

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

UNITED STATES	)	Defense Reply to Government
	)	Response to Motion to Dismiss
v.	)	(Unreasonable Multiplication
	)	of Charges for Findings)
SGT Robert B. Bergdahl	)	
HHC, Special Troops Battalion	)	
U.S. Army Forces Command	)	
Fort Bragg, North Carolina 28310	)	1 September 2017

The government has bet the farm on ACCA’s summary disposition in *Fosdyck*, urging that the case “clearly *controls*” and has a “*controlling* nature” (emphasis added). There are two problems with this. First, as a summary disposition, *Fosdyck* does not have the force of law within the Army and is not precedential. See ACCA Internal Rules of Practice and Procedure 18.1(a), 18.2, 15 January 2015. Second, *Fosdyck* is unpersuasive because it dealt with separate charges arising from separate acts, while the defense motion focused on when the same act is subject to multiple charges – the category of cases that present the most compelling need for UMC relief. *Bergdahl* is such a case; *Fosdyck* is not.

While the Court in *Fosdyck* noted that the specifications did not involve “*distinctly* separate criminal acts,” (emphasis added), its analysis shows that, in its view, *separate* acts were involved, and that the “gravamen” of the two charges stemmed from those separate acts. The first “gravamen” was that, while his base was literally under Taliban fire (unlike in *Bergdahl*), *Fosdyck* left the FOB perimeter, leaving other soldiers to defend the position. Had nothing else occurred, the government clearly could have made out a violation of Article 86. The Court then turned to what *Fosdyck* did *after* abandoning the perimeter. He obtained magazines, cleared a tent, and masturbated – *separate* acts that “did not conform to the standard of behavior required by a soldier engaging the enemy in combat,” and thus in the court’s view constituted misbehavior. The court noted that the Article 99 charge “is focused on” these separate “intentional acts, to include masturbation.”<sup>1</sup>

Had *Fosdyck* only left the perimeter, there would have been only one charge. That defines this case, in which only one act is charged or specified against the accused: leaving the wire. To be analogous to *Fosdyck*, SGT Bergdahl would have had

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<sup>1</sup> None of the three assignments of error for *Fosdyck* concerned whether the charged intentional misconduct for Article 99(3) must be “a definite violation of the law” as the *Carey* and *Miller* cases require. As a result, the summary disposition did not consider the question. If anything, *Fosdyck* is a cautionary lesson that Article 99(3) is susceptible to abusive charging when its controlling precedents are disregarded.

to have engaged in some separate act *after* leaving the wire. None has been charged or specified here.

Turning to the third *Quiroz* factor – whether the charges misrepresent or exaggerate the accused’s criminality – the defense offers two additional attachments.

The first is a news story showing the Army’s extremely low rate of prosecutions for combat-related desertions. Unlike the accuseds in those cases, SGT Bergdahl was never administratively classified as a deserter (see D APP 97, Defense Motion to Dismiss for Lack of Personal Jurisdiction, at 13), which the Army could have easily done on a low threshold of proof in 2009 or 2010. To do so in 2015 (after months when much of the public and the political world were brandishing pitchforks), unnecessarily second-guessed the judgment of SGT Bergdahl’s GCMCA in combat in 2009. That commander at least had an operational, rather than a political, imperative for his decisions.

The second attachment is the charge sheet in *United States v. Bales*. SSG Bales walked off his base, alone, *twice*, without authority in Afghanistan, in order to commit crimes against civilians. Yet the acts of walking off the base did not even merit mention on the charge sheet. Although we were denied discovery on specifics, it is not unheard of for Soldiers to walk off base in Afghanistan for any number of dubious or wrongful reasons, and none, to our knowledge, have ever faced court-martial for doing so. The main difference with SGT Bergdahl is that he was unlucky enough to have been kidnapped by enemy forces. The fact that he became a victim of a crime should not be the reason why he faces more severe charges than he would otherwise.

