

LAW AND ANALYSIS

3. The decision to grant or deny a motion for a bill of particulars is within the sound discretion of the trial court. *Will v. United States*, 389 U.S. 90, 98-99 (1967). To establish an abuse of discretion requiring reversal, appellant must show actual surprise or prejudice at trial. *United States v. Mobely*, 31 M.J. 273 (C.M.A. 1990).

4. The discussion to Rule for Court-martial (RCM) 906(b)(6) provides in relevant part that:

The purposes of a bill of particulars are to inform the accused of the nature of the charge with sufficient precision to enable the accused to 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.

5. In *United States v. Williams*, 40 M.J. 379 (C.M.A. 1994), the Court of Military Appeals stated that "[i]n determining whether an indictment is sufficiently specific, the traditional test 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." *Id.* at 382.

6. The defense contends that the government has failed to plead with sufficient specificity because they have failed to identify which of the three factual allegations (combat operations in Afghanistan, guard duty at Observation Post Mest and combat patrol duties in Paktika Province, Afghanistan) relate to which of the two theories of liability (shirking important service and avoiding hazardous duty). They claim they cannot adequately prepare to defend unless they know which specific combat operations, guard duty and combat patrols were important and/or hazardous.¹

7. While it is true that the government has pled two different theories of liability and three different general factual allegations they intend to prove in order to establish those theories, such pleading is not inherently improper or confusing in this case.

¹ The request for a bill of particulars relating to reference to "Task Force Yukon" in Charge II has apparently been resolved by the government to the satisfaction of the defense. The government intends "Task Force Yukon" to mean all of Task Force Yukon and not simply the particular element of that Task Force to which the accused was assigned at any particular time. Thus, this part of the defense motion will not be addressed by this ruling.

The defense has been provided with extensive discovery. The charges contain all the elements of the offenses intended to be charged. They are pled with sufficient specificity to enable the accused to prepare for trial, avoid or minimize the danger of surprise at trial, and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense. The government is not required to disclose its theory of the case to the defense and a bill of particulars is not an appropriate device for the defense to use to discover such. Nevertheless, based upon the discovery provided in this case and the information provided by the government in response to this and other pleadings in this case, the government theory of liability for this offense should be plain and obvious to the defense. What is more, there is nothing about the pleading in Charge I that is so complex or nebulous that the defense can be said to be reasonably confused as to how to defend.

8. Finally, it is clear from the case law in this area that the government is not required to plead or even prove specific discrete operations, patrols, or duties in order to properly plead or prove this offense. In *United States v. Moss*, 44 CMR 298 (1971), the Court of Military Review held that an accused infantryman who was on orders for Vietnam but fled military control after he left AIT but before he was to have embarked for Vietnam from the replacement unit in California was properly found guilty of desertion with the intent to avoid hazardous duty. In *Moss*, the duty was no more specific than Vietnam. Here, the defense has been provided even more specificity in the form of three actual hazardous duties or important services the accused was liable to perform. Thus, the government has narrowed the field of possible duties the accused could have performed and which might be alleged to have been hazardous or important to those three -- more than they were required by law to do.

RULING

9. The Defense motion for a bill of particulars is DENIED.



JEFFERY R. NANCE
COL, JA
Military Judge