

NAVY-MARINE CORPS TRIAL JUDICIARY  
WESTERN JUDICIAL CIRCUIT

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UNITED STATES	)	GENERAL COURT-MARTIAL
	)	
v.	)	GOVERNMENT MOTION FOR
	)	APPROPRIATE RELIEF
WUTERICH, Frank D.	)	(INSTRUCTION ON LESSER INCLUDED
XXX XX 3221	)	OFFENSE)
Staff Sergeant	)	
U.S. Marine Corps	)	2 August 2010
	)	

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1. **Nature of Motion**. The Government respectfully requests that the court give an instruction on the lesser included offense of Involuntary Manslaughter Article 119 of the UCMJ to the greater offense charged which was Voluntary Manslaughter, Article 119 of the UCMJ. Additionally, an instruction on Principals, Article 77, UCMJ is also requested with the Voluntary Manslaughter charge.

The accused is charged with voluntary manslaughter, a violation of Article 119, and as such is on notice that he may be charged with the lesser included offense of involuntary manslaughter under 119 because “all of the elements of the lesser offense are included in the greater offense.” UCMJ Article 79, M.C.M. (2008). As such, the government requests that the court give an instruction on the lesser included offense of involuntary manslaughter.

Furthermore, the government requests that the court give an instruction on Article 77 Principal Liability. Any person who (1) commits an offense punishable by this chapter, or aids, counsels, commands, or procures its commission; or (2) causes an act to be done which if directly performed by him would be punishable by this chapter is a principal. Article 77, UCMJ; MCM, United States (2008 ed.).

2. **Summary of facts**.

On the morning of 19 November 2005, the accused and members of his squad were traveling in a four-vehicle convoy in Haditha, Iraq when the convoy was attacked with an Improvised Explosive Device (IED) resulting in one U.S. fatality. Subsequent to the IED attack, the accused and some of the members of his squad were involved in several engagements in Haditha, Iraq. As a result of those engagements, twenty-four people died. The first engagement took place at the "Roadside" near the intersection of Routes Chestnut and Viper and resulted in the death of six people. The second engagement took place several minutes later in a residential structure called "House 1" and resulted in the death of five people and the wounding of several others. The final relevant engagement took place several minutes later in a residential structure called "House 2" and resulted in the death of eight people.

3. **Discussion.**

a. The Supreme court has adopted the "elements" test in order to determine whether a charge may be given as a lesser included offense

Courts may instruct the members on lesser included offenses which are raised by the evidence. *United States v. Miergrimado*, 66 M.J. 34, 36 (C.A.A.F.2008). However, due process requires that the accused has a right to know what offense and under what legal theory he will be tried and convicted. An instruction can be given on a lesser included offense only if it meets this notice requirement: If "it is a subset of the greater offense alleged." *United States v. Medina*, 66 M.J. 21, 26-27 (C.A.A.F.2008). In *Schmuck v. United States*, 489 U.S. 705 (1989), the Supreme Court analyzed Fed.R.Crim.P. 31(c) and adopted the "elements" test. The "elements" test holds that "one offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater charged offense, no instruction is to be given under Rule 31(c)."

*Schmuck v. United States*, 489 U.S. 705 (1989).

b. The Supreme Court's "elements" test has been adopted by this court

In *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010) the court adopted the "elements" test standard as set forth by the Supreme Court in *Schmuck*. Under the "elements" test for a lesser included offense instruction the court must compare the written elements of each offense. In this case the court would compare the elements of voluntary manslaughter and involuntary manslaughter. If all of the elements of the lesser offense are found in the elements of the greater charged offense then the "elements" test is satisfied and the court may give an instruction on the lesser included offense. *United States v. Teters*, 37 M.J. 370, 375-76 (C.A.A.F.1993).

c. Involuntary manslaughter as a lesser included offense of voluntary manslaughter satisfies the "elements" test as understood by the Jones Court

One of the primary goals of the "elements" test is to ensure that the elements as set forth by Congress are properly honored: "Determinations as to what constitutes a federal crime, and the delineation of the elements of such criminal offenses-including those found in the UCMJ-are entrusted to Congress." *Jones*, at 471. Involuntary manslaughter is listed by the MCM as a lesser included offense of voluntary manslaughter, and while the *Jones* court determined that this alone was not enough to support an automatic satisfaction of the "elements" test, it does point to a strong intention of Article 119, UCMJ to consider the elements of them to be the same.

The elements of voluntary manslaughter under Article 119 are:

- (a) That a certain named or described person is dead;
- (b) That the death resulted from the act or omission of the accused;
- (c) That the killing was unlawful; and
- (d) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon the person killed.

The elements of involuntary manslaughter under Article 119 are:

- (a) That a certain named or described person is dead;
- (b) That the death resulted from the act or omission of the accused;
- (c) That the killing was unlawful; and

(d) That this act or omission of the accused constituted culpable negligence, or occurred while the accused was perpetrating or attempting to perpetrate an offense directly affecting the person other than burglary, sodomy, rape, robbery, or aggravated arson.

The elements in Voluntary Manslaughter compared with Involuntary Manslaughter are the same. The first three elements of Involuntary Manslaughter mirror the elements of Voluntary Manslaughter. The fourth elements are different between the two in that the fourth element of Involuntary Manslaughter is a more narrowly defined second element which narrows the act or omission allowed in Voluntary Manslaughter to those of culpable negligence, or those that occur while the accused is perpetrating or attempting to perpetrate an offense directly affecting the person other than burglary, sodomy, rape, robbery, or aggravated arson. Element four in Involuntary Manslaughter is merely expounds on the second element.

The primary argument for the “elements” test made by the majority in *Jones* concerning lesser included charges is predicated on charges that have completely foreign elements, in this case indecent acts and rape. Additionally, the majority and the dissent’s primary disagreement concerns a crucial element of Article 134: “under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.” An element that the majority believes severely restricts the applicability of Article 134 violations as lesser included offenses. *Jones*, at 473. Neither of these significant issues is present in the comparison of involuntary and voluntary manslaughter.

All of the elements of involuntary manslaughter are clearly contained in the first three elements of voluntary manslaughter, the charged violation, and thus it satisfies the “elements” test and may be given as a lesser included offense instruction under Article 79 and in light of *Jones*.

d. Article 77 Principal Liability Instruction

The government requests that the court give an instruction on Article 77 Principal Liability. The court may give an instruction on principal liability if the accused may be shown to be liable (become a principal) under Article 77. There are two ways that the accused may be shown liable under Article 77:

Actual Perpetrator: That the accused is the perpetrator: that this individual actually commissioned the crime by his or her hand or knowingly or purposefully induced or ordered another party to commit a criminal action, where the third party has no knowledge of wrongdoing. OR

Other Party Assistance: That the accused assisted, encouraged, advised, instigated, counseled, or commanded the actual perpetrator in the commission of the offense; and shared in the criminal purpose of the design. UCMJ Article 77, 134; MCM, United States (2008 ed.).

A charge must contain one of these forms of liability. Essentially, "Article 77, UCMJ, 10 U.S.C. § 877 eliminates common law distinctions on principals, including those between aider and abettor and accessory before the fact, and joins them all as principals." *U.S. v. Duarte*, 1998 WL 37445 (N.M.Ct.Crim.App.1998). In this particular case the Article 77 instruction is warranted because Staff Sergeant Wuterich will be shown by the government to have acted both as the actual perpetrator and principal either as a perpetrator or as principal who commanded another individual. He commissioned the violation, and encouraged, advised, instigated, counseled, or commanded his fellow perpetrators in the commission of the offense; and shared in the criminal purpose of the design.

If the accused is the perpetrator in this case the accused can be considered the principal of the crime because he or she actually committed the crime by his or her hand. This can be accomplished by the accused meeting the required elements of the crime, and either having committed the crime himself or herself, or having wrongfully caused another innocent third party (an innocent individual without proper mens rea to be charged) to have committed the crime. In

either case the individual can be considered to have been the perpetrator and thus the principal, whereby he or she has actually committed the crime or done so through extension.