Regarding the fifth *Quiroz* factor – prosecutorial overreaching or abuse in drafting of charges – the defense attaches a transcript of the press statement that FORSCOM public affairs officer Colonel Daniel King made the day charges were preferred, 25 March 2015.<sup>2</sup> This event was one of the largest military press conferences in years. Colonel King was surely well-prepared by his lawyers. And yet he failed to mention that SGT Bergdahl is entitled to a presumption of innocence as he was required to do by AR 27-26 ¶ 3-6. This was not an innocent mistake: on nearly every publically accessible pre-trial filing with the Court (to include its response to the current motion), the *Bergdahl* special prosecution team over our objections has wrongfully branded SGT Bergdahl a “deserter” and failed to make any statement about his presumption of innocence, as required, again, by AR 27-26 ¶ 3-6. This smear campaign is not only a breach in the customs of military practice, but also corroborates points made in our motion about prosecutorial overreach and abuse.



FRANKLIN D. ROSENBLATT  
LTC, JA

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<sup>2</sup> Video of the announcement is available at [https://www.youtube.com/watch?v=2rVcGfq\\_R38](https://www.youtube.com/watch?v=2rVcGfq_R38)

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CERTIFICATE OF SERVICE

I certify that I emailed the foregoing to the Court and Trial Counsel on 1 September 2017.



FRANKLIN D. ROSENBLATT  
LTC, JA  
Defense Counsel

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# Army data shows rarity of desertion prosecutions



FILE - This undated file photo provided by the U.S. Army shows Sgt. Bowe Bergdahl. The U.S. Army says it has prosecuted about 1,900 cases of desertion since 2002. However, tens of thousands of soldiers have fled the service in the face of deadly combat, long and multiple deployments in Iraq and Afghanistan and strains on military families. The data reflects how rarely the military takes desertion cases to court. And it underscores the complexities of such cases as a top military commander begins to review the investigation of Sgt. Bowe Bergdahl. (AP Photo/U.S. Army, File) (The Associated Press)

By **LOLITA C. BALDOR** Associated Press

DECEMBER 24, 2014, 10:48 AM

**W**ASHINGTON (AP) — The U.S. Army has prosecuted about 1,900 cases of desertion since 2001, despite tens of thousands of soldiers fleeing the service in the face of deadly combat, long and multiple deployments in Iraq and Afghanistan and strains on military families.

The data reflects how rarely the military takes desertion cases to court. And it underscores the complexities of such cases as a top military commander reviews the investigation of Sgt. Bowe Bergdahl, who left his Afghanistan post in 2009 and was captured and held by the Taliban for five years.

More than 20,000 soldiers have been dropped from the rolls as deserters since 2006, Army data show. Totals for earlier years weren't available, but likely include thousands more.

Encl 1 to D APP 100 - #4



Labor Day Sale ends 9/5

SAVE NOW!

an in May in an exchange for five top Taliban

commanders who were imprisoned at Guantanamo Bay, Cuba.

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**This article is related to:** Armed Forces, Afghanistan, U.S. Army, Taliban, Unrest, Conflicts and War, Wars and Interventions, Dwight D. Eisenhower

Encl 1 to D-APP#100-6

## CHARGE SHEET

### I. PERSONAL DATA

1. NAME OF ACCUSED ( <i>Last, First, MI</i> ) <b>BALES, ROBERT</b>		2. SSN [REDACTED]	3. GRADE OR RANK <b>SSG</b>	4. PAY GRADE <b>E-6</b>	
5. UNIT OR ORGANIZATION  Headquarters and Headquarters Company 2d Battalion, 3d Infantry Regiment (Rear) (Provisional) Joint Base Lewis-McChord, Washington 98433			6. CURRENT SERVICE		
			a. INITIAL DATE <b>14 Jan 09</b>	b. TERM <b>6 Years</b>	
7. PAY PER MONTH		8. NATURE OF RESTRAINT OF ACCUSED  <b>Pretrial Confinement</b>		9. DATE(S) IMPOSED  <b>11 Mar 12 – present</b>	
a. BASIC	b. SEA/FOREIGN DUTY				c. TOTAL
<b>\$3243.30</b>					<b>\$3243.30</b>

### II. CHARGES AND SPECIFICATIONS

10. CHARGE: I VIOLATION OF THE UCMJ, ARTICLE 118.

SPECIFICATION 1: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, murder a female of apparent Afghan descent known as [REDACTED] by means of shooting her with a firearm.

SPECIFICATION 2: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, murder a male of apparent Afghan descent known as [REDACTED] by means of shooting him with a firearm.

SPECIFICATION 3: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, murder a male of apparent Afghan descent known as [REDACTED] by means of shooting him with a firearm.

