Custom Instructions for Desertion with Intent to Shirk

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A deployed wheeled vehicle mechanic goes home on Environmental Morale Leave (EML) from Afghanistan. He returns of his own accord, twenty-five days late. The company commander, well advised by his trial counsel, is waiting for him with DA Forms 31 and 2823. The Soldier waives his rights and explains his absence: he has spent the last month nursing his sick mother, babysitting his neighbor's sick children, filling a critical shortfall at a local soup kitchen, raising money for a wounded Soldiers' charity, and rescuing endangered animals from house fires. He always intended to come back once this noble work was done. The TC doubts the veracity of this tale, but is in no position to disprove it. The command decides on immediate court-martial. What crime should be charged?

The answer is desertion with intent to shirk important service under Article 85, UCMJ. This crime covers even short intentional absences from duty—if the culprit intended to shirk hazardous duty or important service. To prove this crime, the prosecution must clear three conceptual hurdles.

1. First Hurdle: Definition of "Important Service"

The *Military Judges' Benchbook* defines "hazardous duty" and "important service" as follows:

> Hazardous duty means 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.
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> Important service means service that is more significant than the ordinary everyday service of members of the Armed Forces.[1]

Whether service is important or duty is hazardous is a question of fact, and a failure to introduce evidence of these facts will be fatal to the Government's case. However, the *Manual for Courts-Martial* and case law flesh out these definitions far more than the *Benchbook* instructions.

Training exercises, drill, ranges, and practice marches are not usually important service, but overseas duty or even training or embarking for overseas duty may be.[2] Thus, the Court of Military Appeals held a resupply mission to bases in Antarctica to be important service, and a cook who fed the Sailors on that mission was performing important service.[3] Combat zone deployments are important service. "Deployment of any unit or individual during wartime carries with it the inference that the mission of that unit or individual is important in the war effort."[4] Missions that support deployed troops are important service, even if the supporting Soldier is not himself deployed. A medic treating Soldiers evacuated from combat zones was performing important service, even though his assignment was in Germany.[5] A Soldier who missed the preparatory train-up for a deployment was shirking important service, even if he intended to return to his unit in time for the actual deployment.[6]

On the bare language of the *Benchbook* instructions, the defense could argue that a wheeled vehicle mechanic in a combat zone was not performing "important service" —he was doing the same kind of vehicle maintenance he did every day back in the States. But the case law shows that an assignment supporting a combat deployment is "important" even if the work itself is commonplace. A deployed wheeled vehicle mechanic may have been performing hazardous duty—depending on just where he was. If he was supporting deployed troops, fixing their vehicles so they could carry out their missions, he was definitely performing "important service." When he intentionally failed to return on time, he was shirking it.

"Hazardous duty" cannot be assumed simply from the fact that the Soldier was serving in a designated combat zone or hostile fire area. The Army's administrative determinations as to whether service in a given area is dangerous (or will entitle the Soldier to hostile fire pay) are insufficient to determine whether the service performed by a given Soldier is, in fact, hazardous. In *United States v. Smith*, the Court of Military Appeals reversed a conviction for desertion with intent to shirk because the Government

[1] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK § 3-9-2.d. (1 Jan. 2010).

[2] MANUAL FOR COURTS-MARTIAL, pt. IV, ¶ 9c(2)(a) (2008) [hereinafter MCM].

[3] United States v. Merrow, 34 C.M.R. 45, 48–49 (C.M.A. 1963). The cook's service was "important" because his duty "was closely connected to the general well-being of the officers and men."

[4] United States v. Swanholm, 36 M.J. 743, 745 (A.C.M.R. 1992).

[5] *Id.*

[6] United States v. Kim, 35 M.J. 553, 554 (A.C.M.R. 1992).

failed to prove that the accused's specific duties in Vietnam, during the Vietnam War, would have been dangerous. The Army's designation of Vietnam as a hostile fire zone was, as a matter of law, insufficient to establish hazardous duty.[7] When both hazardous duty and important service are present, as is frequently the case in combat zone desertions,[8] desertion with intent to shirk important service should be the preferred charge, as it is the easier to prove.[9]

2. Second Hurdle: Intent to Shirk vs. Motivation

The defense may wish to argue that the Soldier's *intent* was not to shirk important service, but to nurse the sick and do community service. However, case law distinguishes between intent and motive.