In his unsworn statement before the Article 32 Investigation and in his written statement given to Col Watt in Staff Sergeant Wuterich admitted to firing upon a group of "military aged males" who had exited a white van. Additionally, Staff Sergeant Wuterich stated that he and his team had cleared at least two houses through the employment of "grenades and clear by fire" though he stated that he did not specifically shoot any individuals located in either of the homes. (Encl. 1, 2). These statements as well as the evidence presented by the government establish the principal liability of Staff Sergeant Wuterich as an actual perpetrator and require that an instruction should be given on principal liability under Article 77.

Proving liability as a principal is relatively simple, and comparatively it requires less proof than conspiracy as there is no need for proof of a distinct criminal agreement or proof of overt acts in furtherance of conspiracy. *U.S. v. Rubenacker*, 39 M.J. 970 (AFCMR 1994). Additionally, the accused does not need to agree to or even know all details of the planned crime in order to be an accessory before the fact. *U.S. v. Herrick*, 12 M.J. 858 (AFCMR 1981).

Article 77 liability for accessories before the fact relates much more generally: "If there is a concert of purpose to do a given criminal act, and that act is done by one of the parties, all probable results that could be expected from the act are chargeable to all parties concerned; but in order to make one liable as a principal in such a case, the offense committed must be one embraced by the common venture or an offense likely to result as a natural or probable consequence of the offense directly intended." *U.S. v. Seberg*, 5 M.J. 895 (AFCMR 1978). One who causes an act to be done, which, if directly performed by him, would be punishable under the Uniform Code of Military Justice, is a principal.

In his unsworn statement made at the Article 32 hearing in September 2007, Staff Sergeant Wuterich informed the commission that he had “advised the team something like “shoot first, and ask questions later,” or “don’t hesitate to shoot.” (Encl. 1) . Additionally, in his statement to Col Gregory Watt on February 2006 Staff Sergeant Wuterich related that he had told the Marines accompanying him in the assault on two houses to “shoot first and ask questions later” and that the Marines “did as I told them to do and did a good job.” (Encl.2). In both of these statements Staff Sergeant Wuterich also admits to participating in the clearing of these two homes by “grenades and clear by fire.” For these reasons, an instruction should be given on principal liability under Article 77.

4. **Relief Requested.**

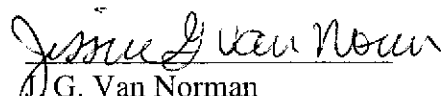
The Government respectfully requests that the court give an instruction on the lesser included offense of involuntary manslaughter under Articles 79 and 119 of the UCMJ. The government also requests that the court give an instruction on Article 77 Principal liability.

5. **Evidence and Burden of Proof.** The following evidence will be entered to show that an Article 77 instruction is warranted:

- Enclosure 1: Transcript of Article 32 Investigation, 6 September 2007
- Enclosure 2: SSgt Wuterich’s Statement to Col. Watt, 21 February 2006

Pursuant to R.C.M. 905(c), the burden of proof is a preponderance of the evidence, and is assigned to the government as the moving party.

6. **Oral Argument.** The government respectfully requests oral argument.

  
J.G. Van Norman  
Capt, U.S. Marine Corps  
Assistant Trial Counsel

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**Certificate of Service**

I hereby attest that a copy of the foregoing motion was served on the court and opposing counsel by electronic mail on 2 August 2010.



J. G. Van Norman  
Capt, U.S. Marine Corps  
Assistant Trial Counsel



The Article 32 investigation was called to order at 1302,  
6 September 2007.

**MJ:** This hearing is called to order.

**CC (Mr. Pucket):** Sir, before you get started, Mr. Zaid has to be absent today. We should address that on the record.

**MJ:** Sure.

Staff Sergeant Wuterich, Mr. Zaid is not present. Do you want to recess these proceedings until he is present, or would you like to proceed in his absence?

**ACC:** Proceed now, sir.

**MJ:** Would you like to continue to be represented by Mr. Puckett, Lieutenant Colonel Vokey, and Major Faraj?

**ACC:** Yes, sir.

**MJ:** Okay. He is excused.

It is my understanding that we're not going to have any other witnesses called. There is one exhibit I'm aware of, a CD of a deposition that's going to be produced for me, and I was informed that defense would like to -- or Staff Sergeant Wuterich would like to provide an unsworn statement and also through the assistance of counsel's questions.

Mr. Puckett, you may proceed.

**CC (Mr. Pucket):** Thank you, sir.

*UNSWORN STATEMENT*

**ACC:** Saturday, November 19, 2005, started off as a normal day for 1st Squad, 3rd Platoon, Kilo Company, in Haditha, Iraq. 0530 was reveille and 0600 I gave my patrol brief to the squad. Although the mission was something we had conducted and accomplished dozens of times before, today would be extraordinarily different. The vehicle order was the same, and the squad breakdown was the same. Two forms of positive communication was a requirement that was met with a

one forty-eight in the third vehicle and a VRC-89 in the first vehicle, which was a hard-back HMMWV.

The other three vehicles were high-backs. The special equipment was the same and re-checked, which included, at least, one AT4, GSR kits, digital camera, pyro used for escalation of force, among other things. Pre-combat checks and pre-combat inspections were conducted prior to and while mounted on the vehicles. I gave my required brief to the watch officer which included a mapped-out route and the description of the mission, special equipment, and communication.

Corporal Salinas, Lance Corporal Sharratt, and Lance Corporal Rodriguez occupied the first vehicle. Lance Corporal Tatum, Corporal De La Cruz, and PFC Mendoza occupied the second vehicle. I, Lance Corporal Graviss, and Corpsman "Doc" Witt occupied the third vehicle. Lance Corporal Terrazas and Lance Corporal Crosson and PFC Guzman occupied the fourth vehicle.

Once I re-checked our vehicles, we conducted one last radio check and requested permission to exit friendly lines. Because our enemy goes to great lengths to exploit our patterns, I chose to change our routes to the traffic control point our company occupied. We reached our objective without incident. Business was as usual while there, which included a daily crypto change with the radios, chow re-supply, and relief in place for our combat counterparts, the Iraqi National Guard.

The day was chilly and the sky was clear. The city was almost too quiet. Our route back included driving north on River Road, west on Route Chestnut, north on Route Leopard, east on Haditha Road, and through our entry control point into our firm base parking lot. Again, I changed the normal route of north on River Road and west on Haditha Road. This is one decision I will always regret.

Vehicle one turned left on Route Chestnut; vehicle two turned left on Route Chestnut; vehicle three turned left on Route Chestnut; and vehicle four turned left on Route Chestnut. We were halfway home. Vehicle dispersion was normal that day, 30 to

40 meters as per battalion standard operation procedures. As I made the turn on Chestnut I decided to cross the two-lane road and drive on the left side of the median. This was a decision, I'm sure, that saved the lives of the Marines in my vehicle. Vehicle four was not so lucky.

An explosion louder than anything I had ever heard rocked the entire convoy. I remained calm. I continued to drive west as my A-driver started to scream "the fourth vehicle got hit." I made my way back to the other side of Chestnut and stopped my HMMWV. Clear skies suddenly turned brown, black, and gray as shrapnel from the HMMWV came plummeting down in front of me from hundreds of feet in the air.

Lance Corporal Graviss was immediately on the radio requesting QRF and notifying our command operating center of the IED attack as he struggled to exit his vehicle. I stepped out of the HMMWV after struggling a bit to unstick my door. Smoke and debris was everywhere. The first thing I noticed outside my vehicle was a white four-door sedan to the southwest. At this point I realized my mission had changed. We had practiced this scenario before in white boards, in classrooms, in front of superiors, subordinates, and peers. My training would take over from here. Some details of the events that occurred that day will always be vividly clear in my mind. Other details will never be.

