UNITED STATES MARINE CORPS
U.S. MARINE CORPS FORCES CENTRAL COMMAND
7115 SOUTH BOUNDARY BOULEVARD
MACDILL AIRFORCE BASE, FLORIDA 33621-5101

IN REPLY REFER TO:
5800
SJA
21 Dec 07

MEMORANDUM

From: Staff Judge Advocate, U.S. Marine Corps Forces, Central Command
To: Commander, U.S. Marine Corps Forces, Central Command

Subj: PRETRIAL ADVICE IN THE CASE OF UNITED STATES V. STAFF SERGEANT FRANK D. WUTERICH XXX XX 3321, USMC

Ref: (a) Article 32, UCMJ
(b) R.C.M. 405, MCM (2005 Ed.)
(c) Article 34, UCMJ
(d) R.C.M. 406, MCM (2005 Ed.)
(e) R.C.M. 306, MCM (2005 Ed.)
(f) CMC ltr 5800 JAM1 dtd 06 Jun 06 designating COMUSMARCENT as CDA for the Haditha cases

Encl: (1) Charge Sheet preferred on 21 Dec 06
(2) Article 32 IO's report of 02 Oct 07 w/ encls
(3) Trial Counsel ltr 5811 LSST-C dtd 12 Oct 07
(4) Defense counsel email dtd 15 Oct 07
(5) Additional Charge Sheet

1. Per references (a) and (b) an Article 32 pretrial investigation was directed into the charges and specifications in enclosure (1). Enclosure (2) is the Investigating Officer's (IO) report. The IO recommends dismissing all of the preferred charges and specifications, preferring the charges and specifications in (a) through (d) below, and referring them to trial by General Court-Martial. I agree in part and disagree in part.[1]

a. Seven specifications of Article 134 (negligent homicide), UCMJ under Charge I (e.g., one for each victim in house 2);[2]

[1] The IO recommends no charges against SSgt Wuterich for the shooting of the five Iraqis that exited a white car ("taxi") that stopped near the Marine's convoy. The IO also recommends no charges against SSgt Wuterich for the six deaths in "house 1."
[2] The IO has omitted one of the eight victims in house 2 for unknown reasons.

b. Four specifications of Article 92, UCMJ under Charge II; two specifications of willful dereliction of duty; (willfully failing to supervise and ensure his subordinates applied the rules of engagement (ROE) while clearing house 2; willfully failing to accurately report the circumstances he witnessed as innocents in house 2 were killed); and two specifications of violating a lawful general order (failing to report a ROE violation after witnessing LCpl Mendoza kill an unarmed man through a door; failing to report a suspected ROE violation when he learned or witnessed Marines under his direct authority kill unarmed women and children inside house 2);

c. One specification of accessory after the fact for negligent homicide (knowing that Mendoza and Tatum had negligently killed others, SNM assisted them by concealing and not reporting accurate details of events in house 2 in order to hinder their punishment) under Article 78, UCMJ, as Charge III;

d. One specification of misprision of negligent homicide (knowing that Mendoza and Tatum had committed negligent homicide of seven[3] individuals in house 2, SNM concealed the offenses by inaccurately reporting the circumstances, number and nature of casualties in house 2 and failed to make them known to civil or military authorities as soon as possible) under Article 134, UCMJ, as Charge IV.

e. The IO then provides an alternative option and recommends that should the original Charges be referred to a GCM, there should be changes to the language of some specifications. This recommendation is more aligned with my recommendation.

f. The IO concludes there is insufficient evidence for culpability as to any of SSgt Wuterich's actions relative to the deaths of the civilians at the white car (aka taxi cab) or in house 1. As to house 2, he believes the elements and theory of negligent homicide best fits the evidence of what occurred there because, "[w]hen a Marine fails to exercise due care in a combat environment resulting in the death of innocents, the charge of negligent homicide, not murder is the appropriate offense."

