

INVESTIGATING OFFICER'S REPORT

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

1a. FROM: <i>(Name of Investigating Officer - Last, First, MI)</i> WARE, PAUL, J	b. GRADE LTCOL	c. ORGANIZATION WESTPAC, NAVY-MARINE CORPS TRIAL JUDICIARY	d. DATE OF REPORT 2 OCT 2007
2a. TO: <i>(Name of Officer who directed the investigation - Last, First, MI)</i> MATTIS, JAMES N	b. TITLE COMMANDER	c. ORGANIZATION U.S. MARINE CORPS FORCES, CENTRAL COMMAND	
3a. NAME OF ACCUSED <i>(Last, First, MI)</i> WUTERICH, FRANK, D	b. GRADE SSGT	c. SSN 000-00-3312	d. ORGANIZATION 3RD BN, 1ST MARINES
			e. DATE OF CHARGES 21 DEC 2006

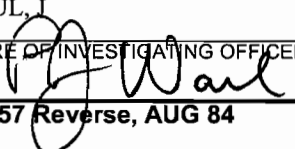
<i>(Check appropriate answer)</i>			YES	NO
4. IN ACCORDANCE WITH ARTICLE 32, UCMJ, AND R.C.M. 405, MANUAL FOR COURTS-MARTIAL, I HAVE INVESTIGATED THE CHARGES APPENDED HERETO (Exhibit 1)			<input checked="" type="checkbox"/>	
5. THE ACCUSED WAS REPRESENTED BY COUNSEL (If not, see 9 below)			<input checked="" type="checkbox"/>	
6. COUNSEL WHO REPRESENTED THE ACCUSED WAS QUALIFIED UNDER R.C.M. 405(d) (2), 502(d)			<input checked="" type="checkbox"/>	
7a. NAME OF DEFENSE COUNSEL <i>(Last, First, MI)</i> PUCKETT, NEIL	b. GRADE CIV	8a. NAME OF ASSISTANT DEFENSE COUNSEL <i>(If any)</i> VOKEY, COLBY, C	b. GRADE LTCOL	
c. ORGANIZATION <i>(If appropriate)</i>		c. ORGANIZATION <i>(If appropriate)</i> Legal Team Echo, LSSS, 1st MLG		
d. ADDRESS <i>(If appropriate)</i> 2181 Jamieson Ave Ste 1505 Alexandria, VA 22314		d. ADDRESS <i>(If appropriate)</i> Bldg 22163, Box 555607 Camp Pendleton, CA 92055		
9. <i>(To be signed by accused if accused waives counsel. If accused does not sign, investigating officer will explain in detail in Item 21.)</i>				
a. PLACE		b. DATE		

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				
10. AT THE BEGINNING OF THE INVESTIGATION I INFORMED THE ACCUSED OF: <i>(Check appropriate answer)</i>			YES	NO
a. THE CHARGE(S) UNDER INVESTIGATION			<input checked="" type="checkbox"/>	
b. THE IDENTITY OF THE ACCUSER			<input checked="" type="checkbox"/>	
c. THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 31			<input checked="" type="checkbox"/>	
d. THE PURPOSE OF THE INVESTIGATION			<input checked="" type="checkbox"/>	
e. THE RIGHT TO BE PRESENT THROUGHOUT THE TAKING OF EVIDENCE			<input checked="" type="checkbox"/>	
f. THE WITNESSES AND OTHER EVIDENCE KNOWN TO ME WHICH I EXPECTED TO PRESENT			<input checked="" type="checkbox"/>	
g. THE RIGHT TO CROSS-EXAMINE WITNESSES			<input checked="" type="checkbox"/>	
h. THE RIGHT TO HAVE AVAILABLE WITNESSES AND EVIDENCE PRESENTED			<input checked="" type="checkbox"/>	
i. THE RIGHT TO PRESENT ANYTHING IN DEFENSE, EXTENUATION, OR MITIGATION			<input checked="" type="checkbox"/>	
j. THE RIGHT TO MAKE A SWORN OR UNSWORN STATEMENT, ORALLY OR IN WRITING			<input checked="" type="checkbox"/>	

11a. THE ACCUSED AND ACCUSED'S COUNSEL WERE PRESENT THROUGHOUT THE PRESENTATION OF EVIDENCE <i>(If the accused or counsel were absent during any part of the presentation of evidence, complete b below.)</i>		<input checked="" type="checkbox"/>
b. STATE THE CIRCUMSTANCES AND DESCRIBE THE PROCEEDINGS CONDUCTED IN THE ABSENCE OF ACCUSED OR COUNSEL		
7a. Two additional defense counsel; Mr. Mark S. Zaid, Esq., practice address of 1920 N Street N.W. Suite 300, Washington, D.C. 20036 and Maj Haythem Faraj, assigned to Legal Team Echo, LSSS, 1st MLG.		
11. LtCol Vokey was absent on two occasions for a total of approximately 90 minutes. Each absence was with the expressed oral consent of the accused. Defense counsel, Mr. Puckett, Mr. Zaid and Maj Faraj were present for all sessions of the Article 32 hearing.		

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
See attached report				
b. THE SUBSTANCE OF THE TESTIMONY OF THESE WITNESSES HAS BEEN REDUCED TO WRITING AND IS ATTACHED.			<input checked="" type="checkbox"/>	
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>			
Listing of exhibits included in attached report				
b. EACH ITEM CONSIDERED, OR A COPY OR RECITAL OF THE SUBSTANCE OR NATURE THEREOF, IS ATTACHED			<input checked="" type="checkbox"/>	
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>				<input checked="" type="checkbox"/>
15. THE DEFENSE DID REQUEST OBJECTIONS TO BE NOTED IN THIS REPORT <i>(If Yes, specify in Item 21 below.)</i>				<input checked="" type="checkbox"/>
16. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL				<input checked="" type="checkbox"/>
17. THE CHARGES AND SPECIFICATIONS ARE IN PROPER FORM				<input checked="" type="checkbox"/>
18. REASONABLE GROUNDS EXIST TO BELIEVE THAT THE ACCUSED COMMITTED THE OFFENSE(S) ALLEGED			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
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>			<input checked="" type="checkbox"/>	
20. I RECOMMEND:				
a. TRIAL BY <input type="checkbox"/> SUMMARY <input type="checkbox"/> SPECIAL <input type="checkbox"/> GENERAL COURT-MARTIAL <input checked="" type="checkbox"/>				
b. <input 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>				
As requested by both counsel, I granted delay in filing argument submissions from September 7th to September 14th. I found this delay reasonable and granted the request excluding the inclusive dates pursuant to RCM 707.				
Defense requested additional delay from September 14th to September 21st to submit argument. The government did not object. I granted this delay also concluding it was reasonable, and excluded the inclusive dates pursuant to RCM 707.				
16. LCpl Tatum and Sgt Salinas are essential witness and the government may have to provide testimonial immunity for them to become available.				
17. Charge I, specification 13 is not in proper form and is explained in discussion on page 29.				
18. Reasonable grounds exist for some of the charges. Full explanation is contained in attached report.				
22a. TYPED NAME OF INVESTIGATING OFFICER		b. GRADE	c. ORGANIZATION	
WARE, PAUL, J		LTCOL	WESTPAC JUDICIAL CIRCUIT, NAVY-MARINE CORPS TRIAL JUDICIARY	
d. SIGNATURE OF INVESTIGATING OFFICER			e. DATE	
			2 Oct 2007	

12a The following witnesses testified under oath:

Name	Organization/address
Captain Alfonso Capers	MCAGCC, 29 Palms, CA
Captain Kathryn Navin	HQBN, CampPen, CA
Staff Sergeant Travis Fields	SOI, CampPen, CA
Staff Sergeant Justin Laughener	CLR 17, CampPen, CA
Sergeant Sanick DelaCruz	H&S BN, SEPS CO, Camp Pendleton, Ca
Lance Corporal Humberto, Mendoza	2 nd Bn, 24 th Marines
Mr. Trent Aaron Graviss	Fairdale, Ky
Special Agent Thomas Brady	NCIS, Mayport, FL

13a The following statements, documents or matters were considered; the accused was permitted to examine each. Other than noted in paragraph 21, there were no objections to any of the documents by either party.

