

INVESTIGATING OFFICER'S REPORT

(Of Charges Under Article 32, UCMJ and R.C.M. 405, Manual for Courts-Martial)

1a. FROM: (Name of Investigating Officer - Last, First, MI) REDMAN, HUGH J.	b. GRADE 0-4	c. ORGANIZATION H&HS, MCAS YUMA, AZ.	d. DATE OF REPORT 17 OCT 11
2a. TO: (Name of Officer who directed the investigation - Last, First, MI) O'DONNELL, JR., ANDREW W.	b. TITLE COMMANDING GENERAL	c. ORGANIZATION 3RD MARINE AIRCRAFT WING	
3a. NAME OF ACCUSED (Last, First, MI) HICKENHORST, DAVID L.	b. GRADE 0-4	c. SSN XXXXX3370	e. DATE OF CHARGES 14 JUL 11


(Check appropriate answer)

4. IN ACCORDANCE WITH ARTICLE 32, UCMJ, AND R.C.M. 405, MANUAL FOR COURTS-MARTIAL, I HAVE INVESTIGATED THE CHARGES APPENDED HERETO (Exhibit 1)	YES	NO	
5. THE ACCUSED WAS REPRESENTED BY COUNSEL (If not, see 9 below)	X		
6. COUNSEL WHO REPRESENTED THE ACCUSED WAS QUALIFIED UNDER R.C.M. 405(d) (2), 502(d)	X		
7a. NAME OF DEFENSE COUNSEL (Last, First, MI) MARSHALL, MERIDITH L.	b. GRADE 0-4	8a. NAME OF ASSISTANT DEFENSE COUNSEL (If any) FARAJ HAYTHAM	b. GRADE CIV
c. ORGANIZATION (If appropriate) H&HS, MCAS MIRAMAR, CA		c. ORGANIZATION (If appropriate) PUCKETT AND FARAJ, PC	
d. ADDRESS (If appropriate)		d. ADDRESS (If appropriate) 1800 Diagonal Road STE 210 Alexandria, VA 22314	
9. (To be signed by accused if accused waives counsel. If accused does not sign, investigating officer will explain in detail in Item 21.)			
a. PLACE N/A		b. DATE N/A	

I HAVE BEEN INFORMED OF MY RIGHT TO BE REPRESENTED IN THIS INVESTIGATION BY COUNSEL, INCLUDING MY RIGHT TO CIVILIAN OR MILITARY COUNSEL OF MY CHOICE IF REASONABLY AVAILABLE. I WAIVE MY RIGHT TO COUNSEL IN THIS INVESTIGATION.

c. SIGNATURE OF ACCUSED N/A		
10. AT THE BEGINNING OF THE INVESTIGATION I INFORMED THE ACCUSED OF: (Check appropriate answer)		
a. THE CHARGE(S) UNDER INVESTIGATION	YES	NO
b. THE IDENTITY OF THE ACCUSER	X	
c. THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 31	X	
d. THE PURPOSE OF THE INVESTIGATION	X	
e. THE RIGHT TO BE PRESENT THROUGHOUT THE TAKING OF EVIDENCE	X	
f. THE WITNESSES AND OTHER EVIDENCE KNOWN TO ME WHICH I EXPECTED TO PRESENT	X	
g. THE RIGHT TO CROSS-EXAMINE WITNESSES	X	
h. THE RIGHT TO HAVE AVAILABLE WITNESSES AND EVIDENCE PRESENTED	X	
i. THE RIGHT TO PRESENT ANYTHING IN DEFENSE, EXTENUATION, OR MITIGATION	X	
j. THE RIGHT TO MAKE A SWORN OR UNSWORN STATEMENT, ORALLY OR IN WRITING	X	
11a. THE ACCUSED AND ACCUSED'S COUNSEL WERE PRESENT THROUGHOUT THE PRESENTATION OF EVIDENCE (If the accused or counsel were absent during any part of the presentation of evidence, complete b below.)	X	
b. STATE THE CIRCUMSTANCES AND DESCRIBE THE PROCEEDINGS CONDUCTED IN THE ABSENCE OF ACCUSED OR COUNSEL N/A		

NOTE: If additional space is required for any item, enter the additional material in Item 21 or on a separate sheet. Identify such material with the proper numerical and, if appropriate, lettered heading (Example: "7c"). Securely attach any additional sheets to the form and add a note in the appropriate item of the form: "See additional sheet."

12a. THE FOLLOWING WITNESSES TESTIFIED UNDER OATH: <i>(Check appropriate answer)</i>				
NAME <i>(Last, First, MI)</i>	GRADE <i>(If any)</i>	ORGANIZATION/ADDRESS <i>(Whichever is appropriate)</i>	YES	NO
DIMOH, PATRICK E.	O-3	MWSS 373, MCAS MIRAMAR, CA	X	
GUERRERO IV, MANUEL A.	E-5	MWSS 373, MCAS MIRAMAR, CA	X	
RICH, JACOB B.	E-5	MWSS 373, MCAS MIRAMAR, CA	X	
WILSON, CHRISTOPHER N.	E-6 (Retired)	Retired From: MWSS 373, MCAS MIRAMAR, CA Current: 310 Robinson Lane, Pensacola, FL 32514	X	
b. THE SUBSTANCE OF THE TESTIMONY OF THESE WITNESSES HAS BEEN REDUCED TO WRITING AND IS ATTACHED.			X	
13a. THE FOLLOWING STATEMENTS, DOCUMENTS, OR MATTERS WERE CONSIDERED; THE ACCUSED WAS PERMITTED TO EXAMINE EACH.				
DESCRIPTION OF ITEM	LOCATION OF ORIGINAL <i>(If not attached)</i>		YES	NO
IE 1: Charge Sheet	Joint Law Center, MCAS Miramar		X	
IE 2: IO Appointment Letter	Joint Law Center, MCAS Miramar		X	
IE 3: FOB Dwyer Workspace Diagram & Wing Policy Letter 1-10 (Weapons Policy (FWD))	NCIS & 3rd MAW G-1, Respectively		X	
IE 4: FOB Dwyer COC Tent Diagram (Hand Drawn)	Attached		X	
IE 5: Photo of FOB Dwyer COC	NCIS		X	
IE 6: Email from GySgt Pere to SSgt Wilson, 29 Aug 11	N/A		X	
IE 7: Email chain from 26 Aug 11 to 2 Sep 11	N/A		X	
b. EACH ITEM CONSIDERED, OR A COPY OR RECITAL OF THE SUBSTANCE OR NATURE THEREOF, IS ATTACHED			X	
14. THERE ARE GROUNDS TO BELIEVE THAT THE ACCUSED WAS NOT MENTALLY RESPONSIBLE FOR THE OFFENSE(S) OR NOT COMPETENT TO PARTICIPATE IN THE DEFENSE. <i>(See R.C.M. 909, 916(k).)</i>				X
15. THE DEFENSE DID REQUEST OBJECTIONS TO BE NOTED IN THIS REPORT <i>(If Yes, specify in Item 21 below.)</i>			X	
16. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL.			X	
17. THE CHARGES AND SPECIFICATIONS ARE IN PROPER FORM			X	
18. REASONABLE GROUNDS EXIST TO BELIEVE THAT THE ACCUSED COMMITTED THE OFFENSE(S) ALLEGED			X	
19. I AM NOT AWARE OF ANY GROUNDS WHICH WOULD DISQUALIFY ME FROM ACTING AS INVESTIGATING OFFICER. <i>(See R.C.M. 405(d)(1).)</i>			X	
20. I RECOMMEND:				
a. TRIAL BY <input type="checkbox"/> SUMMARY <input type="checkbox"/> SPECIAL <input type="checkbox"/> GENERAL COURT-MARTIAL				
b. <input checked="" type="checkbox"/> OTHER <i>(Specify in Item 21 below)</i>				
21. REMARKS <i>(Include, as necessary, explanation for any delays in the investigation, and explanation for any "no" answers above.)</i>				
See attached sheets.				
22a. TYPED NAME OF INVESTIGATING OFFICER		b. GRADE	c. ORGANIZATION	
HUGH J. REDMAN		O-4	H&HS, MCAS YUMA, AZ	
d. SIGNATURE OF INVESTIGATING OFFICER			e. DATE	
			17 OCT 11	

Block 1d: The Article 32 hearing was originally scheduled for August 5, 2011. On July 27, 2011 a defense continuance was agreed to by Government Counsel (GC) until September 8, 2011. The basis for this continuance was to allow the accused time to secure Civilian Defense Counsel (CDC). On September 2, 2011, I received another continuance request from Defense Counsel (DC) to September 29, 2011 due to scheduling conflicts of CDC. I granted this request over GC objection, and have attached both continuances to this report. I recommend that the delay from August 5, 2011 to September 29, 2011 be excludable under Rule for Court-Martial (R.C.M.) 707, Article 10, UCMJ, and any other applicable speedy trial authorities. The original due date of this report was October 6, 2011. Pursuant to my instruction in the appointing order, I contacted the Third Marine Aircraft Wing Staff Judge Advocate and requested an extension to September 17, 2011, which was approved.