g. I concur in part and disagree in part with the IO's conclusions and recommendations. It is my opinion that the IO's analysis of the law misinterprets operational issues such as the proper use of force and the application and interpretation of the

[3] As noted at footnote 2 above, the IO has omitted one of the eight victims in house 2 for unknown reasons.

law of armed conflict (LOAC) and the ROE as presented at the hearing. His conclusions based on his analysis are in places inconsistent with the evidence that was presented at the hearing relative to the critical issues of positive identification, and application of the ROE and LOAC. The evidence presented at the hearing indicates the Marines involved in this incident were trained in, and routinely applied, the requirements of "Positive Identifications (PID)" and recognition of hostile act (HA) and hostile intent (HI) prior to utilizing force.

2. Having reviewed the enclosures, I offer the following advice pursuant to references (c) and (d):

a. The charges and specifications in enclosure (5) allege offenses under the Uniform Code of Military Justice;

b. The allegations of each offense in the charges and specifications in enclosure (5) are warranted by the evidence and are sufficient for referral to a General Court-Martial.

c. A General Court-Martial would have personal jurisdiction over the accused and subject-matter jurisdiction over the alleged offenses.

3. Recommendation as to Disposition.

a. In advising that the charges and specifications against the accused be referred to a general court-martial I made an independent and informed appraisal of the charges and evidence presented at the Article 32 investigation, to specifically include enclosure (3), the Government's objections to the IO's report. The defense counsel affirmatively declined the opportunity to submit matters in response to the IO's report. See enclosure (4).[4] I made my analysis consistent with the defined purpose and parameters of an Article 32 hearing as reflected in references (a) through (d).[5]

[4] Although past the time for submission of any matters under R.C.M. 405(j)(4), on 15 Oct 07 my office contacted the defense team to confirm they had not submitted any matters and to inquire if they desired to do so. LtCol Colby Vokey responded (enclosure (4)) on behalf of the defense team that the "defense has neither objections nor comments to the IO report."

[5] The Article 32 investigation is not a trial and the IO is not a trier-of-fact. The only requirement is that the Government produce so much evidence as is necessary to show probable cause. The IO may only evaluate the evidence before him - not what he thinks the evidence will be at trial or how that evidence will be interpreted by a reasonable trier-of-fact. His belief as to the sufficiency of evidence under the criminal standard of "beyond a reasonable doubt" is speculative at best and improperly assumes the role of

4. Training.

a. **PID.** The IO highlights what he perceives as an inconsistency between the training SSgt Wuterich received and its application. This position is contrary to the evidence presented at the Article 32 hearing which indicates that SSgt Wuterich received appropriate training in the Law of Armed Conflict, Rules of Engagement and Military Operations in Urban Terrain (MOUT), and understood them. The evidence also indicates he disregarded them. During his nationally televised statement on "60 Minutes," (evidence entered at the Article 32 hearing) his interviewer asked him, "[a]s you understood it, what were the rules for using deadly force?" A full 15 months since the incident and SSgt Wuterich still retained the lessons from his training and correctly responded, "[t]he biggest thing was 'P-I-D,' positive identification." When next asked, "what does that mean?" SSgt Wuterich again correctly responded, "[i]t means, you need to, ya know, positively identify your target before you shoot to kill." In other words, just as demonstrated at the Article 32 hearing (by the testimony of Capt Navin, Capt Capers, SSgt Fields, 1stLt Kallop, and via the ROE vignettes and the ROE card) SSgt Wuterich knew what "PID" was and that you "need to" have it before using deadly force.[6]

b. **Hostile Act (HA)/Hostile Intent (HI).** SSgt Wuterich has also demonstrated his trained knowledge of HA/HI. 60 Minutes asked SSgt Wuterich "[a]nd the kind of targets you were permitted to shoot to kill included what," to which he answered "[u]h, various things. Obviously anyone, uh, with a weapon, ya know, especially pointed at you. Hostile act, hostile intent was the biggest thing they had. So if they had used a hostile act against you, you could use deadly force. If, if ah, there was hostile intent towards you, you could use deadly force."[7]

c. **MOUT.** In his sworn testimony, 1stLt Kallop, SSgt Wuterich's Platoon Commander, explained the training and proper procedures that SSgt Wuterich and his Marines received. After

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trier-of-fact at a court-martial. Holding the Government to the trial standard of "beyond a reasonable doubt" at an Article 32 investigation unfairly and improperly requires the Government to "try" its entire case - without subpoena power for witnesses and documents and without a judge to make rulings of law or members to properly serve as trier-of-fact.