Thus, in *United States v. Kim*, the appellant missed several weeks of predeployment training, which counted as "important service." Kim stated that he had gone to Korea to visit a sick relative, so that missing important service was not his true intent. The Army Court of Criminal Review upheld his conviction and explained its distinction:

> Appellant contended that the reason he left his unit was to visit his dying grandmother and resolve a problem regarding his citizenship. He claimed his absence was intended to be temporary, as evidenced by his purchase of a roundtrip ticket to Korea with a return date prior to his unit's departure for Saudi Arabia. The government contended the reason he left his unit was that appellant went to Korea to be with his girlfriend, a Korean woman married to an American soldier, and because appellant thought it unfair that he had to go to Saudi Arabia but could not reenlist. Appellant's actual motivation for leaving his unit is unimportant, if as a consequence of that unauthorized absence appellant had reasonable cause to know that he would avoid important service. *See United States v. Shull*, 2 C.M.R. 83, 88–89 (C.M.A.1952).[10]

The *intent* to stay away, combined with the *knowledge* that he was missing important service by staying away, was enough to establish his intent to shirk important service. The other things he hoped to accomplish, no matter what they were, were simply motives that could not negate this intent. As the Court of Appeals for the Armed Forces later explained:

> A person often acts with two or more intentions. These intentions may consist of an immediate intention (intent) and an ulterior one (motive), as where the actor takes another's money intending to steal it and intending then to use it to buy food for his needy family . . . . It may be said that, so long as the defendant has the intention required by the definition of the crime, it is immaterial that he may also have had some other intention . . . . The ultimate end sought . . . is more properly labeled a "motive."[11]

A Soldier who intentionally overstays EML from a combat zone knows that he is missing deployed service in support of the war effort. He therefore has the intent to shirk, no matter how virtuous his motives may be.

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[7] United States v. Smith, 39 C.M.R. 46, 48–50 (C.M.A. 1968).

[8] Hazardous duty and important service exist independently of each other. Both may occur together, or either may occur without the other. *Id.* at 49. Thus, a medic in Germany treating troops evacuated from combat is performing important service that is not hazardous duty. An ordinary airborne exercise probably is not "important service" but may be "hazardous duty" for the Soldiers who jump. A Soldier who absented himself with intent to avoid a jump would also be guilty of absence without leave (AWOL) with intent to avoid maneuvers or field exercises under Article 86, Uniform Code of Military Justice (UCMJ). The aggravating element is not found in Article 85, so that this kind of AWOL is not a lesser included offense of desertion with intent to shirk. In such a case, the Government should consider charging both crimes.

[9] If the prosecution also has evidence of desertion with intent to remain away permanently and chooses to charge this crime as well, that should be done in a separate specification. The crimes of desertion with intent to shirk and desertion with intent to remain away permanently are separate crimes and combining both charges in one specification is duplicitous. *Kim*, 35 M.J. at 554. While both crimes may both be proved in the same case for the same period of time, they have been held multiplicious for sentencing purposes. United States v. Cuero, 41 C.M.R. 398, 399 (C.M.A. 1970) (the CAAF has now changed this concept to "unreasonable multiplication of charges as applied to sentence," U.S. v. Campbell, 71 M.J. 19 (2012), but the practical result is likely to remain the same). The prosecution should avoid the temptation to charge the accused with one intent "or" (or "and/or") another, as such pleading can render a specification fatally defective. *See* United States v. Woode, 18 M.J. 640, 642 (N.M.C.M.R. 1984).

[10] *Kim*, 35 M.J. at 554–55. A defense may arise if the accused believed he did not actually have a duty to perform the important service. *See* United States v. Huet-Vaughn, 43 M.J. 105, 116 (C.A.A.F. 1995) (discussing United States v. Apple, 10 C.M.R. 90, 91–92 (C.M.A. 1953)). In *Apple*, the accused left his unit, which was engaged in hazardous duty in the Korean War, apparently because he believed his front-line service was over, and he may not have been guilty of desertion. In *Huet-Vaughn*, the accused knew she had important service to perform, but left her unit as a gesture of protest because she believed Operation Desert Shield was illegal. Her personal legal analysis had no bearing on the case, and she was guilty of desertion. Despite the broad language in *Kim* about "reasonable cause to know," desertion is a specific intent offense, so that the accused must have actual knowledge of the hazardous duty or important service to be guilty. United States v. Lanier, No. 20080296, 2009 WL 6843586, at *2 (A. Ct. Crim. App. Feb. 4, 2009).