Block 2a: The IO appointment letter was originally signed by Major General Conant, Commanding General, Third Marine Aircraft Wing, on August 17, 2011. In light of the Third Marine Aircraft Wing change of command on September 23, Block 2a identifies Major General O'Donnell as the recipient of this investigation.

Block 10a: CDC waived the reading and explanation of the charges. The accused confirmed that he had a copy of the charge sheet, had read through it and understood the charges under investigation.

Block 12a: Captain Dimoh and Sergeant Guerrero testified in person at the hearing. Sergeant Rich and Staff Sergeant (retired) Wilson testified by telephone. Each testimony is summarized below.

(1) Sergeant Guerrero

(a) Sergeant Guerrero is an Aircraft Recovery Specialist with MWSS 373, and joined the unit approximately two years ago. He currently performs platoon sergeant duties. Sergeant Guerrero was present in the Command Operations Center (COC) tent aboard Camp Dwyer, Afghanistan, on the date in question (March 18, 2011). He explained that he, Sergeant Rich and Staff Sergeant Wilson had been involved in an airfield runway matting project supervised by Major Eickenhorst (hereafter "the accused"). The project goal was to repair damaged runway on the expeditionary air field (EAF) at Camp Dwyer. At this particular point in the project, the accused had tasked Staff Sergeant Wilson with providing him dimensions of the damaged runway, and as it turned out, Staff Sergeant Wilson provided inaccurate figures. This caused the accused to become frustrated and angry with Staff Sergeant Wilson. Staff Sergeant Wilson appeared to be "in a rush" and under "more pressure" because of this project.

(b) Sergeant Guerrero referred to the diagram in IFE 3 as a fair and accurate representation of where everyone was standing or sitting at the time of the incident. He did state that he recalled Sergeant Rich being more to Major Eickenhorst's four o'clock position than the six o'clock portrayed in the diagram. He also estimated Staff Sergeant Wilson to have been at

one o'clock to the accused, whereas the diagram appears to be closer to two o'clock. Sergeant Guerrero testified that the accused asked Staff Sergeant Wilson (words to the effect of) whether he wanted to retire early, and contemporaneously un-holstered his pistol, pointed the barrel upwards and then "waved it around lazily." Sergeant Guerrero stated that Staff Sergeant Wilson's reply was, "I'd rather you not shoot me." Sergeant Guerrero stated that he had no way of knowing whether the accused had his pistol at condition three or one.

(c) During cross-examination, Sergeant Guerrero confirmed that there was some complacency with weapons aboard Camp Dwyer ("a few"). He also stated that the EAF was at the border of the base, and that the EAF mission importance overall was a 9 out of 10. He considered Staff Sergeant Wilson to be a mentor, and that Staff Sergeant Wilson was an "abused beat dog" around the accused. Sergeant Guerrero stated that on another occasion at a Camp Dwyer smoke pit, the accused un-holstered his weapon to emphasize that "We're going to condition three." Sergeant Guerrero stated that he did not feel threatened during the incident in the COC.

(2) Sergeant Rich (Telephonic Witness Attending Sergeant's Course)

(a) Sergeant Rich clarified that the EAF maintenance project was for runway repairs as well as lighting repairs. He worked for Staff Sergeant Wilson and estimated the incident in question to have occurred around 1200. His recollection of how personnel were positioned at the time in question is consistent with the diagrams in IE 3 and 4. Sergeant Rich recalls the accused to have drawn his pistol, raised it up alongside his head with the barrel pointing upwards and uttered words to the effect of, "Why wait for retirement? Let's end it now." He described the accused to have waved his pistol around nonchalantly, and "all over the place." He stated that the accused's tone did not seem to be joking, and that he felt threatened at the time in question. Camp Dwyer's weapon's condition policy was condition three at this time.

(b) During cross-examination, Sergeant Rich stated that he had served with Staff Sergeant Wilson in the past, but had never spoken with him outside of a professional setting. Sergeant Rich also confirmed that he was friends with Sergeant Guerrero. Sergeant Rich stated that Staff Sergeant Wilson was frustrated by the maintenance and lighting project because it was "unscheduled maintenance" and that Staff Sergeant Wilson felt that the project "should be 2nd MAW's problem." This was a reference to the fact that relief in place (RIP) was underway with MWSS 372. Sergeant Rich confirmed that he also had been tasked to measure dimensions on the damaged portion of the runway, and that his figures were correct, whereas Staff Sergeant Wilson's were incorrect.

(3) Captain Dimoh

(a) Captain Dimoh confirmed that he served as XO of detachments and that RIP with MWSS 372 was underway at the time in question. Captain Dimoh had previously served in the Army as a Military Police Officer. He stated that he was seated directly to the left of the accused

in the COC. He testified that at the time in question, he was working on fitness reports and turnover, and that he was listening to music with his headphones on. He stated that the volume of his music was such that he could hear some conversation in the COC but not all. He noticed nothing out of the ordinary or consistent with the allegations of the other witnesses. He didn't hear about the incident until around 2300-2400.

(b) During cross-examination, Captain Dimoh drew and labeled the diagram submitted as IE 4, referring to the area and positioning within the COC tent. He confirmed he was aware of Staff Sergeant Wilson's miscalculations, and that the lighting repairs were being conducted for an upcoming CMC visit. For further clarification, he stated that the table behind which both he and the accused were situated stood about 3.5 to 4 feet high. He also stated that his chair was approximately 12-18 inches away from that of the accused. He described the accused as "demanding but never threatening." Captain Dimoh stated that no one ever approached him about the incident and that under the accused, the work environment was demanding, but morale was high. He stated that the only time he had seen the accused un-holster his pistol was at the range, and that it was pursuant to standard range procedures.

(4) Staff Sergeant Wilson (Telephonic Witness From Pensacola, Florida)

(a) Staff Sergeant Wilson officially retired from the Marine Corps on August 31, 2011. He confirmed that he deployed with MWSS 373 from September 2010 to April 2011. During the time in question, his reporting senior was Captain Dimoh and his reviewing officer was the accused. He confirmed that the accused was upset with him because his measurements of the damaged runway were initially incorrect. Staff Sergeant Wilson testified that the accused un-holstered his pistol, pointed the barrel at a 45-degree angle to the deck, and stated words to the effect of, "Would you like to work on an early retirement? All I have to do is the paperwork." Staff Sergeant Wilson stated that he replied to the accused with, "I'd rather you not shoot me, Sir." His pistol appeared to be in condition three, but he couldn't be sure between condition three or one.

(b) During cross-examination, Staff Sergeant Wilson confirmed that the accused pointed his pistol to the deck at approximately a 45-degree angle, and that Staff Sergeant Wilson was positioned at approximately 2 or 3 o'clock from the accused. He also confirmed that after the incident in question, he approached Sergeant Rich and Sergeant Guerrero and asked both of them, "Did that seem wrong to you guys? Do you think he threatened me?"

Block 14: In response to my question, DC raised no issue during the hearing concerning either the accused's mental responsibility at the time of the alleged commission of the offenses charged or of the accused's competency to participate in his own defense.

Block 15: Defense Objections. Although CDC did not submit written objections to be included in this report, I have summarized defense objections and my responses below that were raised prior to and during the hearing.

(a) IO Determination of Witness Unavailability (SSgt Wilson and Sgt Rich)

(1) R.C.M. 405(g)(2)(A) states that “The investigating officer shall make an initial determination whether a military witness is reasonably available. If the investigating officer decides that the witness is not reasonably available, the investigating officer shall so inform the parties.” R.C.M. 405(g)(1)(A) states that a witness is “reasonably available” when the witness is “located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness’ appearance.” The discussion to this subsection points out that a witness located beyond the 100-mile limit is “not *per se* unavailable,” and that “the significance of the witness’ live testimony must be balanced against the relative difficulty and expense of obtaining the witness’ presence at the hearing.”

(2) On August 26, 2011, I sent an email to GC and DC confirming the hearing date of September 8, 2011 and also asking for confirmation of witnesses either side wanted to call. On August 29, 2011, I received a request from GC to determine Staff Sergeant Wilson (on terminal leave in Florida) and Sergeant Rich (attending the USMC Sergeant’s Course at 29 Palms, California) unavailable to testify in person pursuant to R.C.M. 405(g)(2)(A). Later that day, I received an email from CDC, requesting a continuance from September 8 to September 29, 2011, and also objecting to the “failure to produce military witnesses.” CDC stated his opinion that it was unacceptable that Staff Sergeant Wilson not be produced, since he is the victim named in the charges and that he could be ordered back from terminal leave. *See* IE 7.