[6] IE 37, Video of March 18, 2007 "60 Minutes" interview at timestamp 6:13 - 6:31

[7] IE 37, Video of March 18, 2007 "60 Minutes" interview at timestamp 6:13 - 6:31

assessing the situation at Chestnut and Viper, then 2ndLt Kallop ordered then Sgt Wuterich to "clear south," which he described in an admissible, video-taped deposition under oath on 7 May 2007, as follows:

> "Q: All right. Now, had you provided training to Sergeant Wuterich as his Platoon Commander prior to 19 November 2005 with regard to what the term "clear south" means?
> A: Yes, sir.
>
> Q: Could you explain for the record exactly what type of training you had provided to Sergeant Wuterich with regard to what the term "clear south" means?
> A: In terms of what, sir? What do you mean?
>
> Q: Well, is that -- one of the questions would be was that an authorization to go into the homes and engage everybody within the homes?
> A: No, sir. It would have been clearing the house in terms -- I mean, if we hadn't positively ID'd anybody inside -- if we hadn't positively ID'd a hostile position at that point, he would have cleared each room looking for insurgents. If -- once that house has been cleared he can move on, either post overwatch and move to another house. We had cleared hundreds of houses up to that point and we had not --
>
> Q: Okay. Can you describe for the record exactly the type of training you provided as the Platoon Commander with regard to appropriate clearing techniques of civilian residences?
> A: I guess the best example, sir, would be the March Air Force Base Training when we did have rules of engagement scenarios, we cleared houses with insurgents inside, we cleared houses without -- with civilians inside."[8]

1stLt Kallop expounds on the training and experience specific to his platoon, to include then Sgt Wuterich, had:

> "Q: How many homes do you estimate that your platoon actually cleared [during Operation Rivergate in October 2005]?
> A: I want to say a few hundred, sir, but I can't say that for sure.
>
> Q: Okay. And during Operation Rivergate in October 2005, when you say they cleared a few hundred, did your platoon abide by the requirement for positive identification of a hostile act or a hostile threat while they were clearing those homes?
> A: Yes, sir.
>
> Q: Were there any civilians killed during any of the clearing operations that were conducted by your platoon in October 2005 as part of Operation Rivergate?
> A: No, sir."

[8] May 7, 2007, Deposition of 1stLt Kallop, IE 35, pp. 18-19

> Q: Would you do -- would you conduct training, or did you conduct training I guess is the way to ask this question, prior to 19 November 2005 while you were in Haditha with regard to positively identifying a hostile threat inside a residential structure prior to using lethal force?
> A: We went over the rules of engagement every time we gave an order, sir, and we gave a patrol order every time we left the wire.
>
> Q: All right. But I have a particularized question for you, Lieutenant, because you were their Platoon Commander, prior to 19 November 2005, did you train your platoon with regard to the requirement for positive identification of a hostile act or hostile threat within a residential structure before engaging anyone within the structure with lethal force?
> A: Yes, sir.[9]

After months of work-ups in MOUT-ROE-PID-HA/HI with both trained instructors and his platoon chain of command, after clearing hundreds of houses during Operation Rivergate without a civilian casualty, after receiving a patrol order and reviewing the ROE every time he left the wire, and after receiving "reset" training on ROE every 8-15 days in country - - upon receiving the order to "clear south" from the very officer who trained him on what that order meant and how to do it, SSgt Wuterich's final statement to his squad as they approached the first house (where no one had positively identified (PID) anything or anyone that evidenced a current hostile act or hostile intent) was, "shoot first, ask questions later."