1. Charge Sheet
2. Appointing Orders dtd 18 January 2007 & 23 May 2007
3. Convening Order
4. LtGen Mattis letter 5800 dtd 7 March 2007, RE: Excludable Delay
5. LtCol Riggs letter 5800 dtd 7 March 2007, RE: Excludable Delay
6. Trial Counsel letter 5800 dtd 5 March 2007, RE: Excludable Delay
7. Col Chester email dtd 25 April 2007, RE: Excludable Delay
8. Col Chester email dtd 6 February 20087, RE: Excludable Delay
9. Order by LtCol Ware extending Article 32 date until 22 August 2007, RE: Excludable Delay
10. Protective Order dtd 19 March 2007
11. Trial Counsel letter 5800 dtd 7 March 2007, RE: Request for Accused to Testify
12. Invocation of Co-Accuseds by Email, RE: Request for co-Accuseds' attendance at Article 32
13. Neil Puckett, Esq. letter dtd 8 December 2006, RE: Attorney Representation
14. Mark Zaid, Esq. letter dtd 12 December 2006, RE: Attorney Representation
15. Col Castellvi legal hold order, RE: SSgt Wuterich, dtd 16 March 2007
16. Cleansed OMPF SSgt Wuterich (fitness reports while an MCT instructor are highlighted)
17. Cleansed Service Record Book of SSgt Wuterich
18. Memorandum for Record dtd 01 May 07, RE: Tim McGirk
19. Testimonial Immunity Documents, RE: SSgt Laughner
20. Testimonial Immunity Documents, RE: Sgt Dela Cruz
21. Testimonial Immunity Documents, RE: LCpl Mendoza
22. Results of Review of Photographs and Video Provided by Khalid Salman Rasif / 30 Mar 06 (12 Sept 06 ROI, Ex. 381) [photos of roadside, House 1 and House 2 scenes]
23. RCFL review of Maj Hyatt's Image Hard Drive (12 Sept 06 ROI, Ex. 424)
[photos of roadside, House 1 and House 2 scenes]

24. Death certificates of 19 Nov 2005, Haditha, Iraqi victims (12 Apr 06 ROI, Ex. 48) [certificates of roadside, House 1 and House 2 victims]
25. Translation of Death certificates of 19 Nov 2005, Haditha, Iraqi victims (3 Aug 06 ROI, Ex. 377) [certificates of roadside, House 1 and House 2 victims]
26. Medical Examination of 19 Nov 2005, Haditha, Iraqi victims (3 Aug 06 ROI, Ex. 378) [roadside, House 1 and House 2 victims]
27. 19 Nov 2005, Haditha, Iraqi victim photos pre-death (12 Sept ROI, Ex. 491) [roadside, House 1 and House 2 victims]
28. 19 Nov 2005, Haditha, Iraqi victim photos post-death from LCpl Wright (12 Sept ROI, Ex. 412) [roadside, House 1 and House 2 victims]
29. 19 Nov 2005, Haditha, Iraqi victim photos post-death from SSgt Laughner(12 Sept ROI, Ex. 455) [roadside, House 1 and House 2 victims]
30. Eman Waleed Al Hameed U.S. Navy Medical Records
31. Al-Rahman Waleed Al-Hameed U.S. Navy Medical Records

32. IA: Results of Interview / Abid Al Hameed / (12 April 06 ROI, Ex. 43)
33. IA: Eman Waleed Al-Hameed dtd 08 Jun 06
34. IA: Results of Interview / Eman Hamed / 18Mar06 (12 April 06 ROI, Ex. 42)
35. Deposition transcript of 2ndLt William Kallop taken 7 May 2006
36. Statement of SSgt Frank D. Wuterich with Rights Advisement and Rights Waiver dtd 21 Feb 06
37. SSgt Wuterich 60 minutes video & transcript (with authentication affidavit)
38. Statement of Sgt Hector R. Salinas with Rights Advisement and Rights Waiver dtd 19 Feb 06
39. Statement of Sgt Hector R. Salinas with Rights Advisement and Rights Waiver dtd 18 Mar 06
40. Statement of Sgt Hector R. Salinas with Rights Advisement and Rights Waiver dtd 19 Mar 06
41. Statement of Sgt Hector R. Salinas with Rights Advisement and Rights Waiver dtd 24 Mar 06
42. Statement of LCpl Steven B. Tatum with Rights Advisement and Rights Waiver dtd 19 Feb 06
43. Statement of LCpl Steven B. Tatum with Rights Advisement and Rights Waiver dtd 19 Mar 06
44. Statement of LCpl Steven B. Tatum with Rights Advisement and Rights Waiver dtd 24 Mar 06
45. Results of Interview of LCpl Steven B. Tatum with Rights Advisement and Rights Waiver dtd 3 Apr 06
46. Results of Interview of LCpl Steven B. Tatum with Rights Advisement and Rights Waiver dtd 9 May 06
47. Results of Interview of LCpl Steven B. Tatum with Rights Advisement and Rights Waiver dtd 17 May 06
48. Statement of LCpl Justin L. Sharrat with Rights Advisement and Rights Waiver dtd 19 Feb 06
49. Statement of LCpl Justin L. Sharrat with Rights Advisement and Rights Waiver dtd 19 Mar 06
50. Statement of LCpl Justin L. Sharrat with Rights Advisement and Rights Waiver dtd 24 Mar 06

51. Results of Death Scene Investigation from 3 Aug ROI, RE: House #1
52. Results of Death Scene Investigation from 3 Aug ROI, RE: House #2
53. Statements of HN Hatch
54. IA: Results of Forensic Reconstruction & Pathology of House #1 dtd 16Oct06
55. IA: Results of Forensic Reconstruction & Pathology of House #2 dtd 16Oct06
56. IA: Results of Forensic Reconstruction & Pathology of Roadside dtd 16Oct06
57. IA: Result of Forensic Analysis of House #1 dtd 15Nov06
58. IA: Result of Forensic Analysis of House #2 dtd 15Nov06
59. IA: Result of Forensic Analysis of Roadside dtd 15Nov06
60. House #1 Pathology Report dtd 14 Dec 06
61. House #2 Pathology Report dtd 14 Dec 06
62. Statements of Zelada
63. Transcript of Abdul Rahman Waleed Al-Hamid interview

64. Transcript of Eman Waleed Abdul Hamid interview interpreted by Mr. Malek
65. Transcript of Safa'a younis Salim Rasif interview interpreted by Mr. Malek
66. Transcript of Yassin salem Rasif Hussein interview interpreted by Mr. Malek
67. Transcript of Jameel Mahmoud Ashoor Latif interview interpreted by Mr. Malek
68. Transcript of Shamas Al-Din Dawood Mohammed Khalil Al-Araji interview interpreted by Mr. Malek
69. Video recorded sworn interview of Jameel Ayada Abid Hussayn dtd 25Jan07 (with video and translator declaration)
70. Video recorded sworn interview of Hameed Flaeh Hassan dtd 25Jan07 (with video and translator declaration)
71. Results of Interview of Safah Yunis Salim dtd 8Jun06
72. Memorandum of Capt Tim Garrison dtd 23 January 07, RE: victim identification (with affidavit)
73. Transcript of interview of LCpl Rodriguez dtd Jan07
74. Transcript of interview of LCpl Rodriguez dtd 28Mar07
75. SSgt Laughner Power Point presentation re: 19 Nov 2005
76. Cpl Robert Stafford Testimony from the Article 32 hearings of LCpl Sharratt and Tatum, respectively
77. Transcript of interview of LCpl Zuniga dtd 19Jan07
78. Cpl Harmala 19 Nov 05 video
79. 2nd MARDIV ROE Card Effective 15 Apr 05 (MajGen Bargewell Rpt, Encl. 130)
80. Appendix 6 to Annex C to MNF-W Operations Order 1-05 (Operation Iraqi Freedom 04-06 Campaign Plan) Rules of Engagement (Col Watt Invest, Encl 12)
81. Tab A to appendix 6 to MNF-W Operations Order 1-05 (Operation Iraqi Freedom 04-06 Campaign Plan) [MNF-W ROE CARD]
82. K Co Training Calendar Schedules dtd July 05
83. Predeployment Class- ROE taught by Capt Navin in July 05
84. CV of SA Mike Maloney
85. CV of SA Tom Brady
86. CV of LtCol Elizabeth Rouse
87. Results of receipt of 3/1 Captured Weapons Log dtd 1 Jun 06