(3) On August 30, 2011, I asked GC to provide me with Staff Sergeant Wilson’s location within Florida, his EAS date, and Sergeant Rich’s graduation date from the Sergeant’s Course in 29 Palms. I received an email back from GC the same day, stating that Staff Sergeant Wilson’s EAS was August 31, 2011 (the next day), and that he was located in Pensacola, Florida. I also learned that Sergeant Rich was scheduled to graduate from the Sergeant’s Course at 29 Palms on October 12, 2011.

(4) Staff Sergeant Wilson is located approximately 1,800 miles from the location of the hearing. In addition, he was retiring from active duty the following day. Although his in-person testimony is obviously relevant, I considered the significant delay already associated with the case (30 days previously approved at the request of defense), and the expense of flying in a witness from across the country. Additionally, Sergeant Guerrero and Captain Dimoh were still scheduled to testify in person, and according to the NCIS investigation (which I reviewed only to determine which witnesses may be necessary), they were in close proximity to both Staff Sergeant Wilson and the accused during the incident in question. Based upon all of these factors, I determined that Staff Sergeant Wilson was not reasonably available. Sergeant Rich was a student at the Sergeant’s Course at 29 Palms, California, which is located approximately 175 miles from Marine Corps Air Station Miramar. For the same reasons identified above, as well as

his attendance at a mandatory USMC career course, I informed all parties via email on August 30, 2011 that I determined both Staff Sergeant Wilson and Sergeant Rich to be unavailable. IE 7.

(5) At the actual hearing on September 29, 2011 CDC again requested that Staff Sergeant Wilson (now a civilian) and Sergeant Rich be produced. GC and CDC engaged in extensive argument about whether or not the Government had properly “invited” Staff Sergeant Wilson to the hearing, and whether or not he had indicated a willingness to appear at the hearing in person. During cross examination of Staff Sergeant Wilson, CDC specifically asked whether he had “been invited” to attend the Article 32 hearing by the Government. Staff Sergeant Wilson replied that he had not. During re-direct by GC, Staff Sergeant Wilson stated that it was probable that he in fact had been invited through previous discussions with Government representatives, and that he may have indicated a preference to testify telephonically, and that he may have stated that he was uneasy about missing time off from work. *See* IE 6. In my opinion, this extensive argument between counsel during the hearing is irrelevant for the purposes of my initial determination of unavailability. The discussion to R.C.M. 405(g)(2)(B) states that “The investigating officer should initially determine whether a civilian witness is reasonably available without regard to whether the witness is willing to appear. If the investigating officer determines that a civilian witness is apparently reasonably available, the witness should be invited to attend and when appropriate, informed that necessary expenses will be paid.” I had already determined Staff Sergeant Wilson and Sergeant Rich to be unavailable prior to the hearing. I advised all counsel well in advance of the hearing that I wanted to pursue telephonic testimony for both. At the hearing, I reiterated that determination, and both testified telephonically. I did not consider any additional alternatives to their testimony.

(b) IO Consideration of the Diagram in IE 3

(1) CDC objected at the hearing to my consideration of the COC diagram in IE 3. The grounds for his objection is that the diagram is not a properly “authenticated copy, photograph, or reproduction of similar accuracy of the evidence” pursuant to R.C.M. 405(g)(5)(B)(ii). Sergeant Guerrero described the evidence contained in the diagram from his own memory, using a “clock” orientation description. After he described the evidence from memory, he was handed IE 3 by GC, and stated that it fairly and accurately represented the COC tent and everyone’s relative position during the time in question. He made two minor “clock” adjustments after reviewing the diagram, which I considered insignificant. Therefore, I accepted and considered IO 3.

(c) IO Consideration of Wing Policy Letter 1-10 (Ammunition and Weapons Policy)

(1) CDC objected to my consideration of the Wing Policy Letter contained in IE 3 on the grounds of relevance. Essentially, CDC argued that since this is not a punitive order, but only a policy letter, it is not relevant. The Wing Policy Letter contains, among other things, the Wing’s Forward Operating Bases’ policies regarding the combat load for the M9 pistol, weapons

safety rules and carrying conditions for the M9. In light of the charges in this case, I considered the Wing policy on those issues relevant.

Block 18: The testimony consistently established a scenario where the accused was frustrated with Staff Sergeant Wilson because of his submission of incorrect runway measurement data. Three of the witnesses saw the accused un-holster his weapon inside the COC and ask Staff Sergeant Wilson words to the effect of whether he wanted to retire early. The combination of the accused un-holstering his pistol and the contemporaneous comment about early retirement establishes a prima facie case for all four charges. In fact, reasonable grounds support the reckless endangerment charge simply by virtue of the alleged un-holstering and pistol waving of the accused in the COC in front of several Marines, while presumably at weapons condition three.

Block 21:

(a) Threatening Words, Menacing Gesture and Fear of Immediate Harm

(1) The Government's case essentially relies on the trier of fact to determine, beyond a reasonable doubt, a combination of threatening words and menacing gesture from the accused, which created in the mind of Staff Sergeant Wilson a reasonable fear of immediately being shot. Technically, the fear element is only required for the aggravated assault charge (Charge I). However, Additional Charge I (Maltreatment) alleges the same assault as the basis of the maltreatment. Therefore, without the combination of all three (words, gesture and fear), the Government loses the most significant charge of aggravated assault, as well as the related maltreatment charge. Similarly, communicating a threat technically requires only that the accused wrongfully communicated language to another that indicated a present intent to injure. In this case however, the alleged language (asking someone if they want to retire early), in and of itself, does not express a present intent to injure without the simultaneous un-holstering. The Government recognized this and therefore combined the words and the un-holstering in Charge II.

(2) Sergeant Guerrero and Sergeant Rich both testified that the accused un-holstered his pistol, raised it up with the barrel pointing upwards next to his head, and then waved it around "lazily" or "nonchalantly" before re-holstering. Staff Sergeant Wilson, on the other hand, testified that the accused un-holstered his pistol, then pointed the pistol *downwards* toward the deck at approximately a 45-degree angle before re-holstering. Either version could support the charges (un-holstering *itself* may be enough, combined with the accused's statement), but the problem for the Government is the strange inconsistency between witnesses from similar distances and vantage points. Staff Sergeant Wilson is in fact the alleged "victim" in the charges, but his account of the pistol barrel direction and movement is opposite of the two sergeants. Sergeant Guerrero went so far as to say that the accused's weapon was "all over the place" and that he was waving it around at head level. Captain Dimoh, who was seated directly

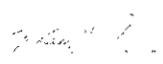
to the left of the accused, observed nothing out of the ordinary, as he was wearing headphones and listening to music while he worked at his computer. However, the fact that someone whose chair was only “12-18 inches away” (and with an unobstructed view of the accused), failed to visually notice the pistol waving described by Sergeant Guerrero and Sergeant Rich will simply add to the inconsistency among the Government’s witnesses. The trier of fact may of course choose to believe one source of testimony over others, or even choose to believe portions of different sources. In this case however, where four witnesses are within a few feet of each other within the same work space, all extremely close to the accused, this degree of inconsistency will likely equate to reasonable doubt that any menacing act or gesture ever occurred.

(3) Staff Sergeant Wilson stated that after the accused un-holstered his pistol and made the “early retirement” comment, he replied with, “I’d rather you not shoot me Sir.” This could be taken one of two ways by the trier of fact. It could be seen as self-evident that Staff Sergeant Wilson was afraid that he was about to be shot. However, it could also be taken as a sarcastic response from him in a situation he didn’t take seriously. Staff Sergeant Wilson testified during cross-examination that he later approached Sergeant Rich and Sergeant Guerrero and asked them both, “Did that seem wrong to you guys? Do you think he threatened me?” Regardless of how Staff Sergeant Wilson may explain this at trial, the fact that he asked others if they thought *he* was threatened is, in my opinion, a significant weakness to elements of Article 128-Assault (fear of “immediate bodily harm”), Article 134-Communicating a Threat (the accused communicated a “present determination or intent” to shoot him), and Article 134-Maltreatment (the maltreatment theory being essentially the same assault).

(b) Appropriate Forum. After considering all of the testimony and exhibits provided at the hearing, I don’t believe this case merits referral to a court-martial. It is unlikely that the evidence presented at trial would satisfy the requisite burden of proof that Staff Sergeant Wilson had a reasonable apprehension that he was about to be shot, or that the accused communicated a threat to shoot him. The accused apparently stopped short of actually pointing his pistol. His words about retirement are certainly open to more than one reasonable interpretation. In fact, Staff Sergeant Wilson stated on cross-examination that he understood the accused’s statement, “All I have to do is the paperwork” to mean literally that he could put in the paperwork so that Staff Sergeant Wilson could retire early. Finally, the four witnesses present in the COC, who were all within a few feet of the accused, have significant inconsistencies in what they perceived at the time in question. Therefore, I recommend the accused be notified of Commanding General’s NJP pursuant to Part V, Manual for Courts-Martial (2008) and Chapter I, Part B of the JAGMAN. I further recommend that the alleged offenses at NJP be violations of Article 134-Reckless Endangerment and Article 92, Dereliction of Duty (willful). The focus of the reckless endangerment should be not only Staff Sergeant Wilson, but should also include Sergeant Guerrero, Sergeant Rich and Captain Dimoh as potential victims.