It is my opinion that the evidence indicates SSgt Wuterich disregarded his training, disregarded his experience, and disregarded the ROE.

5. Taxi Cab.

a. SSgt Wuterich told "60 Minutes" that as the convoy approached the intersection of Chestnut and Viper from the east, a white sedan with five occupants approached from the "west." It was standard operating procedure (SOP) for convoys to instruct civilian vehicles to pull off to the side to allow the convoy to pass. In his sworn statement LCpl Sharratt stated he so instructed this vehicle - and it complied. Subsequently the IED exploded under vehicle 4. SSgt Wuterich stated the explosion was "huge" and "rocked the truck" (his lead vehicle). He stated he was absolutely certain it was remotely detonated. SSgt Wuterich's nationally televised statement was that almost immediately after the IED explosion, he heard 2-3 shots of AK-47

[9] Kallop deposition, IE 35, pp. 20-21

fire coming from the "north." Sgt DelaCruz ordered the 5 men out of the taxi - and they complied.[10] They stood together, unarmed, next to the taxi. No weapons were ever found on their person or in the taxi. When asked how much time had passed from the moment of the explosion until the time he killed these men, SSgt Wuterich testified, "I'd say about two minutes."[11]

b. In his "60 Minutes" interview, SSgt Wuterich stated that his "first thought" after receiving fire from the "north" was "maybe this [vehicle packed with 5 occupants] was a car bomb, maybe these guys [coming from the "west" and heading towards the IED and pulling over as instructed 100m from it and its "huge" blast radius] had something to do with this IED." SSgt Wuterich told "60 Minutes" that the Iraqi's know the drill, that they're supposed to get down on the ground, that Sgt DelaCruz was yelling at them to get down and that "these individuals were doing none of that" and that "they got out of the car, as they were going around, they started to take off, so I shot them." Footnote 1 to the IO's report states, "Forensic analysis suggests one of the persons may have been in movement or kneeling when shot. The remaining 4 persons were deemed 'highly unlikely' that they were running or moving away." The forensic conclusions are also supported by Sgt DelaCruz' version of the event.

c. There was no PID, HA/HI. 60 Minutes asked "[h]ow do these men, running away from the scene as you describe them, square with hostile action or hostile intent?" SSgt Wuterich responded:

> "Because hostile action, **if they were the triggermen**, would've blown up the IED, and which would also constitute hostile intent, but also at the same time, you know, the military age males that were inside that car, you know, the only, the only vehicle the only thing that was out, that was Iraqi that was out that morning was them. They were 100m away from that IED. Those are the things that went through my mind before,

[10] Sgt Wuterich's stmt dtd 21 Feb 06 (IE 36, p.4) as well as the testimony of Sgt DelaCruz and Special Agent Brady at Wuterich's Article 32 hearing all have the 5 occupants exiting the taxi of their own volition after the IED blast, and congregating on the passenger side while looking towards the blast site.
[11] The evidence indicates that following the IED blast, SSgt Wuterich ran to the rear of the convoy to assess the damage and then back to the front of the convoy then shooting the 5 men. In not shooting the 5 men immediately after the blast it suggests SSgt Wuterich had sufficient time to deliberate on his decision to shoot these victims and determine if they were in fact armed and/or exhibiting hostile act or intent.

before I pulled the trigger. And, you know, that was, that was positive identification."[12]