I remember encountering no vehicle traffic or foot traffic that morning leading up to IED detonation. The white four-door sedan was parked on the side of road within 100 meters of the IED attack and within the security parameters of our convoy. I heard yelling mostly from the west where Corporal De La Cruz was shouting in broken Arabic and using expletives to the military-aged males who occupied the white car. His weapon was at the ready as it should have been. They were not complying and, in fact, were starting to run in the opposite direction to the south away from where Corporal De La Cruz was approaching them. I took a knee on the road and fired. Engaging was the only choice. The threat had to be neutralized.

Vehicle-borne IED's were a serious threat and would have incapacitated our squad, making us combat-ineffective. I don't remember anyone else firing at the same time I was. Although I had a squad de-brief later on, I learned that Corporal De La Cruz had engaged the men at the car at the same time I did, and Corporal Salinas also reported that he had opened fire. After I watched the military-aged males fall to the ground, Corporal De La Cruz advanced on them and I saw him fire at the bodies as they lay before I turned to make my way back to the casualties. That is when I started hearing small-arms fire from the south.

Lance Corporal Graviss was on the radio trying to communicate with the COC but was growing increasingly agitated because the COC couldn't understand him and was asking for the same information he provided several times before. Remaining calm, I grabbed the radio from him and conveyed the information the COC requested, which included a typical cas-evac report stating the administration number of the wounded and killed, the priority of the casualties along with the triage that was being administered by our corpsman, Doc Witt.

The next thing I remember was the QRF arriving on scene. Lieutenant Kallop was the first Marine I met from the QRF, and I began to present an informal situation report to him. I remember his main focus was on the WIA's. I provided him that information and showed him our KIA, Lance Corporal Terrazas. While still receiving small-arms fire Corporal Salinas directed Lieutenant Kallop to take cover and get down. Corporal Salinas and I then advised Lieutenant Kallop that we were taking fire from a house south and we needed to assault that house. Lieutenant Kallop agreed and gave us the order to clear south.

Corporal Salinas then commenced suppressive fire on the house using his M203 grenade launcher firing high-explosive rounds into the structure. I watched at least three impacts detonate on the upper portion of the house with minimal to no damage. The small-arms fire had ceased, and now I and Corporal Salinas proceeded to assault that house.

Simultaneously, Corporal Salinas directed the two closest squad members, Lance Corporal Tatum and Lance Corporal Mendoza to join us so we would have at least a fire team going into the assault. At some previous time to us departing, Lieutenant Kallop directed me to give him my one forty-eight because he didn't have a radio with him at the time.

The four of us aggressively advanced on the house, and on approach I advised the team something like "shoot first, and ask questions later" or "don't hesitate to shoot." I can't remember my exact words, but I wanted them to understand that hesitation to shoot would only result in the four of us being killed. This was the first time we would employ MOUT training tactics since we had been in Iraq.

The exact details of clearing the first and second house will forever remain unclear to me. I'll never be able to pinpoint exact shooting positions, exact chronology of events, who was where and when, or even what the exact layout of the houses were. What I do know is that we cleared those houses as we were trained, using forced entry, grenade employment followed by clearing with fire. I remember that after clearing the bottom floor of the first house, a door that was leading south was open. Someone shouted "there's a runner," and we quickly exited that house and continued the assault to the second house directly south.

We ran to the second house because it was the closest structure and the only place the runner could have gone. We treated the second house the same as the first. After PFC Mendoza fired at the man at the door, the rest of the team flowed in. Again, we used grenades and clear by fire.

After I felt the threat was neutralized and we were no longer being fired on, I took the team back within the security perimeter Route Chestnut. Heading along route Zebra, the team stopped twice to search unoccupied structures. Somewhere around the intersection of Zebra and Chestnut, I received my radio back. At that time, I transmitted back to the COC that we had finished clearing two houses and there may be collateral damage. I was asked to

provide more details as far as the number of enemies versus neutral KIA. This was information I did not have at the time. I estimated 15 KIA's, and that was the extent of my report.

After communicating with Lieutenant Kallop that we just finished clearing two houses, he directed us to search a house on the north side of Chestnut that had anti-American writing in Arabic on the courtyard brick wall. We learned about the Arabic language from one of the Iraqi security force members. I don't remember who was with my me when that house was searched, but upon completion of the search, nothing significant was found.

My team then occupied an overwatch position at the intersection of Chestnut and Viper. Within the next several hours we located and killed insurgents in a house north of our position, and we killed another suspected insurgent fleeing from the scene along the ridge line. We watched as rotary-wing aircraft deployed Hellfires, and dropped bombs on houses directly to our south. We remained on overwatch for the majority of the rest of the day.

That day ended with my squad, along with 3rd Squad from my platoon and a squad from 1st Platoon, retrieving the deceased from the multiple locations and transporting them to the Firm Base Sparta via HMMWV's. They were counted, separated, and photographed and would later be delivered to the hospital.

As a sergeant and a squad leader of 1st Squad, 3rd Platoon, I'm responsible for the decisions made to employ the tactics we used that day. My Marines responded to the threats they faced in the manner that we all had been trained. I will bear the memory of events that day forever and will always mourn the unfortunate deaths of the innocent Iraqis who were killed during our response to that attack.

**CC (Mr. Pucket):** With your permission, sir.

**MJ:** You may.

**CC (Mr. Pucket):** Thank you, Staff Sergeant Wuterich.

Staff Sergeant Wuterich, the other day Sergeant De La Cruz said for the first time any of us has ever heard it that you said, after Ortega's wounding, the week before 19 November, that after the next IED you should kill all the Iraqis in the area. Did you ever say that?

ACC: No, sir.

CC (Mr. Pucket): Do you remember anyone saying anything like that?

ACC: No, sir.

CC (Mr. Pucket): Did Sergeant De La Cruz say that -- or Corporal De La Cruz?

ACC: No, sir.

CC (Mr. Puckett): In February you were interviewed by Colonel Watt, do you remember that?

ACC: Yes, I do, sir.

CC (Mr. Pucket): What was the circumstances of that interview?

ACC: Prior to him -- the Army coming out to do an investigation, we were notified by my chain of command -- I was notified by my chain of command -- that there was someone from the Army that was going to be coming down to gather information on what happened that day.

CC (Mr. Puckett): And so did you have a meeting with Colonel Watt?

ACC: Yes, I did, sir.

CC (Mr. Puckett): And describe that meeting, that initial meeting.

ACC: We met at the dam in one of the briefing rooms. He sat me down, gave me my rights waiver form, and he wanted to emphasize at the top that I was not being suspected of any crimes. This was for information purposes only.

CC (Mr. Puckett): And then did he ask you questions?

ACC: He asked me to describe what happened that day, yes.

CC (Mr. Pucket): Walk you through it?

ACC: Yes, sir.

CC (Mr. Pucket): Did he have other people there with him?

ACC: Yes, he did, sir.

CC (Mr. Pucket): So did you describe the events of that day?

ACC: Yes, I did, sir.

CC (Mr. Pucket): Did you do it just from your personal recollection or also from the input that you had received from others?

ACC: At that point when I was giving my interview to him, I wanted him to know what happened that day. So I was using everything that I knew about that day including my memory as well as what I've heard.

CC (Mr. Puckett): This was a full three months later.

ACC: Yes, sir.

CC (Mr. Pucket): So you had heard other things since 19 November about what happened?

ACC: Absolutely, sir.

CC (Mr. Puckett): From other squad members?

ACC: Yes, sir.

CC (Mr. Pucket): Okay. Now, in that document you say that there were five to eight people in the bedroom of house number two. When did you first know that there were five to eight people there?

ACC: I first learned of that after the body retrieval that we did later on that night.

CC (Mr. Puckett): Were you aware of how many people or -- what the nature of the type of the people who were



in that room at the time that you were -- your squad was clearing the house?

