and all soldiers) reasonably understand that the conduct is proscribed. For those reasons, the Government requests that the Court deny the Defense motion.

//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 6 June 2017.

//Original Signed//

JUSTIN C. OSHANA
MAJ, JA
Trial Counsel

¹ The Court need look no further than the Accused's own admissions, where he explains that he expected to be placed in the brig upon reaching FOB Sharana and that he expected to be given non-judicial punishment, in support of the conclusion that he was aware that his conduct was proscribed.