"If they were the triggermen." SSgt Wuterich stated in his "60 Minutes" interview he shot these men, in the back, as they were running away. Neither SSgt Wuterich nor any witness or evidence demonstrates any reasonable certainty these five men committed a hostile act or demonstrated hostile intent. They were driving towards the location of the IED and pulled off the road in compliance with the convoy's instruction to do so. Rather than drive away after the explosion, they remained a full two minutes, through purported SAF fire coming from the north, and either exited on their own or complied with instructions to exit the taxi - unarmed. Based on the evidence, there was no greater reason to suspect the taxi of being a VBIED than there was for any other vehicle; in fact less since it only takes one person to drive and this vehicle was filled with five occupants. While this vehicle was the only one within 100m, there were ample potential hides in nearly every direction - to include the "north" where the only SAF (2-3 rounds) had just come from. Also critical is the fact that the forensics indicate, and the testimony of Sgt DelaCruz states that the Iraqi men were not running away.

d. The IO's opinion is the Government has satisfied each of the elements for the alleged offenses relative to the shooting of the five victims at the taxi except for showing the use of deadly force was "unlawful" and concludes, "On the whole of the evidence, I believe the actions of SSgt Wuterich were reasonable and lawful under the circumstances presented to him...."[13] He adds SSgt Wuterich was within the ROE because these facts are similar to vignette scenario 13, below.[14] A plain reading of the vignette is that this differs greatly from the actual events of that day.

ROE Vignette Scenario 13	**19 Nov 05 Haditha, Iraq**
Convoy suffers IED attack	Convoy suffers IED attack
Location is unpopulated	Location is MSR in populated

[12] IE 37, timestamp 9:45-10:36 (underline emphasis added).
[13] Encl (2), p.18
[14] IE 83, pp58-59. Scenario 13: The convoy you are in suffers an IED attack on the unpopulated outskirts of Baghdad. As you focus your attention on the location of the IED, you notice two individuals in civilian clothes and no weapons jump up out of fighting hole about 40 meters away from where the IED exploded and run away from you. You quickly ascertain the individuals were within command-detonation range of the IED. What can you do? A: You may engage the individuals with the necessary force, including deadly force, to prevent their escape.

outskirts of Baghdad = no one else around	urban neighborhood of Haditha = civilians and potential triggermen in every direction
You notice two individuals in civilian clothes and no weapons jump up out of "fighting hole" about 40m away from where the IED exploded and run away = only possible triggermen fleeing scene immediately after blast [note also that the model answer uses Escalation of Force (EOF) to detain these highly suspect individuals to prevent their escape]	You see a taxi headed towards your convoy 100m to the west. You direct it to pull over and it complies. After the IED you receive SAF from the north. The occupants exit on their own and wait or you direct the occupants to exit and all 5 unarmed men comply. While yelling at the men to get down, you believe they are starting to run = no reasonable certainty these men, among all the civilians within command detonation range, had hostile intent or committed a hostile act (forensics show 1 may have been kneeling or in motion and the other 4 were stationary)
PID because the IED was command detonated and the only possible triggermen are the two individuals immediately fleeing their fighting position, e.g., use necessary force, up to and including deadly force, to detain b/c one can be reasonably certain these are the triggermen	NO PID because the IED was command detonated by unknown source, there are numerous possible detonators or locations, the taxi was heading into the blast radius until ordered to pull over (complies), and instead of immediately fleeing a fighting position, the 5 unarmed occupants remain stationary a full two minutes following the IED blast after exiting as ordered and forensics and testimony show they were stationary

It is my opinion that the IO's "beliefs" are not supported by the evidence presented at the Article 32 hearing and that a trier-of-fact could reach a different conclusion. Additionally, the IO's report does not reflect or apply the LOAC principles of proportionality, discrimination, or the requirement to limit collateral damage.