SPECIFICATION 4: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, murder a female of apparent Afghan descent known as [REDACTED] by means of shooting her with a firearm.

(SEE CONTINUATION SHEET)

### III. PREFERRAL

11a. NAME OF ACCUSER ( <i>Last, First, MI</i> ) [REDACTED]	b. GRADE <b>O-4</b>	c. ORGANIZATION OF ACCUSER <b>3d SBCT (R)(P), 2d Infantry Division</b>
d. SIGNATURE OF ACCUSER [REDACTED]		e. DATE <b>1 June 12</b>

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 1 day of JUNE, 2012, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

\_\_\_\_\_  
*Typed Name of Officer*

**3d SBCT, 2d Infantry Division**  
*Organization of Officer*

**O-4**  
*Grade*

**Trial Counsel**  
*Official Capacity to Administer Oath*  
*(See R.C.M. 307(b) – must be a commissioned officer)*

\_\_\_\_\_  
*Signature*

12. On 1 June 2012, 2012, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me (See R.C.M. 308 (a)). (See R.C.M. 308 if notification cannot be made.)

\_\_\_\_\_  
Typed Name of Immediate Commander

17th Fires Brigade, Joint Base Lewis-McChord

Organization of Immediate Commander

O-6

Grade

\_\_\_\_\_  
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 0805 hours, 1 June 2012 at 17th Fires Brigade, Joint  
Designation of Command or

Base Lewis-McChord, Washington

Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE <sup>1</sup> \_\_\_\_\_

\_\_\_\_\_  
Typed Name of Officer

Commanding

Official Capacity of Officer Signing

O-6

Grade

\_\_\_\_\_  
Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY      b. PLACE      c. DATE (YYYYMMDD)

Referred for trial to the \_\_\_\_\_ court-martial convened by \_\_\_\_\_

\_\_\_\_\_, \_\_\_\_\_, subject to the following instructions:

By \_\_\_\_\_ of \_\_\_\_\_  
Command or Order

\_\_\_\_\_  
Typed Name of Officer

Official Capacity of Officer Signing

Grade

\_\_\_\_\_  
Signature

15. On \_\_\_\_\_, \_\_\_\_\_, I (caused to be) served a copy hereof on (each of) the above named accused.

\_\_\_\_\_  
Typed Name of Trial Counsel

Grade or Rank of Trial Counsel

\_\_\_\_\_  
Signature

FOOTNOTES: 1 — When an appropriate commander signs personally, inapplicable words are stricken.  
2 — See R.C.M. 601(e) concerning instructions. If none, so state.

SPECIFICATION 5: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, murder a male of apparent Afghan descent known as [REDACTED] by means of shooting him with a firearm.

SPECIFICATION 6: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, murder a female of apparent Afghan descent known as [REDACTED] by means of shooting her with a firearm.

SPECIFICATION 7: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, murder a female of apparent Afghan descent known as [REDACTED] by means of shooting her with a firearm and burning her.

SPECIFICATION 8: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, murder a female of apparent Afghan descent known as [REDACTED] by means of and shooting her with a firearm and burning her.

SPECIFICATION 9: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, murder a female of apparent Afghan descent known as [REDACTED] by means of shooting her with a firearm and burning her.

SPECIFICATION 10: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, murder a female of apparent Afghan descent known as [REDACTED] by means of shooting her with a firearm and burning her.

SPECIFICATION 11: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, murder a female of apparent Afghan descent known as [REDACTED] by means of shooting her with a firearm and burning her.

SPECIFICATION 12: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, murder a female of apparent Afghan descent known as [REDACTED] by means of shooting her with a firearm and burning her.

SPECIFICATION 13: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, murder a male of apparent Afghan descent known as [REDACTED] by means of shooting him with a firearm and burning him.

SPECIFICATION 14: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, murder a male of apparent Afghan descent known as [REDACTED] by means of shooting him with a firearm and burning him.

SPECIFICATION 15: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, murder a male of apparent Afghan descent known as [REDACTED] by means of shooting him with a firearm and burning him.

SPECIFICATION 16: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, murder a male of apparent Afghan descent known as [REDACTED] by means of shooting him with a firearm and burning him.

CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 80

SPECIFICATION 1: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, attempt to murder a male of apparent Afghan descent known as [REDACTED] by means of shooting him with a firearm.