88. Deposition transcript of 1stLt Frank taken 29 March 2007
89. Deposition transcript of 1stLt Mathes taken 28-29 March 2007
90. U.S. v. Capt Stone, USMC, Article 32 Witness Testimony transcript of 1stLt Mathes
91. Deposition transcript of 2ndLt Martin taken 29 March 2007
92. Deposition transcript of GySgt Dunlap taken 29 March 2007
93. Satellite images of Haditha, Iraq in the vicinity of Route Chestnut and Viper (Google Earth)
94. 1stLt Kallop testimony from Article 32 of Capt Stone
95. Transcript of Khalid Salman Rasif Hussien interview interpreted by Mr. Malek
96. Transcript of Waleed Abdul Khalil Abdul Fattah Ahmed interview interpreted by Mr. Malek
97. SSgt Travis Fields testimony from the Article 32 hearing of LCpl Sharratt
98. SSgt Justin Laughner testimony from the Article 32 hearing of LCpl Sharratt

99. Mr. Amir Alkaysey testimony from the Article 32 hearing of LCpl Sharratt
100. Mr. Trent Graviss testimony from the Article 32 hearing of LCpl Sharratt
101. SA Michael Maloney testimony from the Article 32 hearing of LCpl Tatum
102. SA Nayda Mannle testimony from the Article 32 hearing of LCpl Tatum
103. SA Matt Marshall testimony from the Article 32 hearing of LCpl Tatum
104. SA Brian Brittingham testimony from the Article 32 hearing of LCpl Tatum
105. SA Mark Platt testimony from the Article 32 hearing of LCpl Tatum
106. SA Kelly Garbo testimony from the Article 32 hearing of LCpl Tatum
107. SA Tony Flores testimony from the Article 32 hearing of LCpl Tatum
108. SA Michael Wright testimony from the Article 32 hearing of LCpl Tatum
109. Capt Kathryn Navin testimony from the Article 32 hearing of LCpl Tatum
110. SSgt Travis Fields testimony from the Article 32 hearing of LCpl Tatum
111. SSgt Justin Laughner testimony from the Article 32 hearing of LCpl Tatum
112. LCpl Humberto Mendoza testimony from the Article 32 hearing of LCpl Tatum
113. Mr. Trent Graviss testimony from the Article 32 hearing of LCpl Tatum
114. Statements of AOC Bradley Bunde
115. Statements of SSgt Kelly McDaniel
116. Statements of SSgt Orlando Robinson
117. Statements of Corporal Glenn Mefford
118. Statements of Corporal George M. Rials
119. NCIS Statements of Corporal Rene Rodriguez
120. Statements of Corporal Robert Stafford
121. Statements of Lance Corporal James Prentice
122. Statements of Lance Corporal Maxamillion Schaal
123. NCIS Statements of Lance Corporal Rolando Zuniga
124. Statements of Mr. Jarrett Bilskie
125. Testimony and Statements of Mr. Daniel David Callaway
126. Statements of Mr. Trent Graviss
127. Statements of Mr. Andrew Wright
128. Statements of Staff Sergeant Timothy Diamond
129. Testimony and Statements of Mr. Hank Wolf, III
130. ~~Capt Dinsmore Deposition dtd 26 March 2007~~

131. Order by LtCol Ware extending Article 32 date until 30 August 2007, RE:
Excludable Delay
132. Photos Roadside (from I.E. 59)
133. Photos House 1 (from I.E. 57)
134. Photos House 2 (from I.E. 58)
135. SA Tom Brady testimony from the Article 32 hearing of LCpl Tatum
136. Elizabeth Rouse Testimony from the Article 32 hearing of LCpl Tatum
137. EOD Report
138. Haditha Threat Assessment
139. Garrison Memo 14 July 07
140. Mendoza Watt Statement of 19 Feb 06
141. Mendoza NCIS Statement of 18 Mar 06
142. Mendoza NCIS Statement of 24 Mar 06
143. Removed

144. Mendoza Polygraph Results
145. Mendoza NCIS notes
146. Statement of Dela Cruz 19 Feb 06
147. Statement of Dela Cruz 18 Mar 06
148. Statement of Dela Cruz 24 Mar 06
149. Dela Cruz Testimony at Tatum Art 32
150. Kallop Watt Statement of 21 Feb 06
151. Kallop Depo Transcript of 19 Mar 06
152. Kallop 24 Mar 06 NCIS ROI
153. Kallop Statement Summaries
154. Kallop Deposition Summaries
155. Kallop Deposition By Subject
156. Kallop Deposition Quotes
157. Salinas Statement Summaries
158. McConnell Statement of 18 Feb 06
159. McConnell Statement Summaries
160. McConnell Depo Transcript 19 Mar 06
161. Dinsmore Sworn Statement 26 Mar 06
162. Dinsmore Sworn Statement 2 Jun 06
163. Dinsmore Sworn Statement 15 Sept 06
164. Dinsmore Testimony at Stone Art 32
165. Dinsmore Statement Summaries
166. Dinsmore Deposition Summaries
167. Dinsmore Deposition By Subject
168. Dinsmore Deposition Page References
169. Graviss Statement Summaries
170. Zelada Statement Summaries
171. NCIS Interview of Safah Yunis Salem Putrus 15 Mar 06
172. Safah CNN Interview
173. Safah Yunis Salim Rasif Interview Transcripts 07
174. MG Bargewell 15-6 (Haditha Report) pgs 77-78, paragraph 3.a(1)-(4); pgs 80-85
175. Bargewell Col Davis Testimony

176. Bargewell Maj Collins Testimony
177. Bargewell MG Johnson Testimony
178. Bargewell Report of Alleged LOAC Violation
179. Bargewell NCIS Statement of PFC Jiminez
180. Sharratt IO Report
181. LtGen Mattis Sharratt Dismissal Letter
182. Tatum IO Report
183. Rep Murtha Statements
184. Laughner Statement 15 Jun 07
185. Government's identification of relevant testimony pages
186. Dismissal of Charge I, Spec 12 memo from CDA.
187. Video of portion of LCpl Mendoza testimony.
188. House 1 diagram edited by LCpl Mendoza
189. House 2 diagram edited by LCpl Mendoza

190. door prop used with LCpl Mendoza
 191. Diagram with vehicles drawn by Mendoza
 192. Diagram drawn by Delacruz
 193. Delacruz 2 April 06 Stmt
 194. Delacruz 16 May 06 Stmt
 195. Delacruz 9 May 06 Stmt
 196. Delacruz Capt Stone Art 32 Testimony
 197. NCIS notes delacruz 18 march 06 Stmt
 198. NCIS notes delacruz 9 may 06 Stmt
 199. NCIS notes delacruz 16 may 06 Stmt
 200. LCpl tatum wiretap audio
 201. LCpl Tatum wiretap transcript
 202. Scan Eagle Footage
 203. SSgt Fields Testimony at LtCol Chessani Article 32
 204. HN Whitt Mar 06 Stmt
 205. HN Whitt May 06 Stmt
 206. SA Brady mark up of Scan Eagle footage (Wuterich position)
 207. Note sheet written on by Mr. Puckett during SA Brady's testimony
 208. Capt Dinsmore Deposition (Video only with classified portions redacted)
 209. Defense Written Comments
 210. Government Written Comments
 211. Unsworn addendum to SSgt Wuterich's unsworn statement
 212. 5 May 06 NCIS statement of Lt Frank
 213. 20 Mar 06 Col Ewers interview of Lt Frank
 214. Government argument on evidence
 215. Defense argument on evidence
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Summary of Evidence

On 19 November 2005, in Haditha, Iraq, Staff Sergeant Wuterich (SSgt) was the driver of the third vehicle of a four vehicle convoy. As the convoy traveled down route Chestnut returning from a logistics mission, an Improvised Explosive Device (IED) exploded under the fourth vehicle in the convoy. Prior to the explosion LCpl Sharratt waved to a driver of an oncoming white sedan to pull over as the convoy approached. Directing oncoming traffic to pull over to the side of the road to make way for the convoy was standard practice. Immediately upon exiting his vehicle after the explosion, SSgt Wuterich noticed the white sedan with 5 men inside. As he moved toward the white sedan he heard Sergeant (Sgt) Dela Cruz yell at the occupants of the vehicle. The 5 men exited the vehicle leaving the doors open. Two men who exited on the driver side moved to the other side of the vehicle. The 5 men were not responding to Sgt Dela Cruz's directions. At least one man began to either run or move further away from the car¹. SSgt Wuterich took a knee and began firing. At the same time Sgt Dela Cruz opened fire on the men² from a position to the north and rear of the vehicle. Each of the five men fell from gunshot wounds. Sgt Dela Cruz then moved toward the bodies and fired additional rounds into each body³.