e. In his report it appears the IO failed to consider or failed to apply any of the following ROE principles that were in effect on 19 November 2005 and introduced at the Article 32 hearing: "ROE help minimize risk to innocents;" proportionality includes "using only that amount of force necessary to negate the threat;" "does the collateral damage outweigh the military advantage gained in neutralizing the threat;" and "is it necessary to use force to defend yourself."[15] The IO questions the training SSgt Wuterich received, but the evidence presented as the Article 32 hearing indicates that the training was appropriate, clear and that it was understood by SSgt Wuterich, in that if in a TIC or Self-defense situation, you must PID an individual with HA or HI. Examples of hostile acts include "shooting at you, shoving, grabbing your weapon (includes force used to impede mission accomplishment)."[16] Hostile intent factors to consider include: "What are they doing?" (riding in a taxi cab, pulling over and waiting as directed, exiting as directed); "What is in their hand?" (nothing); "Is it a known enemy area of operations (AO) or tactic, technique and procedure (TTP)?" (yes on AO as was entire city of Haditha, no on TTP since IED detonators do not normally head into the IED blast radius or loiter after the detonation and VBIEDs do not normally employ fully occupied taxis); "Are they carrying any weapons?" (the occupants of the car were not).[17]

f. The ROE training SSgt Wuterich received also specifically asks, "Is there an innocent explanation for what you are observing?"[18] E.g., riding in a taxi at the wrong place at the wrong time? Nowhere does SSgt Wuterich indicate he followed his training and considered an innocent explanation. Self-admittedly, his "first thought," (and apparent only thought) was this vehicle was a VBIED or had something to do with the IED. It is my opinion that the Government has produced more than sufficient evidence that provides probable cause for referring the additional charges and specifications at enclosure (5) (relative to the shooting of the five unarmed men at the taxi) to a General Court-Martial. In consideration of all the factors, I recommend that charges of voluntary manslaughter and dereliction of duty be referred vice the original charges of murder.

6. House 1.

[15] IE 83, pp.4, 13
[16] IE 83, p.15
[17] IE 83, p.18
[18] IE 83, p.19

a. The IO states, "[t]he Government counsel argued that positive identification of occupants of the room was required under the rules of engagement. Such a theory, requiring positive identification before engaging targets inside House 1 is clearly contrary to the training and experiences of the Marines in Third Battalion, First Marines."[19] I disagree with this statement by the IO as it misinterprets and misapplies the evidence relative to the ROE and fails to consider the entirety of the contrary evidence produced at the Article 32 and discussed above. The evidence at the Article 32 presented that PID is an integral part of the ROE and is always required. The evidence is clear that this platoon had previously cleared hundreds of houses - deliberately and without innocent casualties - during Operation Rivergate. On that very day, Sgt DelaCruz's team cleared three houses to the north of the blast site - deliberately and without firing a shot - at the same time SSgt Wuterich's team was clearing south. Sgt DelaCruz testified SSgt Wuterich told him on 15 November 2005 if his squad were struck by an IED he would kill everyone in the vicinity to "teach them a lesson." SSgt Wuterich's last words to his team prior to engaging house 1 was "shoot first, ask questions later." Then 2ndLt Kallop specifically trained and reinforced appropriate ROE and MOUT procedures with then Sgt Wuterich, to include the exact expectations and meaning of "clear south." (See footnotes 5 and 6).

b. SSgt Wuterich's "60 Minutes" interview shows that he well knew what PID was and that you "need to" have it before using deadly force. While the IO fails to make the distinction, it is clear this was not Phase III combat operations as in Fallujah but Phase IV SASO and that this unit was properly trained for SASO. 1stLt Kallop's testimony indicates that this platoon had trained, re-trained and reset on ROE continuously and had cleared hundreds of houses without a single innocent casualty. The evidence indicates the convoy had come from the east when the last vehicle was hit by a command detonated IED, purportedly received 2-3 SAF rounds from the north, stopped and then engaged all of the unarmed occupants of a taxi to the west, heard 2-3 rounds of SAF of either AK-47, M16 or both from the west shortly after Kallop arrived (but no one ever heard any sustained fire) and that Kallop, now 20 minutes after the IED, ordered SSgt Wuterich to "clear south." The record reflects that no one ever saw a triggerman. No one ever saw a muzzle flash. No one ever identified a point-of-origin for the SAF. In other words, it's clear no one had any idea who was shooting or where