SPECIFICATION 2: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, attempt to murder a female child of apparent Afghan descent known as [REDACTED] by means of shooting her with a firearm.

SPECIFICATION 3: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, attempt to murder a male child of apparent Afghan descent known as [REDACTED] by means of shooting him with a firearm.

SPECIFICATION 4: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, attempt to murder a female of apparent Afghan descent known as [REDACTED] by means of shooting her with a firearm.

SPECIFICATION 5: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, attempt to murder a male child of apparent Afghan descent known as [REDACTED] by means of shooting him with a firearm.

SPECIFICATION 6: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, with premeditation, attempt to murder a female child of apparent Afghan descent known as [REDACTED] by means of shooting her with a firearm.

CHARGE III: VIOLATION OF THE UCMJ, ARTICLE 128

SPECIFICATION 1: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, commit an assault upon a male of apparent Afghan descent known as [REDACTED] by shooting him with a loaded firearm and did thereby intentionally inflict grievous bodily harm upon him, to wit: a gunshot wound to the neck.

SPECIFICATION 2: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, commit an assault upon a female child of apparent Afghan descent known as [REDACTED] by shooting her with a loaded firearm and did thereby intentionally inflict grievous bodily harm upon her, to wit: a gunshot wound to the head.

SPECIFICATION 3: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, commit an assault upon a male child of apparent Afghan descent known as [REDACTED] by shooting him with a loaded firearm and did thereby intentionally inflict grievous bodily harm upon him, to wit: gunshot wounds to the thigh.

SPECIFICATION 4: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, commit an assault upon a female of apparent Afghan descent known as [REDACTED] by shooting her with a loaded firearm and did thereby intentionally inflict grievous bodily harm upon her, to wit: gunshot wounds to the chest and groin.

SPECIFICATION 5: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, commit an assault upon a male child of apparent Afghan descent known as [REDACTED] by shooting him with a loaded firearm and did thereby intentionally inflict grievous bodily harm upon him, to wit: a gunshot wound to the head.

SPECIFICATION 6: In that Staff Sergeant (E-6) Robert Bales, U. S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, commit an assault upon a female child of apparent Afghan descent known as [REDACTED] by shooting at her with a dangerous weapon, to wit: a loaded firearm.

SPECIFICATION 7: In that Staff Sergeant (E-6) Robert Bales, U.S. Army, did, at or near Belambay, Afghanistan, between on or about 1 February 2012 and on or about 29 February 2012, unlawfully strike a male of apparent Afghan descent whose name is unknown on the face and body with his hands and knees.

CHARGE IV: VIOLATION OF THE UCMJ, ARTICLE 134

SPECIFICATION 1: In that Staff Sergeant (E-6) Robert Bales, U.S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, wrongfully endeavor to impede an investigation in the case of United States v. Staff Sergeant Bales by damaging a laptop computer which conduct was prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

SPECIFICATION 2: In that Staff Sergeant (E-6) Robert Bales, U.S. Army, did, at or near Belambay, Afghanistan, on or about 11 March 2012, wrongfully burn bodies of apparent Afghan descent which conduct was prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

CHARGE V: VIOLATION OF THE UCMJ, ARTICLE 112a

SPECIFICATION 1: In that Staff Sergeant (E-6) Robert Bales, U.S. Army, did, at or near Belambay, Afghanistan, between on or about 1 January 2012 and on or about 11 March 2012, wrongfully use stanozolol a Schedule III controlled substance while receiving special pay under 37 U.S.C. Section 310.

SPECIFICATION 2: In that Staff Sergeant (E-6) Robert Bales, U.S. Army, did, at or near Belambay, Afghanistan, between on or about 1 February 2012 and on or about 11 March 2012, wrongfully possess some amount of stanozolol a Schedule III controlled substance while receiving special pay under 37 U.S.C. Section 310.

CONTINUATION SHEET 4 OF 4 FOR DD FORM 458, SSG ROBERT BALES, [REDACTED], 2d  
Battalion, 3d Infantry Regiment (Rear) (Provisional), Joint Base Lewis-McChord, Washington 95433

CHARGE VI: VIOLATION OF THE UCMJ, ARTICLE 92

SPECIFICATION: In that Staff Sergeant (E-6) Robert Bales, U.S. Army, did, at or near Belambay, Afghanistan, between on or about 1 November 2011 and on or about 10 March 2012, on divers occasions, violate a lawful general order, to wit: paragraph 2c, CENTCOM General Order Number 1B, dated 13 March 2006, by wrongfully consuming alcoholic beverages within the country of Afghanistan.