U N I T E D S T A T E S)	ARTICLE 32 INVESTIGATION
)	
v.)	DEFENSE REQUEST FOR
)	CONTINUANCE
DAVID I. EICKENHORST)	
XXX XX 3370)	27 JULY 2011
MAJOR)	
U.S. MARINE CORPS)	

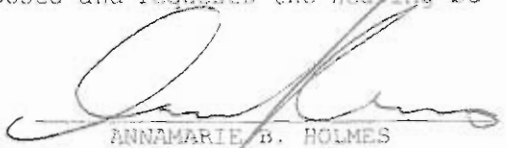
1. The Article 32 Hearing for the above captioned case is currently scheduled for 5 August 2011. The detailed defense counsel, Major Meridith L. Marshall, requests the hearing be continued to . The defense agrees the period of delay from the date of this request until 6 September 2011 will constitute excludable delay under Rule for Courts-Martial 707 and Article 10, UCMJ. The reason for the delay is Major Eickenhorst's search for civilian counsel. In addition Major Eickenhorst is assigned duty in Yuma, Arizona making attorney-client meetings difficult to schedule.



 MERIDITH L. MARSHALL
 Major, U.S. Marine Corps
 Senior Defense Counsel

Counsel for the government, in response to the above motion:

Does not oppose and agrees to the date proposed.
 Opposes the date proposed and requests the hearing be held on _____



 ANNAMARIE B. HOLMES
 Captain, U.S. Marine Corps
 Trial Counsel

All delay from the date of this request until the date of the Article 32 hearing is excludable under R.C.M. 707, Article 10, UCMJ, and any other applicable speedy trial authorities.

Pursuant to the appointing order, all parties shall appear before the court at _____ on _____ for the commencement of this Article 32 hearing.

 Date Investigating Officer

U N I T E D S T A T E S)	ARTICLE 32 INVESTIGATION
)	
v.)	DEFENSE REQUEST FOR
)	CONTINUANCE
DAVID I. EICKENHORST)	
XXX XX 3370)	02 SEP 2011
MAJOR)	
U.S. MARINE CORPS)	

1. The defense requests a continuance in this case until 29 September 2011. The reason for this request is that Major Eickenhorst has retained Mr. Haytham Faraj as his civilian counsel and wants his representation at the Article 32 hearing.

2. Next week, Mr. Faraj has a series of depositions in a civil case that had been postponed a number of times. He will be deposing five police officers and two plaintiffs during that week. On the weekend beginning the 9th, Mr. Faraj has an official function that he is committed to attend on the 9th. He and his partner have a business meeting scheduled for that weekend in Michigan. On the 12th of September, Mr. Faraj has a hearing in state court that cannot be changed. On the 13th, Mr. Faraj has a mandatory day-long seminar for CJA attorneys in the Eastern District of Michigan. On the 14th Mr. Faraj will be traveling to Wyoming to teach a trial skills course that begins on the 15th and ends on the evening on the 24th. He is already on the syllabus for that course and is under contract to be there. On the 27th of September, Mr. Faraj again has to be in Michigan for day two of the mandatory CJA seminar. On the 28th, Mr. Faraj plans to travel to San Diego for the Article 32 on the 29th.


3. The defense agrees that this delay constitutes excludable delay for purposes of Article 10 and R.C.M. 707.

MERIDITH L. MARSHALL
Major, U.S. Marine Corps
Senior Defense Counsel

Counsel for the government, in response to the above motion:

_____ Does not oppose and agrees to the date proposed.

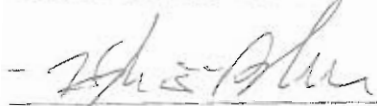
Opposes the date proposed and requests the hearing
be held on 8 Sep 11.



Keith D. Smith
Major, U.S. Marine Corps

All delay from the date of this request until the date of the Article 32 hearing is excludable under R.C.M. 707, Article 10, UCMJ, and any other applicable speedy trial authorities.

Pursuant to the appointing order, all parties shall appear before the court at 0800 on 29 Sep 11 for the commencement of this Article 32 hearing.

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Major Hugh Redman, USMC
Investigating Officer

2 SEP 11
Date

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI) EICKENHORST, David I.		2. SSN 339 60 3370	3. GRADE OR RANK Maj	4. PAY GRADE O-4
5. UNIT OR ORGANIZATION Marine Wing Support Squadron 371 Marine Wing Support Group 37 Third Marine Aircraft Wing Marine Corps Air Station Miramar, California		DOB: 19 Dec 66	6. CURRENT SERVICE a. INITIAL DATE 27 Sep 01	
7. PAY PER MONTH		8. NATURE OF RESTRAINT OF ACCUSED None	9. DATE(S) IMPOSED N/A	
a. BASIC \$6,851.10	b. SEA/FOREIGN DUTY None			

II. CHARGES AND SPECIFICATIONS

10. **Charge I:** Violation of the UCMJ, Article 128

Specification: In that Major David I. Eickenhorst, U.S. Marine Corps, Marine Wing Support Squadron 371, Marine Wing Support Group 37, 3d Marine Aircraft Wing, on active duty, did, at or near Camp Dwyer, Afghanistan, on or about 18 March 2011, commit an assault upon SSgt Christopher Wilson by gesturing toward him with a dangerous weapon likely to produce death or grievous bodily harm, to wit: a loaded firearm.

Charge II: Violation of the UCMJ, Article 134

Specification: In that Major David I. Eickenhorst, U.S. Marine Corps, Marine Wing Support Squadron 371, Marine Wing Support Group 37, 3d Marine Aircraft Wing, on active duty, did, at or near Camp Dwyer, Afghanistan, on or about 18 March 2011, wrongfully communicate to SSgt Christopher Wilson a threat to injure him, to wit: Major Eickenhorst said, "you're fucking up" then unholstered his weapon and said, "want to work on an early retirement?" and that under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI) PERE, Christopher B.	b. GRADE GySgt	c. ORGANIZATION OF ACCUSER HQHQRON, MCAS Miramar, CA
d. SIGNATURE OF ACCUSER	e. DATE	

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this _____ day of _____, 2011, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

A. B. HOLMES

Typed Name of Officer

HQHQRON, MCAS Miramar, CA

Organization of Officer

Captain, U.S. Marine Corps

Grade

Judge Advocate

*Official Capacity to Administer Oath
(See R.C.M. 307(b) - must be commissioned officer)*

Signature

ORIGINAL

FEI

12. On 19 July, 2011, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me (See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)

T. A. PERRY
Typed Name of Immediate Commander

MW5G 37, 3d MAW, MCAS Miramar, CA
Organization of Immediate Commander

Major, U.S. Marine Corps
Grade

T. A. Perry
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1426 hours, 19 July 2011 at MW5G-37, 3d MAW
Designation of Command of

Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 413)

T. A. PERRY
Typed Name of Officer

For The 1 Commanding Officer:
Legal Officer
Official Capacity of Officer Signing

Major, U.S. Marine Corps
Grade

T. A. Perry
Signature

V. REFERRAL: SERVICE OF CHARGES

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

Referred for trial to the _____ court-martial convened by _____
dated _____, subject to the following instructions: None.

by _____ of
Command or Order

Typed Name of Officer

Official Capacity of Officer Signing

Grade

Signature

15. On _____, 2011, I (caused to be) served a copy hereof on (each of) the above named accused.

Typed Name of Trial Counsel

Grade or Rank of Trial Counsel

Signature

FOOTNOTES: 1-When an appropriate Commander signs personally, inapplicable words are stricken.
2-See R.C.M. 601 for concerning instructions. If none, so state.