[19] Encl (2), p.18

they were located. 1stLt Kallop's testimony indicates he expected SSgt Wuterich to attempt to identify insurgents when clearing houses to the south, detain them and move on. Instead, SSgt Wuterich told his squad to "shoot first and ask questions later." As a result, the "clearing" of house 1 commenced with Sgt Salinas kicking in the front door and shooting a 66 year-old grandmother.[20]

c. The IO opines:

> "Time and again I read statements of Marines saying they didn't or wouldn't use additional positive identification in a troops in contact, MOUT assault or declared hostile house situation. The term 'hostile house' does not exist in Capt Navin's presentation, however clearly it exists in the minds of the Marines who are expected to be facing the enemy at the tip of the spear."

The IO made no distinction between status-based hostility and conduct-based hostility, instead using them interchangeably. Positively identifying a person as exhibiting hostile intent or committing a hostile act is conduct-based hostility, as occurs in troops-in-contact and self-defense situations. Designating or declaring a structure, a force or a location as "hostile" is status-based hostility (such as all non-coalition aircraft in a no-fly zone), and coalition forces may engage these designated targets with lethal force regardless of conduct. The authority to declare or designate a target as "hostile" (status) which has not exhibited hostile acts or intentions (conduct) is well above the battalion level and certainly above the sergeant level. The evidence presented at the Article 32 is clear that if, as the IO says, these Marines had "hostile house" in their minds, they didn't get it from their trainers or their chain of command and the evidence indicates there was no conduct-based activity to even remotely consider either house 1 or house 2 "hostile." SSgt Wuterich stated in his "60 Minutes" interview that he never observed any weapons or insurgents inside of House 1 firing at him or his Marines prior to participating in the engagement and killing of the unarmed civilian occupants of House 1.

d. In other words, there was no reason for declaring either house (and all their occupants) "hostile," and SSgt Wuterich's personal and arbitrary decision to treat them as such ("shoot first, ask questions later") is without legal authority or

[20] IE 36: Wuterich stmt dtd 21 Feb 06, p. 4; LCpl Mendoza testimony at SSgt Wuterich Article 32, pp. 25-26

justification and in direct contravention of his training and the ROE. These houses are someone's home in a neighborhood, and not themselves military targets. The individual occupants, whether a family, insurgents, or both, may only be engaged based on individual conduct. This is not a rewrite of, or conflict within, the ROE but exactly the type of discipline and restraint intended and required and intended by the LOAC and ROE.

e. I agree with the IO and find equally incredible SSgt Wuterich's statements that he never fired his weapon in either house 1 or house 2, and I do so for similar reasons, e.g., the other team members testified SSgt Wuterich fired his weapon and SSgt Wuterich was the senior member present.[21]

d. Based on the available evidence I recommend referral of charges against SSgt Wuterich relative to house 1 for dereliction of duty, aggravated assault and reckless endangerment vice murder as reflected on enclosure (5).

5. House 2.

a. The evidence indicates that upon leaving House 1, SSgt Wuterich knew he and his Marines had just killed unarmed women and children. No collateral damage or battle damage assessment was made in an effort to avoid further innocent casualties.[22] The evidence presented at the Article 32 hearing is clear. SSgt Wuterich's team had received no SAF as they walked to House 2. They had neither seen, nor heard, any fire or muzzle flash from House 2. No one in the team had observed any hostile acts or intent from anyone in House 2. They had not positively identified any of its occupants as insurgents. Therefore there was no basis to consider house 2, or anyone in it, "hostile." Contrary to his training, experience and the Rules of Engagement, SSgt Wuterich ordered LCpl Mendoza to shoot whoever came to answer the door, e.g., to use deadly force in the absence of PID/HA/HI. This action commenced the "clearing" of House 2 and resulted in the immediate death of 43 year old Younis Salim Rasif through the kitchen door as he began to open it.[23]

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[21] The IO states, "I find it incredible that SSgt Wuterich chose to stand by while his Marines entered and engaged in clearing the House with grenade and rifle fire." Encl (2), p.18