(END OF CHARGES)

Encl 2 to D APP 100-#12

# U.S. Army Forces Command announces actions in Bergdahl case

By U.S. Army Forces Command Public Affairs March 25, 2015

FORT BRAGG, N.C. -- The U.S. Army Forces Command has thoroughly reviewed the Army investigation surrounding Sgt. Robert Bowdrie ("Bowe") Bergdahl's 2009 disappearance in Afghanistan and formally charged Sgt. Bergdahl under the U.S. Armed Forces' Uniform Code of Military Justice on March 25, 2015, with "Desertion with Intent to Shirk Important or Hazardous Duty" and "Misbehavior Before The Enemy by Endangering the Safety of a Command, Unit or Place," and has referred the case to an Article 32 preliminary hearing.

Sgt. Bergdahl is charged under the Uniform Code of Military Justice with one count of Article 85, "Desertion with Intent to Shirk Important or Hazardous Duty," and one count of Article 99, "Misbehavior Before The Enemy by Endangering the Safety of a Command, Unit or Place." Army Sgt. Bergdahl disappeared June 30, 2009, from Combat Outpost Mest-Lalak in Paktika Province, Afghanistan, and was subsequently captured.

An Article 32 preliminary hearing is a legal procedure under the Uniform Code of Military Justice designed to determine whether there is sufficient evidence to merit a court-martial and is required before a case can be tried by a General Court-Martial. Legal experts often compare this to a civilian grand jury inquiry. The Article 32 hearing will take place at Fort Sam Houston, Texas. Specific scheduling details and procedures for news-media coverage of the hearing will be announced at a later date.

Following the Article 32 preliminary hearing and receipt of the Article 32 preliminary hearing officer's recommendations, the report will be forwarded to a General Court-Martial convening authority who may refer charges to a General Court-martial, refer the charges to a Special Court-martial, dismiss the charges, or take any other action deemed

Encl 3 to D APP 100-#13

appropriate.

Article 85 of the Uniform Code of Military Justice, "Desertion with Intent to Shirk Important or Hazardous Duty," carries a maximum potential punishment of a dishonorable discharge, reduction to the rank of E-1, total forfeiture of all pay and allowances, and maximum confinement of five years. Article 99 of the Uniform Code of Military Justice, "Misbehavior Before The Enemy by Endangering the Safety of a Command, Unit or Place," carries a maximum potential penalty of dishonorable discharge, reduction to the rank of E-1, total forfeiture of all pay and allowances, and possible confinement for life.

Under the Uniform Code of Military Justice, the specific legal elements for Article 85, "Desertion with Intent to Shirk Important or Hazardous Duty," are: (1) "The accused quit his (or her) unit or place of duty," (2) "The accused did so with the intent to avoid or shirk certain service," (3) "The duty to be performed was hazardous or important," (4) "The accused knew he (or she) was required for the duty or service," and (5) "The accused remained absent until a certain date."

The specific legal elements for Article 99, "Misbehavior Before The Enemy by Endangering the Safety of a Command, Unit or Place," are: (1) "The accused has a duty to defend a unit or place," (2) "The accused committed misconduct," (3) "The accused thereby endangered the unit or place," and (4) "The act occurred before the enemy."

Forces Command officials associated with this legal case cannot discuss or disclose the findings of the 2014 investigation while legal actions are pending out of respect to the judicial process, the rights of the accused, and to ensure the proceeding's fairness and impartiality. The Army's 2014 investigation into the circumstances of the Soldier's 2009 disappearance and capture in Afghanistan is currently being treated as potential evidence in the pending Article 32 preliminary hearing.

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Media may direct questions to the U.S. Army Forces Command Public Affairs Office at Fort Bragg, N.C., at telephone 910-570-7200 or 910-570-7217, or by E-mail to [john.p.boyce2.civ@mail.mil](mailto:john.p.boyce2.civ@mail.mil) or

*Encl 3 to D APP 100 - #14*

james.e.hinnant.civ@mail.mil

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