ORIGINAL

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI) EICKENHORST, David I.	2. SSN 339 60 3370	3. GRADE OR RANK Maj	4. PAY GRADE O-4
5. UNIT OR ORGANIZATION Marine Wing Support Squadron 371, Marine Wing Support Group 37, Third Marine Aircraft Wing, Marine Corps Air Station Miramar, California		6. CURRENT SERVICE a. INITIAL DATE 27 Sep 01	b. TERM Indef
7. PAY PER MONTH a. BASIC \$6,851.10		8. NATURE OF RESTRAINT OF ACCUSED None	9. DATE(S) IMPOSED N/A
b. SEA/FOREIGN DUTY None	c. TOTAL \$6,851.10		

II. CHARGES AND SPECIFICATIONS

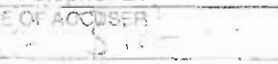
Additional Charge I: Violation of the UCMJ, Article 93

Specification: In that Major David I. Eickenhorst, U.S. Marine Corps, Marine Wing Support Squadron 371, Marine Wing Support Group 37, Third Marine Aircraft Wing, on active duty, did, at or near Camp Dwyer, Afghanistan, on or about 18 March 2011, maltreat SSgt Christopher Wilson, U.S. Marine Corps, a person subject to his orders, by unholstering his weapon and saying to the said SSgt Wilson "you're fucking up," and "want to work on an early retirement," or words to that effect.

Additional Charge II: Violation of the UCMJ, Article 134

Specification: In that Major David I. Eickenhorst, U.S. Marine Corps, Marine Wing Support Squadron 371, Marine Wing Support Group 37, Third Marine Aircraft Wing, on active duty, did, at or near Camp Dwyer, Afghanistan, on or about 18 March 2011, wrongfully and recklessly engage in conduct, to wit: unholstering and brandishing a loaded firearm in the presence of SSgt Christopher Wilson, U.S. Marine Corps, conduct likely to cause death or grievous bodily harm.

III. PREFERRAL

1. NAME OF ACCUSER (Last, First, MI) PERE, Christopher B.	b. GRADE GySgt	c. ORGANIZATION OF ACCUSER HQHQRON, MCAS Miramar, CA
2. SIGNATURE OF ACCUSER 		d. DATE 27 Sep 11

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 27 day of September 2011, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

K. D. SMITH

Typed Name of Officer

HQHQRON, MCAS Miramar, CA

Organization of Officer

Major, U.S. Marine Corps

Grade

Judge Advocate

Official Capacity to Administer Oath
(See H.C.M. 307(b)- must be commissioned officer)


Signature

12. On _____, 2011, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me (See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)

T. A. PERRY

Typed Name of Immediate Commander

MWSG-37, 3d MAW, MCAS Miramar, CA

Organization of Immediate Commander

Major, U.S. Marine Corps

Grade

Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at _____ hours, _____ 2011 at _____
Description of Commander

Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 413)

T. A. PERRY

Typed Name of Officer

Major, U.S. Marine Corps

Grade

Signature

For The 1 Commanding General

Legal Officer

Official Capacity of Officer Signing

V. REFERRAL; SERVICE OF CHARGES

14. DESIGNATION OF COMMAND OF CONVENING AUTHORITY | b. PLACE | c. DATE

Referred for trial to the _____ court-martial convened by _____
dated _____, subject to the following instructions: Note

by // of

Command or Order

Typed Name of Officer

Official Capacity of Officer Signing

Grade

Signature

15. On _____, 2011, I (caused to be) served a copy hereof on (each of) the above named accused:

Typed Name of Trial Counsel

Grade or Rank of Trial Counsel

Signature

FOOTNOTES: 1-When an appropriate Commander signs personally, inapplicable words are struck;
2-See R.C.M. 401(e) concerning instructions. If none, so state.



UNITED STATES MARINE CORPS

3D MARINE AIRCRAFT WING
MARINE CORPS AIR STATION MIRAMAR
PO BOX 452038
SAN DIEGO CALIFORNIA 92145-2038

IN REPLY REFER TO:
5800

CG
AUG 17 2011

From: Commanding General, 3d Marine Aircraft Wing
To: Major Hugh J. Redman XXX XX 0354/4402 USMC

Subj: PRETRIAL INVESTIGATION INTO THE ALLEGED VIOLATIONS OF THE UCMJ
IN THE CASE OF UNITED STATES V. MAJOR DAVID I. EICKENHORST,
XXX XX 3370/1302, USMC

Ref: (a) UCMJ, Article 32
(b) MCM (2008 ed.)
(c) R.C.M. 405, Pretrial Investigation

Encl: (1) Charge Sheet (CO Maj Eickenhorst)

1. You are hereby appointed as the Investigating Officer in the subject case. You are directed to conduct a formal pretrial investigation into the alleged violations committed by the subject-named officer as contained in the enclosure and any additional charges preferred prior to completion of your investigation. Your investigation will be conducted in accordance with the references.

2. You are directed to contact counsel for the government and counsel for the defense upon receipt of this letter to schedule the initial session of your investigation at which you should advise Maj Eickenhorst of his rights at this investigation. You are authorized to grant continuance requests from the date you set for the hearing should circumstances require. You are authorized to grant excludable delay pursuant to R.C.M. 707(c) for any continuance you grant provided that such excludable delay period is with the knowledge of both parties and is for good cause and a reasonable period of time. **You shall complete your investigation no later than 7 September 2011, unless you grant a continuance as discussed above.**

3. Upon completion of this investigation, make a formal report, including therein your recommendations for the disposition of the subject case. If circumstances prevent completion of your report within **seven (7) days** after completion of the investigation, you are to notify my Staff Judge Advocate directly. In your report, include a copy of any requests for delay which you may have approved.


T. CONANT

Copy to:
TC
DC

IEZ



UNITED STATES MARINE CORPS

JOINT LAW CENTER
MARINE CORPS AIR STATION MIRAMAR
P. O. BOX 452013
SAN DIEGO, CALIFORNIA 92145-2013

5800
MJ/cbp
29 Sep 11

From: Military Justice Officer, MCAS Miramar
To: Investigating Officer

Subj: ARTICLE 32 HEARING ICO U.S. v. EICKENHORST

Encl: 1) Diagram of Camp Dwyer FOB workspace
2) 3d MAW (Fwd) Policy letter 1-10 dated 21 Apr 10

1. The attached enclosures are submitted for your consideration as investigative exhibits.
2. Additionally, the following witnesses were called and testified at the subject named Article 32 investigation on 29 September 2011:

Sgt Manual Guerrero, USMC
Sgt Jacob Rich, USMC
Capt Patrick Dimoh, USMC
SSgt (Ret.) Christopher Wilson, USMC

3. The point of contact regarding this matter is Gunnery Sergeant Pere', Military Justice Chief. He can be reached at 858-577-4110.


KEITH DONOVAN SMITH

IE 3

W
A
L
L



Sgt Rich



Maj Eickenhorst



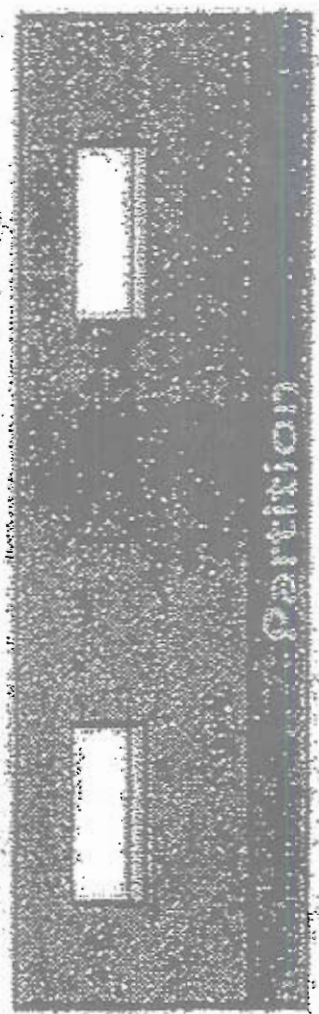
Capt Dimoh



Sgt Guerrero



SSgt Wilson





UNITED STATES MARINE CORPS
3D MARINE AIRCRAFT WING
Unit 41007
FPO, AP 96427-1007

1000
CG
21 Apr 10

WING POLICY LETTER 1-10

From: Commanding General, 3d Marine Aircraft Wing (Forward)
To: Distribution List

Subj: 3D MARINE AIRCRAFT WING (FORWARD) AMMUNITION AND WEAPONS POLICY

Ref: (a) CJCSI 3121.01E, Encl. A (SROE) (U)
(b) HQ ISAF SOP 373 (Force Escalation Awareness) (P//REL)
(c) MCO 5530.14A (Physical Security)
(d) MCO 5500.6G (Use of Force Arming of Law Enforcement and Security Personnel)

Encl: (1) Combat Load and Weapons Checklist
(2) Weapons Safety Rules and Conditions of Carry
(3) Escalation of Force Brief Items
(4) Self-Defense Brief Items
(5) Dry Weapon Drills Syllabus

1. Purpose. To ensure uniformity, safety, and efficiency in the issuing and accounting of ammunition and weapons while in Camp Leatherneck, Forward Operating Bases (FOBs), and in a combat environment. The desired endstate is to allow all personnel the ability to defend themselves while mitigating the risks associated with carrying weapons and ammunition.