[22] The IO summarizes the SASO training testimony of Capt Capers as follows, "When a Marine makes a decision to use deadly force causing collateral damage, the scenario is stopped and discussion about the choice, why it was made and how to employ a better approach reducing collateral damage is explained." Encl (2), p.19

[23] It is unlikely that an insurgent would answer a knock at a door or a ringing doorbell; however a homeowner would.

b. The IO repeatedly asserts SSgt Wuterich's actions conformed to his training and that this battalion either received some kind of different training on MOUT or came up with its own. Again I disagree. There was significant testimonial and documentary evidence to the contrary presented at the Article 32 hearing, notwithstanding the foregoing, that I considered in forming my recommendations and opinions. There is a significant amount of evidence that makes it clear this was not, as the IO suggests, systemic of this unit. For example, while SSgt Wuterich's team was clearing houses to the south resulting in the deaths of unarmed women and children (contrary to 1stLt Kallop's, Capt Navin's, Capt Capers and SSgt Field's training) where there had been no SAF, Sgt DelaCruz's fire team was simultaneously clearing north - where there had been SAF - without firing a shot.[24]

c. The IO recommends referral of specifications of "negligent homicide" instead of murder for SSgt Wuterich in house 2, and I agree except that voluntary manslaughter is the more legally supportable charge and better supported by the evidence. The IO also recommends other additional charges based on theories of solicitation to commit an offense, obstruction of justice, aiding and abetting, misprision, dereliction and violation of a lawful general order.[25] I agree in part and recommend charges of obstruction of justice also be referred to trial by General Court-Martial.

6. Charges II and III. The IO believes the Government has failed to provide reasonable grounds to support the two specifications of Charge II (soliciting Sgt DelaCruz to make false statements that the Iraqi Army shot the taxi occupants, that the occupants were running and that Sgt DelaCruz had ordered then to stop) and the single specification of Charge III (falsely reporting to SSgt McDaniel that "…following the IED, the white vehicle pulled up and the four males engaged the convoy with firearms."). His basis for this belief is his opinion the testimony of Sgt DelaCruz and LCpl Mendoza is unreliable. Although I disagree with the IO's analysis and interpretation, I do not recommend referring either of these charges to trial by

[24] LCpl Graviss testimony at SSgt Wuterich Article 32 hearing.
[25] The IO states at p. 25 of Encl (2): "He [Wuterich] denies he fired his weapon in House 2. He was in charge. His Marines are throwing grenades and shooting people. If he was not also engaged in the clearing of houses then he should have been in a position to watch and supervise their activities." He adds that SSgt Wuterich also had a duty to report suspected or alleged violations of the ROE and failed to do so.

General Court-Martial, opting instead for the more supportable obstruction of justice charges reflected in enclosure (5).

7. Based on the foregoing, I have directed the Trial Counsel to prefer Charges reflecting the following and I recommend you sign block 14 of enclosure (5) referring the following charges and specifications under the Uniform Code of Military Justice to trial by General Court-Martial (the original preferred charges and specifications at Enclosure (1) will be dismissed):

a. 2 specifications under Charge I, Article 92 (dereliction of duty) for failure to PID the victims at the white car and issuing the order "shoot first and ask questions later" at house 1.

b. 9 specifications under Charge II, Article 119 (voluntary manslaughter) for the victims at the taxi and house 2;

c. 2 specifications under Charge III, Article 128 (aggravated assault with a dangerous weapon or a means or force likely) for the victims in houses 1 and 2);

d. 3 specifications under Charge IV, Article 134 (reckless endangerment) by engaging victims at the white taxi, in house 1 and house 2 with M16A4 without positive identification (PID); and,

e. 1 specification under Charge V, Article 134 (obstructing justice) by advising Sgt DelaCruz on divers occasions to provide false information if questioned by superiors regarding the engagement at the taxi.

G. W. RIGGS