**ACC:** No, sir, I did not.

**CC (Mr. Pucket):** Also in your statement you say that you did not positively ID any targets. What did you mean by that and what was the nature of that interaction?

**ACC:** As I was telling him what happened that day, he would stop me every now and then and ask questions. That was one of the questions he asked several times during that interview, was, you know, when you shot those -- when those people were shot or those Iraqis were shot in the room, did you positively identify them? And my response was no.

**CC (Mr. Pucket):** Okay. And did you shoot anyone in house number one?

**ACC:** No, I did not.

**CC (Mr. Puckett):** Did you shoot anyone in house number two?

**ACC:** No, I did not.

**CC (Mr. Pucket):** Before you all entered house number two, did you tell Lance Corporal Mendoza to shoot the man who was coming to the door?

**ACC:** No, sir.

**CC (Mr. Puckett):** Who is Staff Sergeant McDaniel (ph)?

**ACC:** He was the guide for 1st Platoon and Kilo Company.

**CC (Mr. Puckett):** Okay. On November -- did you know -- did you have a relationship with him? Did you have interaction with him?

**ACC:** I did. He was actually one of the first Marines I met when I got to 3/1. The day that I checked in, I actually met him. And, you know, we had a conversation because he had been stationed in Hawaii previously and so had I. And we both had been in about the same time.

**CC (Mr. Puckett):** Did you see him fairly often?

ACC: Yes.

CC (Mr. Puckett): Did you live in the same area with him?

ACC: In Iraq, we did share the same room. Yes.

CC (Mr. Puckett): On November 19, what was his rank?

ACC: He was a sergeant.

CC (Mr. Puckett): On November 19, what was your rank?

ACC: Sergeant.

CC (Mr. Puckett): When were you promoted to staff sergeant?

ACC: I was promoted to staff sergeant January 1, 2006.

CC (Mr. Puckett): When was he promoted to staff sergeant?

ACC: Same day.

CC (Mr. Puckett): Did you see Sergeant McDaniel on the 19th of November?

ACC: Yes I did.

CC (Mr. Puckett): Describe how you came to see him.

ACC: His squad had come some time early afternoon, I believe it was, to help my squad out with security measures around our perimeter. So he approached me, he said, hey, you know, I got my squad here, you know, where do you need me to put my men? So we discussed sort of that kind of tactical scenario, that he wanted to know what happened that day

CC (Mr. Puckett): Okay. And did you tell him?

ACC: Yes, I did.

CC (Mr. Puckett): And how did you relate that?

ACC: I gave him a brief rundown on the events, you know, what I knew of the events at that time.

CC (Mr. Puckett): Okay. Did you tell him that you had been fired on by the occupants of the white car?

ACC: Never.

CC (Mr. Puckett): Have you ever told anyone that?

ACC: No, I haven't.

CC (Mr. Puckett): Why not?

ACC: Because it never happened.

CC (Mr. Puckett): Did you ever think that it happened?

ACC: I never thought that it happened.

CC (Mr. Puckett): Even as a result of talking to another member of your squad, did you ever think that anyone was fired on by the guys in the white car?

ACC: I never thought it happened and I have never heard anyone else say that they thought it happened. No.

CC (Mr. Puckett): So when Sergeant McDaniel was standing there talking to you, what was the sense you got of why he wanted to know?

ACC: That was the biggest day in Iraq up to that point and he was curious.

CC (Mr. Puckett): Was he taking notes and did he seem to be making a report to anyone?

ACC: No, he was not.

CC (Mr. Puckett): Who's Lieutenant Frank?

ACC: Lieutenant Frank is Staff Sergeant McDaniel's platoon commander.

CC (Mr. Puckett): Is Lieutenant Frank in your chain of command?

ACC: No, he is not.

CC (Mr. Puckett): Did you see him that day?

ACC: Yes, I did. Later on.

CC (Mr. Puckett): He came out to the scene at the same time

as Sergeant McDaniel, did he?

ACC: I believe so. Yes.

CC (Mr. Puckett): Same platoon?

ACC: Yes, sir.

CC (Mr. Puckett): Did you have a chance to have any conversations with Lieutenant Frank on that same day?

ACC: I did later on that evening.

CC (Mr. Puckett): Did you discuss the events of the day?

ACC: Yes, I did.

CC (Mr. Puckett): And how did that come up?

ACC: We were -- I believe it was the time that we were doing the body retrieval. And, you know, he was going through the houses with us and he just wanted to know what happened.

CC (Mr. Puckett): Okay. And did you tell him?

ACC: Yes, I did.

CC (Mr. Puckett): How would you compare that description in conversation to the one you gave earlier in the day to Sergeant McDaniel?

ACC: Same brief description of what happened that day.

CC (Mr. Puckett): Did you consider either of those inquiries like official inquiries, like somebody is making an official report?

ACC: No, they were not.

CC (Mr. Puckett): Of course, you and Sergeant McDaniel on that day were basically the same rank?

ACC: Yes, we were.

CC (Mr. Puckett): What's your understanding of the term -- we've heard the term during this hearing, "dead

check." What does that mean in normal --

**ACC:** Well, there's, I guess, two definitions of "dead check." One would be if someone is shot or the enemy is shot to -- you want to make sure they're dead, they're not going to get up. So you can do several things.

**CC (Mr. Puckett):** Like?

**ACC:** Flicking the eye ball or tapping them with your foot or even checking their pulse or something of that nature. And then there's also the other dead check that we sometimes refer to as if, you know, when somebody gets shot, that person or someone else will go up and shoot them again to make sure that they're dead.

**CC (Mr. Puckett):** Is that official Marine Corps doctrine, to shoot someone again when they're on the ground?

**ACC:** No, it's not.

**CC (Mr. Puckett):** Did you ever train anyone to do that?

**ACC:** No, I did not.

**CC (Mr. Puckett):** Regarding that second definition of shooting someone again who's already down, did you ever dead check anyone that day?

**ACC:** I did not.

**CC (Mr. Puckett):** Did you ever tell Corporal De La Cruz to lie?

**ACC:** No, sir.

**CC (Mr. Puckett):** Did you tell him to lie on the 19th of November?

**ACC:** No, sir.

**CC (Mr. Puckett):** Did you tell him any time after that to lie?

**ACC:** No, sir.

**CC (Mr. Puckett):** About anything?

ACC: No, sir.

CC (Mr. Puckett): Did you ever tell anyone to lie about what happened on the 19th of November?

ACC: No, sir, I did not.

CC (Mr. Puckett): Did you ever have meetings with your squad?

ACC: All the time, sir.

CC (Mr. Puckett): Describe what a squad meeting is and when you would have one.

ACC: Every time we came back from the wire, any patrol that we did, we were required to have a squad debrief. And that would consist of gathering the squad up, getting the perspectives or trying to gather intelligence from our other squad members as well. What they saw out there, what happened out there so I can get the best picture and present it to the intelligence Marine stationed with our COC and give him a finalized patrol report.

CC (Mr. Pucket): You have reporting requirements?

ACC: Yes, sir.

CC (Mr. Pucket): So you have to collect all the information that's available to you?

ACC: Yes, sir, I do.

CC (Mr. Pucket): Is that really the reason for it?

ACC: Yes, sir. It's my job.

CC (Mr. Puckett): Lessons learned, maybe?

ACC: Yes, sir.

CC (Mr. Puckett): Later in the day on 19 November, did you observe any misconduct by Corporal De La Cruz?

ACC: I did, sir.

CC (Mr. Puckett): What did you observe?

**ACC:** Going to the white car for the body retrieval, I was going to help out with body retrieval from the white car. As I approached, I observed Corporal De La Cruz urinating inside the skull of one of the deceased Iraqis.