[11] *Huet-Vaughn*, 43 M.J. at 113–14 (internal cites and quotes omitted).

The *Military Judges' Benchbook* does not make this distinction clear. It lists the element of intent and defines hazardous duty and important service, but does not explain how little intent is really required, or the irrelevance of motivation. This may allow the defense to sell (or the panel to invent unaided) a false notion of what "intent to shirk" really means.

3. Third Hurdle: "Desertion Is AWOL Plus Thirty Days"

Army Regulation 630-10 defines a "deserter" as a Soldier "dropped from the rolls of his or her unit . . . [w]hen absent without authority for 30 consecutive days."[12] In the minds of many Army leaders (and even a few Judge Advocates), this fact has been transformed into a myth: that a Soldier who has been absent for thirty days is a deserter within the meaning of the UCMJ, and that the difference between an AWOL Soldier and a deserter is determined by the length of his absence.

In fact, whether the desertion is with intent to remain away permanently or to shirk important service, the distinction between AWOL and desertion is the Soldier's intent. The length of the Soldier's absence may be *evidence* of his intent, but is not an element of the crime.[13] The thirty-day myth is not addressed in the *Benchbook* instructions. If counsel do not address it in opening statements, a panel could spend the entire trial listening to the evidence in light of the myth, and ignoring or forgetting the evidence that really matters.

4. Custom Instructions

To make sure the panel clears these conceptual hurdles, trial counsel prosecuting this crime should request custom instructions from the military judge, along these lines:

> **Important Service. "**Important service is something more than the everyday service performed by members of the Armed Forces. Important service may include service such as duty in a combat zone or other dangerous area, training in preparation for such service, or giving support to such service. Deployment of any unit or individual during wartime carries with it the inference that the mission of that unit or individual is 'important' in the war effort. Ordinary services such as drill, target practice, maneuvers, and practice marches are not usually 'important service.' However, servicemembers performing support roles such as medics and cooks are performing important service if the missions they support are important and their duties are closely connected with the well-being of the mission."
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> Basis: M.C.M. Section IV, ¶ 9.c.(2)(c); *United States v. Swanholm*, 36 M.J. 743, 745 (A.C.M.R. 1992) (medic treating Soldiers evacuated from a combat zone was performing "important service" even though the unit was not present in the combat zone; "deployment of any unit or individual during wartime carries with it the inference that the mission of that unit or individual is important in the war effort" is a direct quote from this case); *United States v. Kim*, 35 M.J. 553, 554 (A.C.M.R. 1992) (training in preparation for Operation Desert Shield was "important service"); *United States v. Merrow*, 34 C.M.R. 45, 48-49 (C.M.A. 1963) (cook aboard resupply mission for Antarctic stations was performing "important service" because his duty "was closely connected to the general well-being of the officers and men"). The *Military Judges' Benchbook* defines "important service," but the *Benchbook* definition is too vague and may confuse the members under the facts of this case. [Counsel should explain why, in light of the facts of the specific case.]
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> **Intent to Shirk versus Motivation.** "Whether a Soldier intends to shirk important service does not depend on his

[12] U.S. DEP'T OF ARMY, REG. 630-10, ABSENCE WITHOUT LEAVE, DESERTION, AND ADMINISTRATION OF PERSONNEL INVOLVED IN CIVILIAN COURT PROCEEDINGS 29 (13 Jan. 2006) (This definition of "deserter" is one of several provided on the same page.). Persons classified as "deserters" within the meaning of that regulation should be dropped from the rolls (DFR) and reported to the U.S. Army Deserter Information Point (USADIP) so that warrants for their arrest may be issued, but the regulatory definition should never be confused with the UCMJ definition. As noted by the *Military Judges' Benchbook*, purely administrative determinations, such as a commander changing a Soldier's status to DFR on DA Form 4187, may **NOT** be considered as evidence of actual intent to desert. DA PAM. 27-9, *supra* note 1, § 3-9-1.d. Form 4187 may be admissible as a business record—United States v. Williams, 12 M.J. 894, 897 (A.C.M.R. 1982)—but its probative value on the issue of intent is nil, and if the Government relies on this form, the defense will be set up for acquittal under Rule for Court-Martial 917.