SSgt Wuterich then went to the damaged 4th vehicle and met First Lieutenant (1stLt) Kallop who arrived with the quick reaction force. While near the 4th vehicle the Marines received small arm fire from the South⁴. Sgt Salinas identified a shooter in the vicinity of House 1 (as identified in the investigation). He alerted 1stLt Kallop to seek cover and fired several M203 rounds at House 1. SSgt Wuterich advised 1stLt Kallop they should assault House 1. 1stLt Kallop ordered SSgt Wuterich to clear South toward House 1. Sgt Salinas and another Marine fired additional M203 rounds at House 1 while Lance Corporal (LCpl) Sharratt laid down suppressive fire with his M240G weapon.

SSgt Wuterich's makeshift fire team to clear South consisted of LCpl Tatum, Sgt Salinas and LCpl Mendoza. 1stLt Kallop initially headed South but stopped when he received word that Marines may have located the trigger house for the IED to the North. SSgt Wuterich was left in command of the fire team and assault. As they approached House 1, they received no further small arms fire. SSgt Wuterich advised the Marines to "shoot first, ask questions later" as he anticipated hesitation could cost them their lives. SSgt Wuterich further advised the Marines that House 1 was to be treated as hostile.

¹ Forensic analysis suggests one of the persons may have been in movement or kneeling when shot. The remaining 4 persons were deemed "highly unlikely" that they were running or moving away.

² Sgt Dela Cruz previous statements under oath claim he opened fire as the men ran away. He testified at the Article 32 that he lied in that statement and that he did not shoot the men until they were already on the ground. He also stated he lied in his previous statement that he yelled toward the men to stop.

³ Sgt Dela Cruz testified that SSgt Wuterich also conducted a "dead check" by shooting each person.

⁴ Numerous Marines report hearing or seeing fire from the South. Several identify House 1 as the source.

Sgt Salinas then entered House 1 and shot and killed Khamisa Tuema Ali (Kamisa) in the hallway by the stairs. SSgt Wuterich and LCpl Tatum followed into the hallway with LCpl Mendoza entering last. LCpl Mendoza moved to the room to the right of the hallway, observed *Abdul Hameed Husin Ali (Abdul)*⁵ inside the room and shot him when Abdul made a movement toward the closet. While Sgt Salinas, LCpl Tatum and SSgt Wuterich were still in the hallway they heard a noise coming from the room to their left. Sgt Salinas and SSgt Wuterich were convinced that sound was the sound of an AK-47 rifle being racked. LCpl Tatum agreed, so he and Sgt Salinas threw grenades into the room. One of the two grenades exploded and immediately after the blast, SSgt Wuterich and LCpl Tatum entered the room and began firing at occupants in the room⁶. As a result *Guhid Abdalhamid Hasan*⁷, Abdullah Waleed Abdul Hameed (Abdullah), Ali Abdul, Hameed Husin and Asmaa Salman Rasif (Asmaa) were killed and Eman Waleed Abd Al Hameed (Eman) and Abd Al-Rahman Waleed Al Hameed (Abd) were injured by a combination of the grenade fragments and or bullets.

After the gunfire ceased, someone announced that there was a runner⁸. SSgt Wuterich noticed the open door to the rear and ordered the Marines to leave House 1 and pursue the runner. The fireteam headed toward House 2 (as identified in the investigation. SSgt Wuterich, Sgt Salinas and LCpl Mendoza took positions outside House 2 next to one door. LCpl Mendoza kept watch toward a second door. One of the Marines knocked or rang a bell at the door. As Yunis Salim Rasif (Yunis) approached the second door, LCpl Mendoza shot through the door and killed him⁹. SSgt Wuterich and LCpl Mendoza entered House 2. When LCpl Tatum arrived at the door, SSgt Wuterich ordered LCpl Tatum to “frag” the next room in the home. LCpl Tatum obtained a grenade from Sgt Salinas and threw it into the room adjacent to the kitchen. It exploded, damaging the pipes in the shower room. Unknown to the Marines at that time, two adult women and six children were in the far back corner room of House 2. SSgt Wuterich ordered the Marines to continue to clear House 2. Sgt Salinas stayed outside House 2 and his whereabouts are not in evidence.

⁵ Person was misidentified in previous report.

⁶ SSgt Wuterich unsworn statement says he can not remember who was in what position but later claims he did not fire his weapon inside House 1.

⁷ Person was misidentified in previous report.

⁸ None of the four Marines claims to have seen a runner but all claim someone called out that there was a runner. The Government argues Sgt Salinas made this comment. Sgt Salinas statements claim someone else did.

⁹ LCpl Mendoza testified that SSgt Wuterich ordered him to shoot.

It is at this point that the evidence in the investigation contains significant differing accounts of what happened. As a result of the actions of the Marines within House 2, Aida Yasin Ahmed, Mohomed Yunis Salim, Aisha Unes Salim, Zainab Unes Salim, Sena Yunis Salim, Noor Salim Rasif, and Yuda Hasin Ahmed were killed.

LCpl Mendoza testified that he went to the back room of House 2 and opened a closed door. He stepped inside the room and saw women and children. He then closed the door to prevent the people from hearing what he had to say and he turned to LCpl Tatum. He claims he told LCpl Tatum that the room had women and children inside to which LCpl Tatum responded, "kill them". LCpl Mendoza testified that in response he repeated that there were just women and children in the room and left to take a position inside the kitchen.

LCpl Tatum's statements disavow this conversation with LCpl Mendoza claiming he did not know who was in the back room of House 2 when he entered it. LCpl Tatum's version of events is that while checking a room, he heard gunfire erupt from the room to his right. He responded to the gunfire and saw SSgt Wuterich engaging targets in the far corner of the room. He entered the room and fired his weapon at targets on the bed.

Safah Yunis Salim Rasif (Safah) statement through an interpreter claims a Marine threw a grenade into the room and closed the door. The grenade did not explode. The grenade caused them all to move to the back part of the room near the bed. After hearing what sounded like pipes bursting and running water coming from down the hall, her Aunt opened the door and saw Yunis lying on the ground. Her Aunt started to scream and was then shot through the doorway by a Marine. The Marine continued into the room and started shooting at everyone on the bed. She described the Marine as being shorter than her at somewhere around 5 foot 8 inches. She also has several inconsistent statements with regard to small details but ultimately her version is that a Marine sprayed the room with M16 fire after shooting her Aunt. Because she dove to the side of the bed she did not see the actual shooting. After the shooting she passed out and remembers pretending she was dead when some Marines came into the room. She heard a Marine say "they are all dead". When the Marines left, she went to her Uncle's house.

Forensic analysis of the photographs of the deceased inside the room in House 2 conclusively indicates that there were three shooting positions and at least two different shooters. This is based on the trajectory associated with each wound depicted in the photographs and a forensic reconstruction of the most likely sequencing of gunfire.

SSgt Wuterich provided statements to an interviewer of the *60 Minutes* program and an unsworn statement at the Article 32 hearing that he did not fire his weapon inside House 2.