2. Weapons Handling

a. All personnel shall have a service rifle and/or pistol and all issued ammunition on their person except during the following times:

- (1) Shower/hygiene
- (2) Gym or physical training
- (3) Within medical facilities onboard U.S. military Forward Operating Bases.
- (4) Within 3d MAW (FWD) Headquarters office spaces (inside of ECP).

b. When weapons and ammunition are not on a person, the following storage procedures shall apply:

(1) Weapons shall be under armed guard or double-locked. Ammunition shall be stored under armed guard or double-locked and separate from the weapon.

(2) Normal Examples

ENCLOSURE ()

Subj: 3D MARINE AIRCRAFT WING (FORWARD) AMMUNITION AND WEAPONS POLICY

(a) Billeting Temporary Storage

1. M4 Carbine cable-locked to rack, billeting door locked OR M4 Carbine cable-locked to rack, roommate informed and positively assumes weapon guard responsibilities. Individual removes the M4 magazine from the stock pouch and maintains their rounds/magazines on their person OR locks them in a container that is separate from the weapon.

2. M9 Pistol locked within a footlocker, billeting door locked OR M9 Pistol cable-locked to rack, roommate informed and positively assumes weapon guard responsibilities. Individual maintains their rounds/magazines on their person OR locks them in a container that is separate from the weapon.

(b) Office Temporary Storage. M4 Carbine or M9 Pistol placed in weapon rack or other location designated by an OIC, where a co-worker is assigned and assumes positive weapon guard responsibilities. This weapon must be in condition 4 and cable-locked. At no time shall any weapons be left without a co-worker assigned as weapon guard. Each individual shall maintain their rounds/magazines on their person, lock them in an ammunition container that is separate from the weapon, or leave them with a co-worker tasked as ammunition guard.

c. Weapon Confiscation

(1) Condition levels and safe weapons handling will be strictly enforced. Anyone who willfully and unnecessarily elevates the condition level of their weapon or improperly handles their weapon (negligence or horseplay) will have their weapon/ammunition confiscated by the nearest SNCO or Officer.

(2) Personnel that exhibit poor judgment and/or discipline, or present significant mental health concerns will be carefully evaluated and may be subject to administrative action to include possible re-deployment out of theater. Violators may be subject to adverse administrative action and/or punitive action under the Uniform Code of Military Justice.

(3) Weapons and ammunition shall be confiscated in any of the following circumstances:

(a) Personnel under medical care that includes treatment for emotional or psychological reasons.

(b) Disciplinary problems.

(c) Lack of proper weapons handling and/or safekeeping.

(d) Suicidal ideations or attempts.

(e) Anger management concerns.

(f) Other circumstances in which the Commanding Officer determines that good cause exists to confiscate weapons and/or ammunition.

(4) Suicidal/Dangerous Patients

(a) Any patient identified to be at imminent risk for suicide or harm to others shall have their weapon and ammunition confiscated immediately. The command must be notified immediately.

Subj: 3D MARINE AIRCRAFT WING (FORWARD) AMMUNITION AND WEAPONS POLICY

(b) Any patient identified to be at imminent risk for suicide or harm to others will be immediately assigned a 1:1 ratio watch. The watch will be an NCO or higher in rank than the at-risk individual. This person will be briefed by the commander or senior enlisted advisor and instructed on their duties.

(c) Any patient identified to be an immediate risk for suicide or harm to others will be referred to the Combined Aid Station (CAS) or the Flight Line Aid Station (FLAS) for safety and acute stabilization. The patient will be maintained on 100% 1:1 observation at the squadron until appropriate transportation and handover is available. A minimum of two daily follow-ups by a proper health care provider shall be conducted until evacuated.

3. Weapons and Ammunition Issue

a. Refresher Training. Prior to Squadron personnel receiving any ammunition the following must happen:

- (1) Squadrons conduct PME on main points of this policy.
- (2) Squadrons conduct classes on the following items:
 - (a) Squadron Commanding Officer Guidance.
 - (b) Weapon Safety Review, enclosure (2).
 - (c) Escalation of Force Brief, enclosure (3).
 - (d) Self-Defense Brief, enclosure (4).
 - (e) Dry Weapon Drills, enclosure (5).
 - (f) Weapon Safety Test.
 - (g) Rounds Issued.
 - (h) Sustainment Training by Leadership.

b. Authorization Process. Additional weapons and ammunition must be approved by the Commanding Officer, and then may be checked out from squadron armory for mission-dependent reasons. The Sample Combat Load & Weapons Checklist, enclosure (1), shall be used for proper authorization. Once the need for additional weapons and ammunition ends (e.g. termination of duty or trip) they shall be checked back into the squadron armory.

c. Camp Leatherneck Loads. Per reference (d), the M4 and M9 shall be in Condition 4 unless duty, mission, or situation dictates otherwise. Nothing in this order shall be construed to limit the ability of squadron personnel to defend themselves individually or collectively.

- (a) M9 Pistol: 2 x Mags of 15 rounds each
Minimum 30 total per reference (c)
Alternate rounds to other mags on weekly basis
- (b) M4 Carbine: 1 x Mag of 27 rounds

Subj: 3D MARINE AIRCRAFT WING (FORWARD) AMMUNITION AND WEAPONS POLICY

d. Combat Loads:

(a) M9 Pistol: 2-4 x Mags of 15 rounds (30-60 rounds total)

(b) M4 Carbine: 2-6 x Mags of 27 rounds (54-162 rounds total)

e. Guardian Angel Duty. While on duty the Guardian Angel Personnel shall be outfitted with a Full Combat Load. While on duty the Guardian Angel shall be Condition 1, unless situation dictates otherwise. If the duty is not a hasty assignment these individuals shall receive an AT/FP update.

f. Squadron Armorer. The Armorer shall be armed with an M9 Pistol and at Condition 1 at all times while on duty, per reference (c). While on duty, the Armorer shall be outfitted with a Full Combat Load. The Armorer shall change to Condition 4 prior to leaving duty, and return to their original Garrison Load.

4. Amnesty Box. An Amnesty Box shall be maintained near and under the watch of squadron duty. The Amnesty Box is for the unhindered return of any found ammunition. The Amnesty Box will be inventoried each morning by the Ammunition Technicians. Absent extraordinary circumstances, squadron personnel will not be subject to administrative or punitive action for using the amnesty box.

5. Armory

a. Inventories. An armory inventory shall be conducted monthly.

b. Morning Reports. Morning Reports shall be delivered to the squadron armory so that the Armorer can correctly account for weapons/ammunition of individuals that are on leave, liberty, or sick in quarters.

6. Conclusion. These standard operating procedures are designed to ensure uniformity, safety, and efficiency in the squadrons' issuing and accounting of ammunition and weapons while at Camp Leatherneck, FOBs, and in a combat environment.



A. W. O'DONNELL, JR.

DISTRIBUTION: A

Combat Load & Weapons Checklist

1. Name: _____ Print Fname, Lname
 2. Section: _____ Section or Department
 3. Reason for additional Ammo/Weapon: _____
 4. OIC approves of Mission _____ initials
 5. Missions outside Base & FOBs require CoS/DCG/CG approval:
Print Name of Approver: _____
Signature of Approver: _____
 6. Refresher/Sustainment Training: _____ initials
 - a. Weapon Safety Review, enclosure (2)
 - b. Escalation of Force Brief, enclosure (3)
 - c. Self-Defense Brief, enclosure (4)
 - d. Weapon Safety Test
 - e. Dry Weapon Drills, enclosure (5)
 7. MWHS-3 S-1 Administration
 - a. Roster updated with planned Location _____ initials
 8. Commanding Officer, MWHS-3, approves/disapproves for additional (weapons/ammo) _____ from MWHS-3 Armory.
- _____
R. J. VRANISH
9. Armory
 - a. Additional Weapon Card (signed)
 - b. Additional Ammo/Weapon issued
 - c. Additional Ammo/Weapon de-issued

Enclosure (1)

ENCLOSURE (2)

Weapons Safety Rules

1. Treat every weapon as if it were loaded
2. Never point a weapon at anything you do not intend to shoot.
3. Keep trigger finger straight and off the trigger until you are ready to fire
4. Keep weapon on safe until you intend to fire.
5. Know your Target and what lies beyond.

Carrying Conditions for the M4

Condition 1. Round in chamber, bolt forward, magazine inserted, weapon on or off safe, ejection port cover closed.

Condition 2. DOES NOT EXIST FOR M4

Condition 3. Empty chamber, bolt forward, magazine inserted, weapon on safe, ejection port cover closed.

Condition 4. Empty chamber, bolt forward, no magazine inserted, weapon on safe, ejection port cover closed.

Carrying Conditions for the M9

Condition 1. Magazine inserted, Round in chamber, slide forward, weapon on safe.

Condition 2. DOES NOT EXIST FOR M9

Condition 3. Magazine inserted, chamber empty, slide forward, weapon on safe.