[13] *See* MCM, *supra* note 2, pt. IV, ¶ 9c(1)(a), (1)(c)(iii) (offense of desertion with intent to remain away permanently is complete once the servicemember absents himself from his unit; length of absence is circumstantial evidence of intent); United States v. Thun, 36 M.J. 468, 469 (C.M.A. 1993) (Soldier guilty of desertion even though he was absent for only three hours); United States v. Williams, 10 C.M.R. 219, 222–23 (A.C.M.R. 1953) (Soldier not guilty of desertion even though he was absent for nearly eight months.).

motivation for doing so, and the fact that the Soldier may also have had some other intention or underlying motive is no defense to a charge of desertion with intent to shirk. For example, if a Soldier intends to stay away from his unit in order to visit sick relatives, or to take care of personal legal problems, and knows that he will avoid important service by doing so, then he has the intent to shirk important service. This is true regardless of what else he intends to do or what motivates him to stay away, and even if he means to return to his unit later on."

Basis: *United States v. Kim*, 35 M.J. 553, 554-55 (A.C.M.R. 1992); *United States v. Huet-Vaughn*, 43 M.J. 105, 113-15 (C.A.A.F. 1995); *United States v. Fazo*, 63 M.J. 730, 733-34 (C.G. Ct. Crim. App. 2006); *United States v. Lanier*, 2009 WL 6843586 at *3 (Army Ct. Crim. App. Feb. 4, 2009). The clarification of the term "intent to shirk" provided by these cases is not found in the *Military Judges' Benchbook.*

Desertion and Time. "Whether a Soldier who is absent without leave is also a deserter depends on his intent, and not on how long he has been away. In particular, whether he has been absent for thirty days does not determine whether he is guilty of desertion. A Soldier could be absent for only three hours, but if he intended to shirk important service or remain away permanently, he would still be guilty of desertion, even if he changed his mind or turned himself in afterwards. On the other hand, a Soldier could be gone for eight months, but if he never had the intent to shirk important service or to remain away permanently, he would not be guilty of desertion. You may consider the length of his absence as evidence of his intent to remain away permanently, together with the other circumstances surrounding his absence, but there is no specific number of days that converts an AWOL Soldier into a deserter."

Basis: *United States v. Thun*, 36 M.J. 468, 469 (C.M.A. 1993); *United States v. Williams*, 10 C.M.R. 219, 222-23 (A.C.M.R. 1953); *United States v. McCrary*, 1 C.M.R. 1, 7 (C.M.A. 1951); M.C.M. Section IV, ¶ 9.c.(1)(a), (1)(c)(iii). The undersigned frequently encounters the myth that a Soldier only becomes a deserter, or enters "deserter status," when he has been gone for thirty days (this is a distortion of the fact that a Soldier should be dropped from the rolls when he has been AWOL for thirty days). This myth is likely to cause confusion among the members, and prevent them from focusing on relevant evidence, if it is not explained to them. This is closely related to the instruction on DFR that appears on page 191 of the *Military Judges' Benchbook* (namely, that being dropped from the rolls is a purely administrative matter that does not determine whether a person is a deserter); the government would like to have this point clarified for the members. The government would particularly like to be able to refer to this fact in its opening statement, so that the members will not be thinking about fictitious thirty-day time limits throughout the case, but will instead be concentrating on the relevant evidence.

By filing the requested instructions early and in writing, the TC may persuade the defense to move from a panel trial to trial by judge alone, and may change the state of plea negotiations. In a judge alone case, the TC can simply cite case law in closing argument.

5. Conclusion

The short-term deserter with a tale of woe presents apparent ambiguities to the trial court. The right instructions can strip away these ambiguities, and free the prosecution to explain the true state of the law right up front to the tribunal. The Soldier who intentionally overstays his leave from a combat zone can then be convicted and sentenced like the deserter that he is.