Test Applied to the Evidence

The test I applied to determine if reasonable grounds exist is whether the set of circumstances would satisfy an ordinary, cautious and prudent person, that there is reason to believe an offense has been committed. Reasonable grounds must be more than suspicion or the ability to theorize a criminal act from a set of facts excluding all evidence to the contrary. Although the Government does not have to prove the allegations are true at an Article 32 investigation, it must present credible evidence to support the conclusion that reasonable grounds exist to believe that a crime was committed.

My recommendation is based on a careful examination of the evidence with particular focus on credibility to provide impartial advice to the Convening Authority with regard to a disposition of the charges. It is the truth of the evidence coupled with careful analysis of the strengths and weaknesses that should be the foundation for an Investigating Officer's recommendation.

The ultimate issue involved in this Article 32 investigation is whether there is a reasonable ground to find that the killings or force used was not done pursuant to legal authorization. In a homicide case arising from actions by a Marine within a combat environment, the Government may not rest on the normal presumption that killing is wrong and is therefore burdened with proving that the killing was in violation of the rules of engagement.

Charge I: Article 118

The elements of the charged offense of Murder under Article 118(2) are:

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

Specifications 1, 2, 3, 4, and 5 (White Sedan)

Specification 1

In that Staff Sergeant Frank D. Wuterich, U.S. Marine Corps, on active duty, did at or near Haditha, Iraq, on or about 19 November 2005, with the intent to kill or inflict great bodily harm, murder a person identified as Number 16, believed to be Ahmed Kutar Museleh, also known as Ahmed Fenr Muselh, by means of shooting that person with an M16A4 service rifle.

Specification 2

In that Staff Sergeant Frank D. Wuterich, U.S. Marine Corps, on active duty, did at or near Haditha, Iraq, on or about 19 November 2005, with the intent to kill or inflict great bodily harm, murder a person identified as Number 17, believed to be Wagdi Aida Alzawi, also known as Wgedi Aida Abd, by means of shooting that person with an M16A4 service rifle.

Specification 3

In that Staff Sergeant Frank D. Wuterich, U.S. Marine Corps, on active duty, did at or near Haditha, Iraq, on or about 19 November 2005, with the intent to kill or inflict great bodily harm, murder a person identified as Number 18, believed to be Kaled Aida Alzawi, also known as Kaled Aida Abd, by means of shooting that person with an M16A4 service rifle.

Specification 4

In that Staff Sergeant Frank D. Wuterich, U.S. Marine Corps, on active duty, did at or near Haditha, Iraq, on or about 19 November 2005, with the intent to kill or inflict great bodily harm, murder a person identified as Number 19, believed to be Mohmed Tbal Ahmed, also known as Mohmed Betel Ahmed, by means of shooting that person with an M16A4 service rifle.

Specification 5

In that Staff Sergeant Frank D. Wuterich, U.S. Marine Corps, on active duty, did at or near Haditha, Iraq, on or about 19 November 2005, with the intent to kill or inflict great bodily harm, murder a person identified as Number 20, believed to be Akram Hamid Flaeh, also known as Akram Hmid Fluhi, by means of shooting that person with an M16A4 service rifle.

White Sedan Incident

When the convoy was hit with the IED, numerous witnesses said that they heard small arms fire from various directions. SSgt Wuterich noticed the white sedan and 5 men inside. These men exited the vehicle and all moved to the left front passenger side of the car. The men were spread apart by several feet and distance from the car. It is most probable that someone was yelling at them and SSgt Wuterich believed that they were a threat to him and his Marines. The known facts at the time were:

- An IED exploded killing one Marine and injuring two others;
- A quick reaction force was on the way to help respond to the attack;
- Small arms fire began either outgoing or incoming;
- A white sedan was the only civilian vehicle on the road before the IED exploded;
- Five men exited a parked white sedan within 100 meters of the convoy;
- The five men left the vehicle doors open;
- Sgt Dela Cruz's vehicle was directly North of the white sedan;
- The five men displayed no weapons or immediate threat to the convoy;
- The white sedan was within the area of the IED which could have been a VBIED or the location of a remote to detonate the IED
- The situation was fast developing and chaotic.
- Marines were trained that an IED blast is a hostile act and that deadly force is authorized in capturing suspected triggermen for the IED

To determine if reasonable grounds exists, I focused my analysis on the following evidence:

Sgt Dela Cruz: Testified that he shot these individuals after they were dead. He claims to have conducted a "dead check" by shooting each of these individuals while they were on the ground and after SSgt Wuterich also performed a dead check. Sgt Dela Cruz's veracity, to put it mildly, is highly suspect. He testified that he provided two previous false statements under oath as part of the investigation. In those statements he admitted to shooting these individuals after yelling at them to stop in Arabic and they began running. He also admitted to further misconduct by later urinating inside one of the dead men's skull. His reason for providing these "false" statements is because he wanted to ensure he would not be charged with murder because he shot into the dead bodies of the individuals. He believed that forensics would trace the bullets back to him. This simply does not make sense. It is incredible to believe that he would confess to

killing these individuals leaving SSgt Wuterich completely out of the scenario as part of a conspiracy to obstruct justice, or as the Government alleges in Charge II, a conspiracy to provide a false statement, because he was worried he would be charged with murder. It is his own voluntary statement that led to an initial charge of murder against him, and absent immunity, would likely find himself an accused at an Article 32 instead of a key Government witness.

Moreover, only after being provided testimonial immunity did Sgt Dela Cruz deny he shot the individuals while they were alive. His newest version of the truth describes these individuals standing next to each other with some having their hands up over their heads. Many questions become unresolved mysteries if these men were standing in a line with their hands raised. Among the more troubling questions the Government will have to address are why these men had their hands up if no one was yelling commands at them, why the forensic evidence suggests they were shot from the North as well as East and why Sgt Dela Cruz defiled one of the corpses.

It is equally important to note that even when confronted with forensic and other evidence that directly contradicts his testimony, Sgt Dela Cruz cannot simply yield that he might be remembering incorrectly. To change his testimony would subject him to perjury and a loss of his testimonial immunity. His obvious self interest in avoiding murder charges coupled with the Government knowing he committed other offenses to include abusing detainees and the bodies of the victims further erodes confidence in his veracity. On the witness stand he is unclear, easily confused, and acquiesces to counsel's questioning. Simply stated, Sgt Dela Cruz's demeanor and performance in the courtroom is poor. He is easily impeached and absent independent evidence to support his statements, wholly incredible. Because I could not rely on Sgt Dela Cruz for the truth, I searched through all the evidence and found his testimony can not be corroborated.

Forensic reconstruction: Special Agent Brady conducted a forensic reconstruction entirely from photographs and a few statements from reported witnesses. He was unable to walk the ground or examine the shooter locations as described in his reconstruction. He concludes that the 5 individuals were shot most likely from the North and East directions. He dismisses an account by Iraqi Army Soldiers that the individuals were lined up and shot while kneeling. Special Agent Brady's conclusion also call into question Sgt Dela Cruz's claim that only SSgt Wuterich shot the men and that the men were standing with their hands up in a line. Based on the likely trajectory of the rounds that may have caused the wounds as depicted in the photographs, Special Agent Brady was firmly convinced a shooter positioned to the North engaged the men. Sgt Dela Cruz's initial statement places him in that position shooting at the men. Special Agent Brady also found that at least 4 of the 5 men were not running and the 5th may have been in a form of motion not excluding running but not necessarily running. Finally, the forensic analysis concludes that the men received their fatal wounds in substantially the same location as depicted in the photographs noting that some were obviously rolled over for subsequent photographs.

In concluding that the men were engaged from a shooter to the North, Special Agent Brady also noted difficulties a shooter from the East position would have in engaging all the men and inflicting the wounds depicted in the photographs. SSgt Wuterich was positioned to the East of the 5 men and his angle was obstructed by a tractor trailer bed, the height of the white vehicle and a mound of dirt. From that vantage point, it is possible that SSgt Wuterich could see the men but not necessarily their entire body. I believe it is possible that in viewing the scene if one person started to move away or run, SSgt Wuterich might conclude they were all running. This becomes an even more likely scenario if Sgt Dela Cruz is the first to open fire, because then one could expect the men might attempt to move away from the white sedan seeking safety.