Condition 4. Magazine removed, chamber empty, slide forward, weapon on safe.

Enclosure (2)

ENCLOSURE (2)

Escalation of Force Brief Items

Classified - see reference (b)

Enclosure (3)

ENCLOSURE (2)

Self-Defense Brief Items

See reference (a)

1. Have you witnessed a hostile act (HA) or hostile intent (HI)?
2. Does you have Positive Identification (PID) of the source of the HA/HI?
3. Have you implemented escalation of force procedures?
4. If yes to ALL, you MAY respond with force up to and including deadly force.

Enclosure (4)

ENCLOSURE (2)

Dry Weapon Drills Syllabus

1. Holster Drills
2. Dry Action Drills from Condition 4 to Dry Condition 3
3. Ready Alert Drills in Dry Condition 3, Muzzle Awareness
4. Immediate Action Dry Drills
 - a. Tap, Rack, Bang
 - b. SPORTS
5. Dry Magazine Drills, Ejecting and Speed Reload
6. Clearing Drills
 - a. Action Drills from Dry Condition 3 to Condition 4
 - b. Clearing Barrel Drills, verifying Condition 4
 - (1) Ensuring Magazine removed
 - (2) Bolt/Slide to rear
 - (3) Inspect Chamber AND Magazine Well
7. Drills emphasizing Clearing prior to Cleaning
8. Cleaning/Maintenance & Refresher training
 - (a) Amnesty Box
 - (b) Desert environment cleaning/lube considerations
 - (c) Emphasize "every weapon considered loaded" before cleaning

Enclosure (5)

ENCLOSURE (2)

ERIC
OPENING



IE 4
Dimoh

MWSS 373 DET Fob Dwyer GOC



IE

IE 5

Pere GySgt Christopher B

From: Pere GySgt Christopher B
Sent: Monday, August 29, 2011 4:54 PM
To: 'theangrydolphin@yahoo.com'
Subject: RE: Article 32 hearing ICO Major Eickenhorst
Attachments: Witness Info Sheet.doc
Signed By: christopher.pere@usmc.mil

SSgt Wilson,

Solution, if needs be will be the government will issue you travel orders and a subpoena (happens all the time even with civilians) and you will be reimbursed for your travels (lodging, etc..) as if you were TAD.

The simpler solution is to be readily available telephonically on 8 September (I will have a more specific time for you as we get closer to the date). The number I have for you is 850 516 9601. Please confirm if this is the best number to contact you. In the mean time please complete and return the attached information sheet for our files.

I appreciate you getting back with me; I will be in touch.

S/F
GySgt Pere'

-----Original Message-----

From: theangrydolphin@yahoo.com [<mailto:theangrydolphin@yahoo.com>]
Sent: Monday, August 29, 2011 13:02
To: Pere GySgt Christopher B
Subject: Re: Article 32 hearing ICO Major Eickenhorst

GySgt, I will be a civilian by then and I'm already in Florida. What is my solution for attending?

Sent from my Verizon Wireless Phone

----- Reply message -----

From: "Pere GySgt Christopher B" <christopher.pere@usmc.mil>
Date: Wed, Aug 24, 2011 3:56 pm
Subject: Article 32 hearing ICO Major Eickenhorst
To: "Dimoh Capt Patrick E" <patrick.dimoh@usmc.mil>, "Guerrero Sgt Manuel A. IV" <manuel.a.guerrero@usmc.mil>, "Rich Sgt Jacob B" <jacob.b.rich@usmc.mil>, <theangrydolphin@yahoo.com>

IEG

Redman Maj Hugh J

From: Redman Maj Hugh J
Sent: Friday, September 02, 2011 10:03 AM
To: Smith Maj Keith D; Marshall Maj Meridith L
Cc: 'haytham@puckettfaraj.com'
Subject: RE: Eickenhorst - continuance request2
Attachments: eickenhorst art 32.pdf
Signed By: hugh.redman@us.usmc.mil

ALCON:

Attached is the endorsed continuance request. I have approved the continuance to the 29th of September. I understand the Government's objection, and recognize that this constitutes significant delay in this case. However, based on all the circumstances, including Mr. Faraj' multiple conflicts during this month which are stated in the continuance request, I consider the delay reasonable.

Major Redman

-----Original Message-----

From: Smith Maj Keith D
Sent: Friday, September 02, 2011 9:29
To: Redman Maj Hugh J; Marshall Maj Meridith L
Cc: 'haytham@puckettfaraj.com'
Subject: RE: Eickenhorst - continuance request2

Maj Redman, the continuance request with the Government's response is attached.

V/R,

Maj Smith

-----Original Message-----

From: Redman Maj Hugh J
Sent: Friday, September 02, 2011 9:16
To: Marshall Maj Meridith L
Cc: Smith Maj Keith D; 'haytham@puckettfaraj.com'
Subject: RE: Eickenhorst - continuance request2

Thanks Major Marshall.

Major Smith, please endorse the Government's position and scan or fax back to me, whichever is preferable.

On a minor note, my last name is spelled Redman. It's been cropping up as Redmon, to include this continuance request.

Thanks,

Major Redman

-----Original Message-----

From: Marshall Maj Meridith L

Sent: Friday, September 02, 2011 9:06
To: Redman Maj Hugh J
Cc: Smith Maj Keith D; haytham@puckettfaraj.com
Subject: Eickenhorst - continuance request2

Good Morning Maj Redman,

Attached is the detailed continuance request in the case of US v. Eickenhorst.

R/
Major Marshall

-----Original Message-----

From: Haytham Faraj [mailto:haytham@puckettfaraj.com]
Sent: Wednesday, August 31, 2011 16:59
To: Redman Maj Hugh J
Subject: Re: Eickenhorst 32

Major Redmon,

I am not questioning your competence or objectivity. If i had a doubt I would raise it. I objected to a decision. I am no where near having any doubts about you personally.

Before we start this off on the wrong foot -perhaps we already have- let me make clear that I am objecting to SSgt Wilson not testifying in person not to your objectivity to be an IO in this matter. His testimony -in my opinion- will be so crucial to your decision that if you don't hear from him to see what he alleges happened and hear what he says, you will be making a decision based on a statement. I cannot cross examine a statement and you can't ask it questions. The SSgt will be out of the Marine Corps when we have this regardless of when it takes place. The government can invite him to come. If he declines, we will be stuck with that but that was not attempted. Your decision can result in this case going forward. But if hearing from the SSgt could possibly cause you to find that there is not sufficient evidence to recommend referral, then the CA and Maj Eichenhurst are entitled to that.

Rs,

Haytham Faraj
Sent from my iPad

-----Original Message-----

From: Redman Maj Hugh J
Sent: Wednesday, August 31, 2011 9:21
To: 'Haytham Faraj'
Cc: Marshall Maj Meridith L; Smith Maj Keith D
Subject: RE: Eickenhorst 32

Mr. Faraj:

Please be careful when attempting to accuse me of "having a paper 32" over your objections, prior to the hearing even being held, and insinuating that in any way I accused you of misrepresenting your schedule, or doubted your word. Neither of those accusations are true, but I now will consider them formal accusations of record against my objectivity and competence as an Article 32 officer, since that is your clear insinuation.

I have been tasked by a General Officer with conducting an Article 32 investigation. I take that obligation seriously. That requires, in my opinion, detailed records-including detailed reasons for extensive delay. I simply requested that you describe the nature of your conflicts so that I had a complete record prior to granting or not granting a continuance request. In no way did I challenge that you had genuine reasons for delay. You can see the problem, I'm

sure, if I'm asked by a General Officer why an Article 32 is taking so long, and my response to him is, "Well Sir, the Defense Counsel needed more time," without any facts to back that up. Detailed explanations for extensive delay is an extremely basic Article 32 IO duty I have always followed. Your initial response to me simply that the proposed date was "untenable" and that you needed another 30 days would hardly create a sufficient record for me as the IO. It does NOT, however, carry with it any allegation that I think you are misrepresenting your availability.

Regarding your assertion that I am conducting a "Paper 32," that is, without doubt, an insinuation that I am biased for the Government and/or incompetent in ensuring that a thorough and impartial 32 take place (another responsibility I take seriously). Your quote that now you are forced to consult with your client "to see whether it is worth the expense to even have a 32" is an obvious allegation that I am poised to conduct a meaningless 32 in violation of R.C.M. 405.

The objection you initially raised was to the Government's assertion that SSgt Wilson was unavailable to testify. After applying the balancing test contained in R.C.M. 405, I determined that SSgt Wilson was unavailable. Your objection will obviously be noted and preserved for the record. That hardly creates a "paper 32 however," with two witnesses still scheduled to testify. I also asked for input as to whether telephonic testimony from SSgt Wilson (his EAS is today) would be amenable, to which I have yet to receive any reply.