**CC (Mr. Puckett):** How did you feel about that?

**ACC:** I thought it was disturbing, and I told him to knock the shit off.

**CC (Mr. Puckett):** And did he stop?

**ACC:** He did.

**CC (Mr. Puckett):** In March of 2006 did you ever have a conversation with Corporal De La Cruz about the NCIS interviews?

**ACC:** Yes, sir, I did.

**CC (Mr. Puckett):** Describe the circumstances of that -- of you coming together and having that conversation.

**ACC:** At that time I was stationed at Haditha Dam. I was with Weapons Company. It was sometime in the evening. I was heading up the ladderwell, the stairs; and he was just coming out of the computer lab, which was on the seventh deck. I ran into him, you know, we greeted each other; and he started asking me questions about an interview what, you know -- he asked me what did you say about the white car, what did you say about what happened at the white car?

**CC (Mr. Puckett):** To NCIS?

**ACC:** To -- yeah. And I said, "I didn't say anything because I didn't make a statement." And he said, "Well, you know, I told him the Iraqis shot the guys in the white car. No Marines shot them, just the Iraqis."

**CC (Mr. Puckett):** And how did you reply?

**ACC:** I looked at him and asked him why, you know, why did you say that? And I told them that I shot them, and you know that's what I've been saying. That's what

I'm going to say.

**CC (Mr. Puckett):** Okay. Very good. Now, let's shift gears a little bit here, Staff Sergeant Wuterich. How long did you spend in Iraq in this tour?

**ACC:** Seven months.

**CC (Mr. Puckett):** Did you get a chance to know the Iraqi people in any way?

**ACC:** Very much so, sir.

**CC (Mr. Puckett):** How so? How were you able to do that?

**ACC:** Everyday, sir, patrolling. Every patrol we went on, we interacted with the Iraqi people, whether it was either to -- like a census patrol, knocking on doors, you know, seeing how the neighborhood is, if they've noticed any insurgent activity, just normal, regular things.

**CC (Mr. Puckett):** Did you get to meet any children?

**ACC:** I did.

**CC (Mr. Puckett):** How did you do that?

**ACC:** Well, they were out all the time playing soccer, playing volleyball. And I always thought it was pretty interesting in my mind that here is this country that is completely plagued by war and these kids are out as happy as can be, you know. And they were always friendly, you know. They always wanted things from us, and we'd given them sometimes when we had it to give. And, you know, I played soccer with them over there. I've taken pictures with them over there.

**CC (Mr. Puckett):** You played soccer with kids?

**ACC:** Yes, I did.

**CC (Mr. Puckett):** What are some of the things that strike you about Iraqi culture?

**ACC:** Well, personally I think, you know, I kind of enjoyed the Iraqi culture while I was over there. And the



reason why I say that is when I first was going to go to Iraq, you know, I had the impression in my mind that, you know, I'm going to be sitting on, you know -- engaging in these firefights for seven months. Getting over there, obviously, it's a different case, and I got to know the people, got to know the culture. And, you know, I just -- I really thought there could be a lot to learn from their culture.

**CC (Mr. Puckett):** What was it like to go into an Iraqi home, for instance?

**ACC:** It was much different than trying to go into someone's home here that you don't know.

**CC (Mr. Pucket):** How so?

**ACC:** Well, I guess, whether it's either their culture or their religion or whatever the case may be, it's almost disrespectful for them not to invite you in, not too offer you something to eat, not to offer you something to drink. And it was done every time. They would always offer you a cigarette and light it for you, and they would always offer you chai tea and that sort of thing.

**CC (Mr. Puckett):** Did you like that?

**ACC:** I did. I did. I mean, I thought it was -- I did.

**CC (Mr. Puckett):** Okay. How do you feel about what happened that day? And I'd like you to include in your answer how you feel about the loss of Lance Corporal Terrazas.

**ACC:** I will never be okay with what happened that day. One of my Marines got killed, two of them got seriously injured --

**CC (Mr. Puckett):** How do you feel about that? Let's focus on that.

**ACC:** It's -- personally, I feel like there were certain decisions that I made then knowing what I know now that I might have changed as far as, like, my route back, you know? Maybe I would have taken the easier route back if, you know, if I knew that this was

going to happen.

CC (Mr. Puckett): But you didn't.

ACC: I didn't.

CC (Mr. Puckett): You think about Lance Corporal Terrazas?

ACC: I do. I think about him and his family.

CC (Mr. Puckett): How do you feel about what happened to the innocent Iraqis who were killed that day? Do you think about them?

ACC: I do.

CC (Mr. Puckett): Why?

ACC: Because families got killed that day, and I can look at my family and I know that I would not want that to happen to them.

CC (Mr. Puckett): How many in your family?

ACC: My immediate family would be three -- four now.

CC (Mr. Puckett): Wife and three daughters?

ACC: Yes, sir. But I will never be okay with how the events turned out that day.

CC (Mr. Puckett): Do you think about it often?

ACC: I do.

CC (Mr. Puckett): How often?

ACC: I think over time, you know, feelings tend to lessen. I used to dream about things like this, what happened over there --

CC (Mr. Puckett): Pleasant dreams?

ACC: No. Not pleasant dreams. Not as frequently now, but I do think about it.

CC (Mr. Puckett): So how do you feel about the tactical decisions that you made that day?

ACC: Based on the information that I had at the time, based on the situation, I made the best decisions that I could have at that time.

CC (Mr. Puckett): Did you rely on your training?

ACC: Yes, I did.

CC (Mr. Puckett): Sir, we have nothing further.

I neglected something, sir. Let me go back. You don't mind?

Staff Sergeant Wuterich, we were talking about positive identification. I neglected to ask you why didn't you positively identify targets on that day?

ACC: We were taking fire from that house, and it was a hostile structure that we were going into. We were using our MOUT tactics to clear that building.

CC (Mr. Puckett): So you had already made a decision that it was a MOUT environment?

ACC: Correct.

CC (Mr. Puckett): And your Marines understood that?

ACC: Yes.

CC (Mr. Puckett): So based on your training, was there a need to positively identify each target before squeezing the trigger?

ACC: No.

CC (Mr. Puckett): Based on the threat? Your actions were based on the threats that presented themselves?

ACC: Yes.

CC (Mr. Puckett): Thank you, sir. Nothing further. That concludes the defense's submission, sir.

MJ: Do counsel for either side have any concerns for the accused's mental responsibility or competency?

CC (Mr. Puckett): No, sir.

GC (LtCol Sullivan): None from the government, sir.

MJ: As we discussed in the very beginning of this hearing do counsel still desire seven business days to submit written matters in summation?

GC (LtCol Sullivan): Yes, sir.

CC (Mr. Puckett): Yes, sir.

MJ: I'm going to grant that request, but I'm going to exclude starting tomorrow until the 13th of September when we're actually in the same clock for that period of time because I can't complete my report.

Knowing that, defense, do you have any objection?

CC (Mr. Puckett): No, sir.

GC (LtCol Sullivan): Sir, just one request. Could we make it 1630 central standard time for the date -- for the e-mailing of PDF filings too. In other words, that gives us the whole day of the 13th.

MJ: When I wake up in the morning of the 14th of September in Hawaii, that's what I'm going to look at.

GC (LtCol Sullivan): Roger that, sir.

MJ: If that's not enough time, just ask me for additional time. I'm excluding through the 15th.

GC (LtCol Sullivan): Roger.

MJ: There's a couple of items, counsel, I told you about. I invite you to comment on your written matters. You do not have to comment on them. I'd ask you to comment on them. One is more directed to the government. With regard to Specification 13 of the charge, I'm unable, at first glance, to understand the theory of liability. That is a unique way of charging a 118 offense. I'd ask maybe you could explain to me what you're trying to encompass right there.

I would like the government to comment on if you know of any material witnesses that will not be

available for a trial. And if you know of that material witness, identify who that person may be so I can include that on my report.