SSgt Wuterich: He provided a statement to Col Watts claiming he and Sgt Salinas¹⁰ fired at the men. He also says he was told that the men engaged but he denies remembering that happening¹¹. In an interview he provided to *60 Minutes* he further stated that the men started running after Sgt Dela Cruz started to yell at them to get down. When he saw the men starting to run, he shot them. He does not deviate from this version of events in his unsworn statements at the Article 32.

Photographs: The photographs depict the men several meters away from the vehicle where they received their fatal injuries. The forensic analysis refutes that the men were lined up and shot and also refutes that the men, as a group, were running. It is most likely that the men were not running although some movement between them can not be ruled out. It seems only logical that once the first person was shot that one or more of the men would attempt to move to seek safety.

Sgt Salinas and LCpl Rodriguez: Both provided statements that they heard yelling prior to the gunfire directed toward the white sedan.

LCpl Zungia: Provided a statement that Sgt Salinas reported to 1stLt Kallop that the men had started to run and SSgt Wuterich shot and killed them. To this 1stLt Kallop responded "good".

Cpl Bliske's: Statement claims that in the same situation he would shoot someone if he saw them running after an IED blast.

Capt Dinsmore: Provided an intelligence brief to the Marines that a coordinated attack with a vehicle borne improvised explosive device VBIED may be used in the Haditha area¹².

¹⁰ Sgt Salinas's statement to Col Watts said he shot at the men. His statement to NCIS says Sgt Dela Cruz fired and not him.

¹¹ SSgt McDaniel claims SSgt Wuterich told him the five men fired at the Marines.

¹² IE 138

Analysis of White Sedan Evidence

The evidence presented at the Article 32 provides reasonable grounds to satisfy the first, second and fourth elements for Article 118 (2), for specification 1, 2, 3, 4 and 5. SSgt Wuterich admits to taking a knee and firing at the 5 named individuals. Sgt Dela Cruz, Sgt Salinas, Mr. Graviss and LCpl Rodriguez all corroborate SSgt Wuterich's admission. Whether Sgt Dela Cruz or Sgt Salinas also engaged the 5 men and caused the death of one or more individuals does not relieve SSgt Wuterich of culpability. SSgt Wuterich should be held equally responsible regardless of whether rounds from his, Sgt Dela Cruz or Sgt Salinas weapons caused the fatal injuries. To hold SSgt Wuterich culpable, the Government must prove he actually shot these individuals or by his actions, encouraged others to shoot and kill these men. Additionally, the lesser included offenses of attempt to commit murder are raised by the evidence.

The central issue left to determine is the third element, whether the killings were unlawful. Sgt Dela Cruz's testimony, if true, provides solid reasonable grounds for specification 1, 2, 3, 4 and 5 of Charge I to go forward. However, the Government impeaches Sgt Dela Cruz testimony with other evidence. When the Government has contradictory evidence, the contradictions should be resolved before moving forward on a Charge. Because the Government presented Sgt Dela Cruz's testimony and then impeached large portions of his testimony with forensic evidence and statements from other Marines, my duty to seek the "truth of the allegations alleged" prevents me from recommending that Sgt Dela Cruz's testimony be believed.

Accordingly, my analysis for a recommendation turns to whether the ROE allow for deadly force to be used under the circumstances described by other evidence, that is, after an IED explosion 5 men exit a vehicle that is within reasonable command detonation range of the IED. Additionally, intelligence briefings warn of a IED attack which may be followed up with an ambush and a VBIED. The Government provides a similar scenario on pages 58-59 of IE 83. In that example, deadly force is one option that the Marines are taught that can be used to stop a suspected triggerman. Based on what the Government taught SSgt Wuterich, he should use force up to deadly force to stop the individuals. ~~The men were not responding to verbal commands and began running.~~ Whether SSgt Wuterich's decision to shoot to stop the men was the best or only option he had left is difficult to assess. Such a determination is extremely hard to do because in hindsight we already know that the men and the vehicle had no weapons or explosives. Careful focus on the facts as they existed at the time is necessary, not what was learned since SSgt Wuterich took action. Although it is easy to second guess his decision to respond with deadly force as the best option, not choosing the best option doesn't make other decisions illegal. On the whole of the evidence, I believe the actions of SSgt Wuterich were reasonable and lawful under the circumstances presented to him and the Government has insufficient evidence to recommend referral of specifications 1, 2, 3, 4, and 5 of Charge I to a court-martial.

Charge I Specifications 13 (House 1)

Specification 13

In that Staff Sergeant Frank D. Wuterich, U.S. Marine Corps, on active duty, did at or near Haditha, Iraq, on or about 19 November 2005, while engaging in an act inherently dangerous to another and evincing a wanton disregard for human life, murder six persons inside a House identified as House 1, by: advising the Marines under his charge, prior to the Marines' entry into House 1, to "shoot first and ask questions later" or words to that effect, thus disregarding the requirement to have positive identification prior to engaging a target; and participating in clearing House 1 with deadly force without conducting positive identification prior to engaging individuals within House 1.

Evidence for House 1 Incident

LCpl Mendoza: LCpl Mendoza testified that when he first saw Abdul in the room he was unsure what to do so he asked Sgt Salinas how to handle the situation. Sgt Salinas told him to shoot the individual. LCpl Mendoza returned to the room and then saw Abdul moving toward the closet. He became scared and believed Abdul was going to retrieve a weapon so he fired 5 to 6 rounds into Abdul. LCpl Tatum entered the room and went over to the body of Abdul and shot into the body saying he was making a dead check. LCpl Mendoza has no memory of a grenade explosion or other gunfire occurring inside House 1. LCpl Mendoza's previous sworn statements made to NCIS contain no mention of asking for advice from Sgt Salinas or that LCpl Tatum shot the body of Abdul.

LCpl Tatum: In three signed, sworn statements, (two of which were to NCIS) LCpl Tatum denies positively identifying any persons within House 1. He also stated that he heard an AK-47 rack inside the room in question and considered House 1 hostile. After hearing the noise, Sgt Salinas and he "double fragged" the room by throwing in two grenades. One grenade exploded. After the grenade exploded, SSgt Wuterich entered the room and began firing his weapon. LCpl Tatum followed SSgt Wuterich and fired his weapon at targets on the right side of the room as he entered. LCpl Tatum's statements make no mention of performing a dead check on the body of Abdul. An NCIS investigative report prepared by Special Agent Brittingham contains statements by LCpl Tatum that he did positively identify targets within the room of House 1 by using a size method.¹³ The report also claims that LCpl Tatum believed he heard a metal on metal sound and when SSgt Wuterich and Sgt Salinas said it was an AK-47, he thought that made sense and agreed. The report further states LCpl Tatum was confused concerning the order of events of when he entered the room, whether it was right

¹³ The size method means to determine the sex and age of the target based on the size of the shadow. Small equals child, medium equals woman and large for a man.

after the grenade explosion or after clearing House 2. Additionally, LCpl Tatum stated he believed House 1 was hostile and that he entered the room believing someone had a weapon inside.

Sgt Salinas: In neither of Sgt Salinas' signed, sworn statements is there any mention of LCpl Mendoza seeking advice on what to do inside House 1. He also states he heard an AK-47 racking sound from the room to the left of the hallway and "double fragged" the room with LCpl Tatum. He heard one explosion and states that they did not clear the room but instead went to House 2 because someone yelled out "there is a runner".

Abd Al-Rahman Waleed Al Hameed (Abd): The Government employed a second translator to verify the statements of Abd. This translation confirmed some concerns I had in previous viewings and provided me more confidence in the accuracy of the transcripts. Abd claims to have been inside the room and witnessing a "flash bang" and that his grandfather's "meat" came off inside the room. He said he witnessed Marines coming into the room and shooting bullets all over. Abd was injured but someone from off camera refused to allow the injury to be viewed. Abd claimed to be removed from the home by Marines later that day.

Eman Waleed Abd Al Hameed (Eman): Eman said her Aunt Hiba picked up her sister Asia and ran out of the room when a grenade exploded. She also said after the explosion of the grenade she witnessed muzzles of rifles pointing into the room from the door and shooting all over the room. Eman did not see any Marines enter the room and claims to have been taken from House 1 by Iraqi National Guard.

