

**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 for Appropriate Relief: Bill of
BERGDAHL, ROBERT BOWDRIE)	Particulars
(BOWE))	
SGT, U.S Army)	
HHC, Special Troops Battalion)	20 July 2017
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	

RELIEF SOUGHT

The Government responds to the Defense’s Motion for Appropriate Relief: Bill of Particulars, dated 12 July 2017. The charge contains each element of the offense and sufficiently puts the Accused on notice of what he must be prepared to defend at trial. Accordingly, there is no need for a bill of particulars in this case and the Defense’s Motion should be denied.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The Defense, as the moving party, has the burden to produce evidence and establish facts in support of the requested relief by a preponderance of the evidence. Rules for Courts-Martial (“RCM”) 905(c)(1)-(2).

FACTS

On 30 June 2009, the Accused, an Infantryman, deployed to Paktika Province, Afghanistan, as part of Task Force Yukon, Regional Command-East (RC 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.

EVIDENCE

No evidence is required to resolve the motion.

LAW AND ARGUMENT

The test to determine whether a charge is sufficiently specific “is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.” *United States v. Williams*, 40 M.J. 379, 382 (C.M.A. 1994); *United States v. Schwarz*, 15 M.J. 109, 111 (C.M.A. 1983), quoting *United States v. Sell*, 3 U.S.C.M.A. 202, 206 (1953); see *Hamling v. United States*, 418 U.S. 87, 117 (1974). “The purposes of a bill of particulars are to inform the Accused of the nature of the charge with sufficient precision so that he may prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable the Accused to plead the acquittal or conviction in bar of another prosecution for the same offense when the specification itself is too vague and indefinite for such purposes.... A bill of particulars should not be used to conduct discovery of the Government's theory of a case, to force detailed disclosure of acts underlying a charge, or to restrict the Government's proof at trial.” See Discussion of RCM 906(b)(6).

The decision whether to grant or deny a bill of particulars is committed to the sound discretion of the judge. *United States v. West*, 16 C.M.R. 587, 1954 CMR Lexis 727 (A.F.C.M.R. May 27, 1954); *Peck v. United States* (C.C.A.) 65 F. (2d) 59; see also *Wong Tai v. United States*, 273 US 77, 82, 47 S Ct 300, 71 L Ed 545. In analyzing requests for a bill of particulars, courts have not confined themselves to the charge sheet. Rather, courts have taken into account other sources of information provided by the Government, including discovery materials. *United States v. Long*, 706 F.2d 1044, 1054 (9th Cir. 1983). The accused is only prejudiced if he is actually surprised at trial. *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990). Here, the charge is sufficiently specific. It addresses each of the elements of the crime and puts the Accused on notice of what he must be prepared to defend at trial. Furthermore, the Government has provided the Accused with the requisite discovery concerning the details of the charged offense.

A. The Accused is charged with both avoiding hazardous duty and shirking important service.

The Manual for Courts-Martial (MCM) (2012), pt. IV, para. 9c(2)(a) provides, “Whether a duty is hazardous or a service is important depends upon the circumstances of the particular case, and is a question of fact for the court-martial to decide.” *United States v. Smith* states that, “...*hazardous duty* and *important service* are not correlative, although they may exist at the same time....” 18 U.S.C.M.A. 46, 49 (1968). As charged, the finder of fact in this case could make the determination that the Accused acted with the intent to both avoid hazardous duty and shirk important service.¹ Alternatively, the finder of fact could find,

¹ The Military Judges’ Benchbook defines “hazardous duty” as “a duty that involves danger, risk, or peril to the individual performing the duty. The conditions existing at the time the duty is to be performed determine whether the duty is dangerous, risky, or perilous.” U.S. Dep’t of Army, PAM. 27-9, Military Judges’ Benchbook, instr. 3-9-2. It further defines “important service” as “service that is more significant than the ordinary everyday service of members of the Armed Forces.” *Id.*

through an exception, that the Accused acted only to avoid hazardous duty or only to shirk important service.

B. The terms “combat operations” and “combat patrols” in Charge 1 and “Task Force Yukon” in Charge 2 are not vague or overbroad.

MCM, pt. IV, para. 9c(2)(a) states that, “Hazardous duty” or “important service” may include service such as duty in a combat or other dangerous area. The Accused’s unit routinely went on “combat operations” and “combat patrols” as part of their unit responsibilities in a combat area. The Accused is aware of the locations, the nature, and the frequency of the operations and patrols that the Accused’s unit was required to perform. Discovery provided to the Defense also includes descriptions of the types of missions the Accused’s unit conducted in Afghanistan. The Accused, therefore, has been given adequate notice through the charge itself and through discovery what he must be prepared to meet at trial.

Article 99(3) states that a member of the armed forces who, before or in the presence of the enemy, through “intentional misconduct endangers the safety of any such command, unit, place or military property” is guilty of misbehavior before the enemy. The Government has specified the unit, Task Force Yukon, that the Accused is charged with endangering and further specificity is not required. The Defense claims that “[t]he factfinder must know whether the government alleges that SGT Bergdahl endangered all of Task Force Yukon, regardless of location, or only certain elements of that Task Force.” The Defense tries to distinguish between endangering certain elements of the task force as opposed to endangering the task force itself. However, the endangerment of any element of a task force does endanger the task force itself. The discovery documents provided to Defense contains information related to the subordinate units that comprised Task Force Yukon and dangers encountered by members of Task Force Yukon when searching for the Accused. Therefore, the Accused has been sufficiently apprised of what he must be prepared to meet at trial and a bill of particulars is not necessary.

CONCLUSION

The charge sufficiently puts the Accused on notice of the crimes of which he is accused. A bill of particulars would only serve the prohibited purposes of restricting the Government’s proof at trial and allowing the Defense to conduct discovery of the Government’s theory of the case. Therefore, the Government respectfully requests that the Court deny the Defense’s request for a bill of particulars.

Nicole K. Ulrich

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CPT, JA
Trial Counsel

CERTIFICATE OF SERVICE

I certify that I have served or caused to be served a true copy of the above on the Defense Counsel on 20 July 2017.

Nicole K. Ulrich

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