As stated previously, due to the serious nature of your accusations against myself personally, I will consider them a formal objection by yourself as to my competence and partiality to continue as the Article 32 IO.

Major Redman

Redman Maj Hugh J

From: Redman Maj Hugh J
Sent: Tuesday, August 30, 2011 5:11 PM
To: Smith Maj Keith D
Cc: Marshall Maj Meridith L; 'Haytham Faraj'; Holmes Capt Annamarie B
Subject: RE: Eickenhorst 32
Signed By: hugh.redman@us.usmc.mil

Thanks Major Smith:

Pursuant to R.C.M. 405(g)(2)(A), I've determined that both SSgt Wilson and Sgt Rich are unavailable military witnesses.

Please send me a copy of the charge sheet.

Alcon:

Time and date still set for 8 September 2011, 0800, JLC, Miramar.

S/F,

Major Redman

-----Original Message-----

From: Smith Maj Keith D
Sent: Tuesday, August 30, 2011 14:14
To: Redman Maj Hugh J
Cc: Marshall Maj Meridith L; 'Haytham Faraj'; Holmes Capt Annamarie B
Subject: RE: Eickenhorst 32

Maj Redman, answers to your questions are as follows:

- 1) Sgt Rich graduates from the Sgt's Course on 12 Oct 11 at 1000.
- 2) SSgt Wilson's EAS is 31 Aug 11. He is currently located in Pensacola, FL.

Additionally, the only two exhibits the government intends to admit are the statements of Sgt Rich and SSgt Wilson. The only two witnesses that the government intends to call are Capt Dimoh and Sgt Guerrero. These exhibits are part of the investigation that was previously provided to defense and defense has had opportunities to interview the witnesses.

V/R,

Maj Smith

-----Original Message-----

From: Redman Maj Hugh J
Sent: Tuesday, August 30, 2011 8:35
To: Smith Maj Keith D; Holmes Capt Annamarie B
Cc: Marshall Maj Meridith L; 'Haytham Faraj'
Subject: RE: Eickenhorst 32

Alcon:

I've seen two references by both sides to a SSgt Williams. After reviewing the investigation, I assume we're all referring to SSgt Wilson, who is on terminal leave in Florida? Would both sides be amenable to telephonic testimony by SSgt Wilson?

Major Smith--What is SSgt Wilson's EAS, and his location within Florida? Also, when does Sgt Rich graduate from Corporal's course?

Mr. Faraj, I understand you are requesting a 30-day continuance, but I really need more specifics as to the reason for the continuance, such as the nature of conflicting cases and their inclusive dates, or whether the basis is prep time, or a combination of the two. Thanks in advance for any additional info you can provide me.

S/F,

Major Redman

-----Original Message-----

From: Redman Maj Hugh J
Sent: Monday, August 29, 2011 15:25
To: 'Haytham Faraj'
Cc: Marshall Maj Meridith L; Smith Maj Keith D
Subject: RE: Eickenhorst 32

Mr. Faraj:

I understand that 8 September does not work for you. Can you give me a better idea of the nature of your conflict for 30 days? In other words, is this due to specific litigation already scheduled or in progress over the next four weeks? If so, are you available weekends during that time?

Thanks,

Major Redman

-----Original Message-----

From: Smith Maj Keith D
Sent: Monday, August 29, 2011 12:48
To: Redman Maj Hugh J
Cc: Marshall Maj Meridith L; Pere GySgt Christopher B; 'Haytham Faraj'; Holmes Capt Annamarie B
Subject: RE: Eickenhorst 32

Maj Redman, the Government objects to any further continuances or delays in this case. This Article 32 Investigation was originally scheduled for 5 Aug 11, but was continued at the request of defense to allow Maj Eickenhorst time to contract and consult with Mr. Faraj (see attachment). The implication was that defense requested the time necessary for the scheduling of this Investigation. Further, It is the government's position that, in the interest of justice, the aggrieved parties (i.e., the command and the victim) need to move forward with the prosecution of this case sooner rather than later.

V/R,

Keith D. Smith, Major, USMC
Military Justice Officer, MCAS Miramar
DSN: 312-267-6859
Commercial: 858-577-6859

Email: keith.d.smith1@usmc.mil

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-----Original Message-----

From: Redman Maj Hugh J
Sent: Monday, August 29, 2011 12:27
To: 'Haytham Faraj'; Smith Maj Keith D
Cc: Marshall Maj Meridith L; Pere GySgt Christopher B
Subject: RE: Eickenhorst 32

Alcon:

Let's tackle the availability issue first. What is the Government's position as to a continuance to 29 September?

S/F,

Major Redman

-----Original Message-----

From: Haytham Faraj [mailto:haytham@puckettfaraj.com]
Sent: Monday, August 29, 2011 12:20
To: Smith Maj Keith D
Cc: Redman Maj Hugh J; Marshall Maj Meridith L; Pere GySgt Christopher B
Subject: Re: Eickenhorst 32

Maj Redman,

I apologize my tardiness in responding. September 8 is untenable for me. My first availability is Sep 29. I request that the Article 32 be rescheduled to that date. I object to the failure to produce military witnesses. SSgt Williams, as I understand, is the main complainant. It's unacceptable that he is not produced. The fact that he is on terminal leave is of no relevance. He can be ordered to return and testify. Terminal leave is still leave.

Vr,

Haytham Faraj
Sent from my iPhone

On Aug 29, 2011, at 9:01 AM, "Smith Maj Keith D" <keith.d.smith1@usmc.mil> wrote:

> Maj Redman, the government will be requesting that Sgt Rich (attending Sgt's Course at Twenty-Nine Palms) and SSgt Williams (on terminal leave in Florida) be found to be "not reasonably available" and their sworn CID statements be admitted at the Article 32 in their stead. This means that the only two witnesses that the government intends to call are Capt Dimoh and Sgt Guerrerro.

>
> Absent any objections by defense, my Military Justice Chief is sending the entire investigation to you simply to create context for the other statements/testimony. We understand that you will only consider those items that are submitted at the actual Article 32 Investigation when you make your recommendation to the Convening Authority.
>
> Also, no objections to proceeding with the Article 32 on the below mentioned date and time.
>
> V/R,
>
> Keith D. Smith, Major, USMC
> Military Justice Officer, MCAS Miramar
> DSN: 312-267-6859
> Commercial: 858-577-6859
> Email: keith.d.smith1@usmc.mil
>
> Email Work Product / Attorney-Client Privilege Notice:
>
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>
>
>
> -----Original Message-----
> From: Redman Maj Hugh J
> Sent: Monday, August 29, 2011 8:40
> To: Marshall Maj Meridith L; Smith Maj Keith D
> Cc: 'haytham@puckettfaraj.com'
> Subject: RE: Eickenhorst 32
>
> ALCON:
>
> Let's proceed with the Article 32 on 8 September, at 0800 at the JLC, Miramar. Please let me know if either side has any additional witnesses they wish to call, in addition to the Government's listed below in the email chain. I have been delegated the authority to issue continuances, so please let me know if 8 September is an issue.
>
> Thanks,
>
> Major Redman
>
> -----Original Message-----
> From: Marshall Maj Meridith L
> Sent: Friday, August 26, 2011 11:38
> To: Redman Maj Hugh J; Smith Maj Keith D
> Cc: haytham@puckettfaraj.com
> Subject: RE: Eickenhorst 32
>
> Maj Redman,
>
> Maj Eickenhorst has retained Mr. Haytham Faraj, cc'd above.
>

> I have not gotten a date of his availability yet as he has been in court. I did alert the government to this already.

>

> R/

>

> Major Meridith L. Marshall
> Senior Defense Counsel
> MCAS, Miramar
> 858-577-1720 (desk line)
> dsn 267-1720
> 858-997-8332 (government cell)
> meridith.marshall@usmc.mil

>

>

> -----Original Message-----

> From: Redman Maj Hugh J
> Sent: Friday, August 26, 2011 11:27 AM
> To: Marshall Maj Meridith L; Smith Maj Keith D
> Subject: Eickenhorst 32

>

> Major Smith/Major Marshall:

>

> Just confirming 8 September for the 32 date. Does 0800 work for you both? Also, I'd like to get a copy of the investigation IOT determine which witnesses I may want to have there that aren't on either of your lists. So far (from Gunny Pere's attached email) from the Government I have:

>

> Capt Patrick Dimoh
> SSgt Christopher Wilson
> Sgt Manual Guerrero
> Sgt Jacob Rich

>

> Let me know if either of you foresee any availability issues or other concerns you'd like to address prior to the hearing.

>

>

> Thanks,

>

> Major Redman

>

> Major Hugh Redman, USMC
> SJA, MCAS Yuma
> 928-269-3484 (DSN 269)
> hugh.redman@usmc.mil

>

>

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