SSgt Wuterich: In both his interview with *60 Minutes* and unsworn statement at the Article 32 hearing, SSgt Wuterich denies firing his weapon inside House 1. He does admit to saying "fire first, ask questions later," or words to that effect to the Marines as they approached House 1. He provides no account of his or any Marines locations or actions within House 1.

Analysis of House 1 Evidence

The evidence submitted regarding House 1 included all evidence produced at the Article 32 investigation in the case of US V LCpl Tatum. Additionally the Investigating Officer Report for that investigation is specifically included as evidence in this investigation. My analysis of the actions of the Marines with regard to the events within House 1 that resulted in the death of six persons has changed in minor areas as the focus is on SSgt Wuterich and not LCpl Tatum. Additionally, the evidence in this case presents a separate analysis concerning MOUT training which is not included in the Investigating Officer Report in US V LCpl Tatum. Additional evidence bearing on this issue is SSgt Wuterich's claims he did not fire his weapon. I find it incredible that SSgt Wuterich chose to stand by while his Marines entered and engaged in clearing the House with grenade and rifle fire. I also believe LCpl Tatum's account that SSgt Wuterich fired into

the room of House 1. The defense alludes that LCpl Tatum was confused by NCIS into including SSgt Wuterich, but there is no evidence to support this supposition. Regardless, LCpl Tatum will be a key witnesses if charges against SSgt Wuterich are referred to a trial.

The evidence demonstrates that the Marines did not believe positive identification was required before engaging the targets inside House 1 based on their training:

The Government counsel argued that positive identification of occupants of the room was required under the rules of engagement. Such a theory, requiring positive identification before engaging targets inside House 1 is clearly contrary to the training and experiences of the Marines in Third Battalion, First Marines.

I am reminded of what I learned from the very first day at The Basic School. “We train as we fight.” It is more than a simple motto to encourage full effort in field and classroom instructions. It is indoctrinating our Marines into a way of thinking, acting and most importantly, responding under the stress and crisis of combat. It is believed that through practice, mental and physical memory can work through the chaos of the event and allow Marines to respond quickly and appropriately to an otherwise overwhelming event.

Capt Capers, a trainer of SASO tactics in MCAGCC, 29 Palms, CA, testified that training Marines for SASO consists of many practical application scenarios. There are no correct answers to the problems posed, but the intent of the training is to demonstrate and provide Marines situations to develop that mental and physical memory of how to respond. An enemy combatant firing from a crowded market place, or a person aggressively approaching a checkpoint are examples of the type of situations that are presented. When a Marine makes a decision to use deadly force causing collateral damage, the scenario is stopped and discussion about the choice, why it was made and how to employ a better approach reducing collateral damage is explained. This training is important, relevant and ongoing. However, while the Government argues that the conduct of SSgt Wuterich violated the ROE, SSgt Wuterich, and through sworn statements and depositions, his fellow Marines, were trained in preparation of MOUT operations, the ROE are not applied in the same manner.

Numerous witnesses to include Capt McConnell (Company Commander), Capt Dinsmore (Intel officer), 1stLt Kallop (Platoon Commander), SSgt Fields (Platoon Sergeant), fellow squad members LCpl Tatum, LCpl Sharratt, LCpl Mendoza, Sgt Salinas, LCpl Rodriguez and Mr. Graviss provided sworn statements that in a MOUT assault, you throw a grenade into a room and assault into the room with gunfire. Almost to a Marine, the understanding is that once a house is declared hostile no further positive identification is necessary to lead an assault with grenade and gunfire. Each of these Marines state in various ways that once a house is declared hostile you can “blow it up”, “lead with grenades and gunfire” or call in indirect fire to destroy the structure. Capt Capers and Capt Navin testified that in applying the ROE, you can never declare a house as hostile and indiscriminately use deadly force against the occupants.

Capt Capers and Capt Navin are not in SSgt Wuterich's chain of command and do not know the training SSgt Wuterich received in regard to tactics for clearing a house in a MOUT assault. The Government presented no evidence of any practical exercise, discussion, lecture, power point slide, field operation or tactical war game where the accused was placed in a simulated combat environment and was required to distinguish legitimate targets from innocents within a room. The SASO training described by Capt Capers was not a troops in contact situation. The Government does have training for close quarters with the focus on using limited force to preserve innocent lives but that training was not provided to SSgt Wuterich or Marines from his Battalion.

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

Capt McConnell, 1stLt Kallop and SSgt Fields were all in SSgt Wuterich's direct chain of command. All the other statements are from Marines in the same Battalion. Clearly this unit's training and leadership either received different training, or came up with its own form of MOUT tactics for clearing a house. The almost universal statements of these witnesses that a house can be declared hostile and you can lead with grenades and gunfire without further positive identification demonstrates this was widely believed throughout all levels of the Company, and most likely the Battalion. It is within the context that SSgt Wuterich and his Marines received training that conflicted with the ROE that the actions he and his Marines made on 19 November 2005 must be analyzed.

One theory the Government argues is that SSgt Wuterich had revenge on his mind that was foreshadowed in a conversation with Sgt Dela Cruz concerning an earlier IED attack. That theory posits that the Marines entered House 1 with the intent to kill the inhabitants out of rage for the IED blast and a rush to engage in combat. In such a context the Government claims that SSgt Wuterich's advice to "Shoot first, ask questions later" is a command to ignore the ROE. But this still remains a compelling story unsupported by evidence. SSgt Wuterich and his Marines didn't kill everyone in sight. They didn't celebrate the opportunity to kill. Their post assault actions conform with behavior which is expected of Marines who have experienced combat and the absence of such a display of satisfaction in their actions works against the theory they were out to seek revenge.

The revenge theory is simply unsupported by the evidence. The Government provided no evidence to demonstrate that SSgt Wuterich proceeded to House 1 for illegitimate reason. The evidence is uncontradicted that a superior, 1stLt Kallop, ordered SSgt Wuterich to clear South after receiving some fire originating from House 1. When Marines receive fire from a location and are actively suppressing the target, that is classified as "troops in contact" and numerous witnesses seem to believe under such circumstances a structure may be declared hostile. Finally, there is no evidence to contradict that within House 1 the Marines heard a sound which they reasonably and honestly believed was the sound of an AK-47 racking.

The Government did present evidence of a forensic reconstruction that suggests that Asmaa and Abdullah were shot at close range from behind. This would mean that the assailant would have to be to the left rear of the victims and firing downward. However, cause of death cannot be forensically determined, nor can ballistics identify the weapon used. Special Agent Brittingham's report states that LCpl Tatum was confused of what time he entered the room to clear it. If a grenade was thrown and then the Marines left returning after the events of House 2 and then fired at the occupants, positive identification would surely be required. However the evidence strongly supports that both SSgt Wuterich and LCpl Tatum fired into the room right after the grenade blast. Eman and LCpl Tatum describe the gunfire occurring from the door. LCpl Tatum and LCpl Sharratt describe returning to House 1 and LCpl Sharratt cleared the room by fire, meaning by firing his 9 mm pistol all around the room.

Special Agent Brady has had time to review the alternative theory that Abd was not shot from close range as presented to him during LCpl Tatum's Article 32 hearing. After reflecting on this theory, he is confident that alternative theory is biomechanically not possible. With the evidence he has at his disposal, he would testify that the alternative theory is simply not possible. I have witnessed Special Agent Brady testify twice now and I am convinced in his sincerity, professionalism and unbiased evaluation. However, no matter how professional, he must concede that his analysis is significantly limited by the evidence he used. Although I am convinced his reconstructed death scene is as good as it can get, I do not believe it will withstand forensic expert critique. Simply put, it is a very good analysis with limited resources and it will be very difficult to rely solely on this forensic report as to what happened inside House 1. This leaves one of several puzzling and disturbing questions that the investigation simply does not answer. One can imagine that LCpl Tatum or SSgt Wuterich inflicted that wound by moving close to the child, but there is no evidence to support it was one of them.