And finally to counsel for both sides, as you see I have a volume of exhibits. I have not made it secret that I read every single exhibit. It takes me several days to do so. But when I write my reports I do not believe I can comment on every single exhibit. I just can't do it. So I take things that are important to me. But I'm going to invite counsel if there's a particular exhibit that you would like me to comment on for the convening authority, you want an analysis made on a specific exhibit, please annotate that on a note for me, and I will do my best to comment on that exhibit. Do not tell me all 205 exhibits. I will not do that.

And, finally, I'm not in my notes aware of any specific objection made by either party to any exhibit or proceeding. But if there is, you need to put that in writing, and I will comment on that as well.

**CC (Mr. Puckett):** There's none from the defense, Your Honor.

**MJ:** And I don't believe there is one from the government. Are there any other matters we need to address at this hearing?

**CC (Mr. Puckett):** None from defense, sir.

**GC (LtCol Sullivan):** None from the government, sir.

**MJ:** And, finally, both sides are free to submit additional written matters or exhibits to me up until the 14th of September. If there is an objection by the other party, I'd like to conference call to discuss the objection before receiving the exhibits; otherwise, with the consent of both parties, I'll receive the exhibit and also review it.

Thank you, counsel. This hearing is in recess.

*The Article 32 investigation recessed at 1336, 6 September 2007.*

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Privacy Act Statement  
(5 U.S.C. 522a)

AUTHORITY: 5 U.S.C.D. 301 and 10 U.S.C. 3012

PURPOSE: The purpose for collecting this information is to obtain facts and make recommendations to assist the appropriate authorities in determining what action to take with regard to: INFORMATION

PROVIDED BY: SSG FRANK WUTERICH 1/3/K

WRT: 19 NOV 05 HADITHAN Complex ATTACK

ROUTINE USES: Any information you provide is disclosable to members of the Department of Defense who have a need for the information in performance of their official duties, and where use of such information is compatible with the purpose for which the information is collected. In addition, the information may be disclosed to Government agencies and persons outside the Department of Defense for law enforcement purposes, or if determined to be disclosable pursuant to a request submitted under the Freedom of Information Act, or if needed for Congressional or other Government Investigations.

DISCLOSURE MANDATORY FOR INDIVIDUAL WHO MAY BE ORDERED TO TESTIFY: Providing the information is mandatory. Failure to provide information could result in disciplinary or other adverse action against you under the UCMJ or applicable Army or other federal regulations.

DISCLOSURE VOLUNTARY FOR INDIVIDUAL WARNED OF HIS RIGHTS UNDER ARTICLE 31, UCMJ, OR THE FIFTH AENDMENT OF THE U.S. CONSTITUTION: Providing the information is voluntary. There will be no adverse effect on you for not furnishing the information other than essential information that might not otherwise be available to the commander for his decision(s) in this matter.

ACKNOWLEDGMENT

The Privacy Act Statement above has been read to me and a copy of it has been provided to me. I understand its contents.

20060221  
Date

Frank D Wuterich  
Signature

FRANK D WUTERICH  
Printed Name and Rank

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ENCLOSURE (2)

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RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE

FOUO

For use of this form, see AR 190-30; the proponent agency is ODCSOPS

DATA REQUIRED BY THE PRIVACY ACT

AUTHORITY: Title 10, United States Code, Section 3012(g)
PRINCIPAL PURPOSE: To provide commanders and law enforcement officials with means by which information may be accurately identified.
ROUTINE USES: Your Social Security Number is used as an additional/alternate means of identification to facilitate filing and retrieval.
DISCLOSURE: Disclosure of your Social Security Number is voluntary.

Table with 4 columns: 1. LOCATION (Hadithah Dam), 2. DATE (2006/02/21), 3. TIME (1930 HRS), 4. FILE NO., 5. NAME (Wuterich, Frank D.), 6. SSN (047-76-3221), 7. GRADE/STATUS (SSGT/E-6), 8. ORGANIZATION OR ADDRESS (USMC Weapons Co. 2nd PLT, 2nd Sec.)

PART I - RIGHTS WAIVER/NON-WAIVER CERTIFICATE

Section A. Rights

The investigator whose name appears below told me that he/she is with the United States Army and wanted to question me about the following offense(s) of which I am suspected/accused: Event WRT 19 Nov 05 Hadithah complex attack

Before he/she asked me any questions about the offense(s), however, he/she made it clear to me that I have the following rights:

- 1. I do not have to answer any question or say anything.
2. Anything I say or do can be used as evidence against me in a criminal trial.
3. For personnel subject to the UCMJ, I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning.

(For civilians not subject to the UCMJ) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning.

- 4. If I am now willing to discuss the offense(s) under investigation, with or without a lawyer present, I have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if I sign the waiver below.

5. COMMENTS (Continue on reverse side)

Section B. Waiver

I understand my rights as stated above. I am now willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer first and without having a lawyer present with me.

Table with 6 rows: 1a. NAME, 1b. ORGANIZATION OR ADDRESS AND PHONE, 2a. NAME, 2b. ORGANIZATION OR ADDRESS AND PHONE, 3. SIGNATURE OF INTERVIEWEE, 4. SIGNATURE OF INVESTIGATOR, 5. TYPED NAME OF INVESTIGATOR, 6. ORGANIZATION OF INVESTIGATOR

Section C. Non-waiver

- 1. I do not want to give up my rights
I want a lawyer
I do not want to be questioned or say anything

2. SIGNATURE OF INTERVIEWEE

ATTACH THIS WAIVER CERTIFICATE TO ANY SWORN STATEMENT (DA FORM 2823) SUBSEQUENTLY EXECUTED BY THE SUSPECT/ACCUSED

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PART II - RIGHTS WARNING PROCEDURE

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THE WARNING

1. WARNING - Inform the suspect/accused of:
  - a. Your official position.
  - b. Nature of offense(s).
  - c. The fact that he/she is a suspect/accused.
2. RIGHTS - Advise the suspect/accused of his/her rights as follows:
 

"Before I ask you any questions, you must understand your rights."

  - a. "You do not have to answer my questions or say anything."
  - b. "Anything you say or do can be used as evidence against you in a criminal trial."
  - c. (For personnel subject to the UCMJ) "You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer

can be a civilian you arrange for at no expense to the Government or a military lawyer detailed for you at no expense to you, or both."

- or -

(For civilians not subject to the UCMJ) You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer can be one you arrange for at your own expense, or if you cannot afford a lawyer and want one, a lawyer will be appointed for you before any questioning begins."

- d. "If you are now willing to discuss the offense(s) under investigation, with or without a lawyer present, you have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if you sign a waiver certificate."

Make certain the suspect/accused fully understands his/her rights.

THE WAIVER

"Do you understand your rights?"

(If the suspect/accused says "no," determine what is not understood, and if necessary repeat the appropriate rights advisement. If the suspect/accused says "yes," ask the following question.)

"Have you ever requested a lawyer after being read your rights?"

(If the suspect/accused says "yes," find out when and where. If the request was recent (i.e., fewer than 30 days ago), obtain legal advice whether to continue the interrogation. If the suspect/accused says "no," or if the prior request was not recent, ask him/her the following question.)

"Do you want a lawyer at this time?"

(If the suspect/accused says "yes," stop the questioning until he/she has a lawyer. If the suspect/accused says "no," ask him/her the following question.)

"At this time, are you willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer and without having a lawyer present with you?"

(If the suspect/accused says "no," stop the interview and have him/her read and sign the non-waiver section of the waiver certificate on the other side of this form. If the suspect/accused says "yes," have him/her read and sign the waiver section of the waiver certificate on the other side of this form.)

SPECIAL INSTRUCTIONS

WHEN SUSPECT/ACCUSED REFUSES TO SIGN WAIVER CERTIFICATE: If the suspect/accused orally waives his/her rights but refuses to sign the waiver certificate, you may proceed with the questioning. Make notations on the waiver certificate to the effect that he/she has stated that he/she understands his/her rights, does not want a lawyer, wants to discuss the offense(s) under investigation, and refuses to sign the waiver certificate.

IF WAIVER CERTIFICATE CANNOT BE COMPLETED IMMEDIATELY: In all cases the waiver certificate must be completed as soon as possible. Every effort should be made to complete the waiver certificate before any questioning begins. If the waiver certificate cannot be completed at once, as in the case of street interrogation, completion may be temporarily postponed. Notes should be kept on the circumstances.

PRIOR INCRIMINATING STATEMENTS:

1. If the suspect/accused has made spontaneous incriminating statements before being properly advised of his/her rights he/she should be told that such statements do not obligate him/her to answer further questions.

2. If the suspect/accused was questioned as such either without being advised of his/her rights or some question exists as to the propriety of the first statement, the accused must be so advised. The office of the serving Staff Judge Advocate should be contacted for assistance in drafting the proper rights advisal.

NOTE: If 1 or 2 applies, the fact that the suspect/accused was advised accordingly should be noted in the comment section on the waiver certificate and initialed by the suspect/accused.

WHEN SUSPECT/ACCUSED DISPLAYS INDECISION ON EXERCISING HIS OR HER RIGHTS DURING THE INTERROGATION PROCESS: If during the interrogation, the suspect displays indecision about requesting counsel (for example, "Maybe I should get a lawyer."), further questioning must cease immediately. At that point, you may question the suspect/accused only concerning whether he or she desires to waive counsel. The questioning may not be utilized to discourage a suspect/accused from exercising his/her rights. (For example, do not make such comments as "If you didn't do anything wrong, you shouldn't need an attorney.")

COMMENTS (Continued)

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STATEMENT

For use of this form, see AR 190-45; the proponent agency is ODCSOPS

PRIVACY ACT STATEMENT

AUTHORITY: Title 10 USC Section 301; Title 5 USC Section 2951; E.O. 9397 dated November 22, 1943 (SSN).
PRINCIPAL: To provide commanders and law enforcement officials with means by which information may be accurately identified.
ROUTINE USES: Your social security number is used as an additional/alternate means of identification to facilitate filing and retrieval.
DISCLOSURE: Disclosure of your social security number is voluntary.

1. LOCATION: Hadithah Dam
2. DATE (YYYYMMDD): 2006/02/21
3. TIME: 2145 HRS
4. FILE NUMBER
5. LAST NAME, FIRST NAME, MIDDLE NAME: Wuterich, Frank D.
6. SSN: 047-76-3221
7. GRADE/STATUS: SSGT/E-6
8. ORGANIZATION OR ADDRESS: USMC Weapons Co. 2nd PLT, 2nd Scc.

9. I, SSGT Frank D. Wuterich, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

I was attached to Kilo Co. 3rd Battalion, 1st Marine Regiment on November 19, 2005. I was also a Sergeant at the time.

There were 4 vehicles in our patrol that day. I was driving the third vehicle and LCPL Graviss was the Adriver. I had Doc in the back along with 3 IAs. There was other IAs in the 2nd vehicle also. The HMMWV's were highbacks. I had no crew serve weapons on board. We were moving onto route Chestnut from River Rd. My truck was even with route Viper, maybe a little before route Viper. I could see the lead vehicle, it was a little pass route Zebra on the right side when the IED went off. After the blast went off, I pulled up a little bit and LCPL Graviss was the first out of the vehicle. Doc was already on scene I was still on the radio. We were taking SAF from the south. It was coming from the first house, south of route Chestnut. It was just an AK. We were not pinned down or anything. Doc was assessing casualties. I immediately noticed a white 4 door sedan at the intersection of route Zebra. There were 5 MAMs inside the sedan. The vehicle was already pulled off the road. I know as soon as I was walking towards them, they were getting out of the car. It was already not a permissive/hostile environment so I and CPL Salinas engaged the MAMs outside my vehicle about 25 meters from them. CPL Salinas was in the lead vehicle. I have also been told that the IAs engaged but, I don't remember them engaging.

We were still taking SAF. I punched a fire team to the North. LCPL Dela Cruz was the team leader. 330 was the house identified by CPL Salinas as the house we were receiving SAF from. CPL Salinas laid down suppressive fire to get to the house. He was right next to us. At that point, we weren't taking SAF from that building anymore. LCPL Tatum, LCPL Mendoza and CPL Salinas were with me. It was a 4 man stack on the wall of the house. I told them to treat it as a hostile environment. I told them to shoot first, ask questions later. We were no longer getting fire after the 203 round hit. It was a forced entry through the front door. I think LCPL Tatum was the first in. He was definitely the first into the second house for sure. We kicked the door in. As we entered, there was a MAM directly to the front, who was engaged. I noticed that the back door was open. I thought some one ran out of it. I heard noise in the back room and we engaged people in that room. I could not ID who had weapons or ID people. That was not the orders I gave. We may have used grenades, I don't remember but, I didn't. We did in the second house for sure.

We exited that house and were taking SAF from the house behind it. We went to that house next. It was the same 4 man stack. Tatum was the lead man. It was a forced entry. There was no one when we first entered the house but, I heard people on the left side and we engaged the people in the room. They were in the back of the house. There were roughly 5-8 people in the room. I did not positively ID them. We found no weapons in that house or the first house after BDA. We fraged some of the rooms.

I want to make it clear that we did not go in intentionally to spray everyone we saw. We were taking fire. I believe the ones who set up the ambush, fell back to the first house and fired upon us and then fell back to the next house and fired on us, then fled to where they were seen by the choppers. It is the only logical conclusion I can think of.

From there we came back to route Chestnut and occupied an OP position in a house. It was another forced entry. The house was empty. We knew the guy who lived there because; he had warned us of an IED before. We knew he was not there. We saw a MAM run out of nowhere, dressed in black and we engaged him from the roof. Everyone saw him that was with me. Around House 490, LCPL Sharratt and I saw a man walking back and forth, west to east, over and over. So we exited the house and went to where he was and knocked on the gate. There were women and kids there. We asked where was the guy and they pointed to the house next door. I told CPL Salinas to keep the women in that house. LCPL Sharratt and I approached the front door. It was open and we went in. There was a room immediately in front that was empty. On the left was a meeting room that led into a bed room. There was a suitcase on one of the couches. LCPL Sharratt was in front of me. As we entered the bedroom, LCPL Sharratt saw a MAM with an AK and he tried to fire with his SAU but, it jammed. He backed off and LCPL Sharratt took his side arm 9mm and fired. He killed 4 MAMs in the room. We found 1AK and a suitcase with passports, clothes and a wallet inside. I took the AK and the suitcase

10. EXHIBIT
11. INITIALS OF PERSON MAKING STATEMENT: FDW
PAGE 1 OF 2 PAGES

ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT TAKEN AT DATED

THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT, AND PAGE NUMBER MUST BE INDICATED.

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STATEMENT OF SSGT Frank D. Wuterich TAKEN AT Hadithah Dam DATED 2006/02/21

9. STATEMENT (Continued)  
outside.

After that we reassumed the over watch at the other house. We stayed until about 1800. The QRF came and relieved us at 1900. It wasn't until 2100, that we were done. There were about 20 detainees on the streets, and then we picked up other detainees from my other team. I am pretty positive that we did not take any fire from the north or east. First PLT was the QRF.

I believe that the total, from the area I was in, was about 25 casualties. We had to police the bodies. I believe there were 2 kids that got evacuated out later that evening. It was not a permissive enviroment. My orders were clear. I was down 9 Marines and with Doc, 8, then 4, so we were spread pretty thin. I started with 12 Marines, lost three, 4 in fire team, then guards on other three vehicles. The IAs were not used for clearing because I did not work with them enough. I used them for cordoning the area and watching detainees on route Chestnut.

As for the PID, I didn't want my Marines to check if they had weapons first. I told them to shoot first and deal with it later. They did what I told them to do and they did a good job.

\*\*\*\*\*NOTHING FURTHER THIS PAGE\*\*\*\*\*

AFFIDAVIT

I, SSGT Frank D. Wuterich HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1, AND ENDS ON PAGE 2. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

[Signature]  
(Signature of Person Making Statement)

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 21 day of February, 2006 at Hadithah Dam

\_\_\_\_\_  
ORGANIZATION OR ADDRESS  
  
\_\_\_\_\_  
ORGANIZATION OR ADDRESS

[Signature]  
(Signature of Person Administering Oath)  
COL Gregory A. Watt  
(Typed Name of Person Administering Oath)  
  
\_\_\_\_\_  
(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT  
FDW

PAGE 2 OF 2 PAGES

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000150

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SAW SWAZAY BACK OUT ENTERED w 9mm SAW MAN w 1x AK. 4x MAMS

25x TOTAL MIA'D HELPED LOAD.

2x KIDS EVACED

STARTED w 12 MINDNES LOST 3x

4x MAN FIRE TN NORTH. 3x SEIZING FOR VEH.

STREICHERD THING.

DID NOT USE IA'S TO CLEAR.

IA'S COORDON BAST SITE.

21 1930 FEB 06

FRANK D WUTRUCH

FR D

BELIEVES INSURGENTS BECAME CONTACT TO THE SOUTH.

ENGAGED PEOPLE IN BACK ROOM 5-8 PEOPLE

NO PID.

DID NOT FIND

WUTRUCH + SWAZAY OPEN FRONT DOOR

LIVING ROOM EMPTY MTK ROOM EMPTY BEDROOM SUITCASE SWAZAY LEAD CLOTHES 2 MAN STACK.

WOMEN + CHILDREN DIRECTED TO #4 SCAMMS TO GUARD WOMEN

SWAMMS ENGAGED MAM'S

MUTATED MINDNES ENGAGED

WHITE 4-DOOR SEDAN. 5x MAMS.

GOT OUT OF VEH BELIEVE IA'S ENGAGED.

ZEBRA

SAME 4 MAN STACK #1 TATUM FIRE

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TOOK NO FIRE FROM THE NORTH OR EAST.

RETURNED TO OVERWATCH UNTIL 3000 HRS.

FORCED ENTRY HOUSE EMPTY OCCUPIED REPORTED.

1158

SET WUTRUCH. DRIV.

LCP GARVISS ADWEN. 4M WHITT IN BACK. 3x IA.

ENGAGED.

MAN IN BACK

4x MAN STACK. SGT WUTRUCH. LCP SWAMMS. LCP TATUM. PFC MENDOZA.

SAK (AV) VIC 330

#1

#2

MAN DIRECT FROM BACK DOOR OPEN ENGAGE PEOPLE IN BACK ROOM DID NOT PID

HOSTILE ENTRY "SWOT FIRST ASK QUESTIONS LATER"

FOUO

000151

SSGT Wuterich

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I was attached to Kilo Co. 3<sup>rd</sup> Battalion, 1<sup>st</sup> Marine Regiment on November 19, 2005. I was also a Sergeant at the time.

There were 4 vehicles in our patrol that day. I was driving the third vehicle and LCPL Graviss was the Adriver. I had Doc in the back along with 3 IAs. There was other IAs in the 2<sup>nd</sup> vehicle also. The HMMWV's were highbacks. I had no crew serve weapons on board. We were moving onto route Chestnut from River Rd. My truck was even with route Viper, maybe a little before route Viper. I could see the lead vehicle, it was a little pass route Zebra on the right side when the IED went off. After the blast went off, I pulled up a little bit and LCPL Graviss was the first out of the vehicle. Doc was already on scene I was still on the radio. We were taking SAF from the south. It was coming from the first house, south of route Chestnut. It was just an AK. We were not pinned down or anything. Doc was assessing casualties. I immediately noticed a white 4 door sedan at the intersection of route Zebra. There were 5 MAMs inside the sedan. The vehicle was already pulled off the road. I know as soon as I was walking towards them, they were getting out of the car. It was already not a permissive/hostile environment so I and CPL Salinas engaged the MAMs outside my vehicle about 25 meters from them. CPL Salinas was in the lead vehicle. I have also been told that the IAs engaged but, I don't remember them engaging.

We were still taking SAF. I punched a fire team to the North. LCPL Dela Cruz was the team leader. 330 was the house identified by CPL Salinas as the house we were receiving SAF from. CPL Salinas laid down suppressive fire to get to the house. He was right next to us. At that point, we weren't taking SAF from that building anymore. LCPL Tatum, LCPL Mendoza and CPL Salinas were with me. It was a 4 man stack on the wall of the house. I told them to treat it as a hostile environment. I told them to shoot first, ask questions later. We were no longer getting fire after the 203 round hit. It was a forced entry through the front door. I think LCPL Tatum was the first in. He was definitely the first into the second house for sure. We kicked the door in. As we entered, there was a MAM directly to the front, who was engaged. I noticed that the back door was opened. I thought some one ran out of it. I heard noise in the back room and we engaged people in that room. I could not ID who had weapons or ID people. That was not orders I gave. We may have used grenades, I don't remember, but, I didn't. We did in the second house for sure.

We exited that house and were taking SAF from the house behind it. We went to that house next. It was the same 4 man stack. Tatum was the lead man. It was a forced entry. There was no one when we first entered the house but, I heard people on the left side and we engaged the people in the room. They were in the back of the house. There were roughly 5-8 people in the room. I did not positively ID them. We found no weapons in that house or the first house after BDA. We fraged some of the rooms.

I want to make it clear that we did not go in intentionally to spray everyone we saw. We were taking fire. I believe the ones who set up the ambush, fell back to the first house and

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000152

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SSGT Wuterich

fired upon us and then fell back to the next house and fired on us, then fled to where they were seen by the choppers. It is the only logical conclusion I can think of.

From there we came back to route Chestnut and occupied an OP position in a house. It was another forced entry. The house was empty. We knew the guy who lived there because; he had warned us of an IED before. We knew he was not there. We saw a MAM run out of nowhere, dressed in black and we engaged him from the roof. Everyone saw him that was with me. Around House 490, LCPL Sharratt and I saw a man walking back and forth, west to east, over and over. So we exited the house and went to where he was and knocked on the gate. There were women and kids there. We asked where was the guy and they pointed to the house next door. I told CPL Salinas to keep the women in that house. LCPL Sharratt and I approached the front door. It was open and we went in. There was a room immediately in front that was empty. On the left was a meeting room that led into a bed room. There was a suitcase on one of the couches. LCPL Sharratt was in front of me. As we entered the bedroom, LCPL Sharratt saw a MAM with an AK and he tried to fire with his SAU but, it jammed. He backed off and LCPL Sharratt took his side arm 9mm and fired. He killed 4 MAMs in the room. We found IAK and a suitcase with passports, clothes and a wallet inside. I took the AK and the suitcase outside.

After that we reassumed the over watch at the other house. We stayed until about 1800. The QRF came and relieved us at 1900. It wasn't until 2100, that we were done. There were about 20 detainees on the streets, and then we picked up other detainees from my other team. I am pretty positive that we did not take any fire from the north or east. First PLT was the QRF.

I believe that the total, from the area I was in, was about 25 casualties. We had to police the bodies. I believe there were 2 kids that got evacuated out later that evening. It was not a permissive environment. My orders were clear. I was down 9 Marines and with Doc 8, then 4, so we were spread pretty thin. I started with 12 Marines, lost three, 4 in fire team, then guards on other three vehicles. The IAs were not used for clearing because I did not work with them enough. I used them for cordoning the area and watching detainees on route Chestnut.

As for the PID, I didn't want my Marines to check if they had weapons first. I told them to shoot first and deal with it later. They did what I told them to do and they did a good job.

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000153