Even though Marines entered believing further positive identification was not required, the evidence presented demonstrates that Marines actually did conduct further positive identification within House 1.

In House 1, Sgt Salinas shot after opening the door and seeing a dark figure approach him. He had witnessed a shooter near House 1 and had fired suppressive M203 rounds. When he knocked in the front door he did so aggressively and at the ready. Seeing a person approach under those circumstances and in light of his MOUT training he fired. LCpl Mendoza shot another man inside the home when he witnessed that man move toward the closet. LCpl Mendoza believed the man was reaching for a weapon so he shot and killed him. SSgt Wuterich, Sgt Salinas and LCpl Tatum all heard what they thought was an AK-47 racking in a room. This made sense to them because they were searching for the person who had been shooting at them when they were by the convoy vehicles. Using MOUT tactics, Sgt Salinas and LCpl Tatum threw hand grenades into the room and SSgt Wuterich and LCpl Tatum followed the explosion with gunfire.

The Marines were trained that after receiving fire from a house or while inside a house that you believe enemy combatants are hiding and you hear a sound that you honestly and reasonably believe is an indication that a weapon is being prepared, **that is positive identification of hostile act and or intent and no specific individualized positive identification is required within the room while employing deadly force to clear the room.**

Among the key pieces of evidence for this conclusion are:

- Several Marines report incoming fire originating from the vicinity of House 1. Sgt Salinas claims to have seen the assailant.
 - Capt McConnell briefed his Marines to be aggressive and not to hesitate.
 - Lt Kallop ordered Marines to clear the South with SSgt Wuterich in command.
 - Sgt Salinas fired an M203 round toward House 1 to mark it as the one to be cleared and yelled out to LCpl Tatum and LCpl Mendoza to join the fire team in clearing south.
 - SSgt Wuterich told the fire team to “shoot first, ask questions later” because he was concerned that if they hesitated, the enemy would kill them.
 - SSgt Wuterich was convinced that there was an enemy combatant inside House 1.
 - Field training, practical applications, lectures and power point slides taught SSgt Wuterich that if you receive fire from a building, that building and the occupants are declared as hostile.
 - In clearing a hostile house while in a troops in contact situation, Marines were taught and believed that the rules of engagement do not require Marines to make further positive identification before using deadly force.
-
- Upon entering House 1, Sgt Salinas shot and killed one person as that individual approached him.
 - In a second room LCpl Mendoza fired and killed a military aged male. LCpl Mendoza testified that he did not perceive a hostile act or intent from this man when he first saw him however, when returning to the room he interpreted the man turning toward the closet as a hostile act possibly retrieving a weapon. Certainly, LCpl Mendoza had in his mindset House 1 was a dangerous house otherwise the act of looking into the closet could not reasonably be interpreted as a hostile act or intent. The Government counsel had a sworn statement with this account prior to recommending he receive immunity. Arguably Government counsel concluded that his actions were in accord with the rules of engagement or were willing to let him avoid liability for murder.

- Sgt Salinas, SSgt Wuterich and LCpl Tatum all heard a sound which they believed was an AK-47 being racked in a room.
- Training taught that in MOUT situations you are to throw a grenade into a room and follow the explosion by tactically entering the room and firing your weapon in a coordinated manner with other members of your fire team.
- Sgt Salinas and LCpl Tatum threw grenades into the room in question and SSgt Wuterich and LCpl Tatum followed up that use of deadly force by employing the approved tactic of firing M16A4 rounds at the occupants of the room.
- Statements by a survivor, Eman, supports that the rifle fire occurred from the doorway.

Certainly today we can second guess SSgt Wuterich's assessment of the situation and conclude there were better alternatives, but it is imperative to objectively look at the situation as it existed at the time, not what was learned after. Marines will often make tactical decisions that are not always the best with the benefit of hindsight, but decisive action at the critical moment is the hallmark of our training. SSgt Wuterich acted decisively and in accord with how he was trained, not on a specific intent to murder innocent people in revenge for an IED assault upon his convoy. Accordingly, based on the above analysis I find that the Government has failed its burden to demonstrate reasonable grounds to believe SSgt Wuterich committed a crime within House 1.

Charge I specifications 6, 7, 8, 9, 10, 11, and 12 (House 2)

Specification 6

In that Staff Sergeant Frank D. Wuterich, U.S. Marine Corps, on active duty, did at or near Haditha, Iraq, on or about 19 November 2005, with the intent to kill or inflict great bodily harm, murder a person identified as Number 8, believed to be Huda Yasin Ahmed, by means of shooting that person with an M16A4 service rifle.

Specification 7

In that Staff Sergeant Frank D. Wuterich, U.S. Marine Corps, on active duty, did at or near Haditha, Iraq, on or about 19 November 2005, with the intent to kill or inflict great bodily harm, murder a person identified as Number 9, believed to be Aida Yasin Ahmed, by means of shooting that person with an M16A4 service rifle.

Specification 8

In that Staff Sergeant Frank D. Wuterich, U.S. Marine Corps, on active duty, did at or near Haditha, Iraq, on or about 19 November 2005, with the intent to kill or inflict great bodily harm, murder a person identified as Number 10, believed to be Mohamed Yunis Salim, by means of shooting that person with an M16A4 service rifle.

Specification 9

In that Staff Sergeant Frank D. Wuterich, U.S. Marine Corps, on active duty, did at or near Haditha, Iraq, on or about 19 November 2005, with the intent to kill or inflict great bodily harm, murder a person identified as Number 12, believed to be Aisa Unes Salim, by means of shooting that person with an M16A4 service rifle.

Specification 10

In that Staff Sergeant Frank D. Wuterich, U.S. Marine Corps, on active duty, did at or near Haditha, Iraq, on or about 19 November 2005, with the intent to kill or inflict great bodily harm, murder a person identified as Number 13, believed to be Sebea Yunis Salim, by means of shooting that person with an M16A4 service rifle.

Specification 11

In that Staff Sergeant Frank D. Wuterich, U.S. Marine Corps, on active duty, did at or near Haditha, Iraq, on or about 19 November 2005, with the intent to kill or inflict great bodily harm, murder a person identified as Number 11, believed to be Zainab Unes Salim, by means of shooting that person with an M16A4 service rifle.

Specification 12

In that Staff Sergeant Frank D. Wuterich, U.S. Marine Corps, on active duty, did at or near Haditha, Iraq, on or about 19 November 2005, with the intent to kill or inflict great bodily harm, murder a person identified as Number 24, believed to be Marwan Aiad Ahmed, by means of shooting that person with an M16A4 service rifle.

Evidence of House 2 incident

LCpl Mendoza: I have previously detailed LCpl Mendoza's credibility in regard to his telling LCpl Tatum that there were women and children in the back room. Surprisingly, LCpl Mendoza further confirmed my belief he is untruthful in his testimony at this Article 32. During his testimony he described that after seeing women and children in the back room of House 2, he closed the door because he didn't want them to hear what he was going to say. He claims to have told LCpl Tatum that there were women and children in the room! Incredible. Not only is this Marine clearly an accomplice in the shooting of Yunis, making his testimony highly suspect, his explanations for his actions within House 2 strike me as a desperate attempt to cover lies with more lies. In the intervening weeks between Article 32 hearings, LCpl Mendoza certainly was more prepared for the Government's direct examination, but woefully unable to explain his actions when challenged in cross examination.

LCpl Tatum: The defense summation of evidence suggests that LCpl Tatum will challenge his statements to NCIS and claim he does not know who was in the back room firing at the occupants when he came to assist. The argument is that he won't be able to identify SSgt Wuterich and thus, the defense argues LCpl Mendoza was the assailant. LCpl Tatum may desire to help out SSgt Wuterich, he may even claim he didn't know who was in that back room, but it is incredible to believe that LCpl Mendoza was the lead. If he was, I am more than confident that LCpl Tatum would have corrected the statements to NCIS. It is highly suspicious to me that now that LCpl Mendoza is a witness against LCpl Tatum, that LCpl Tatum would start to become vague as to who was in the back room. It is but one more discouraging development in the search for the truth of what happened and why it happened.

SSgt Wuterich: He denies he fired his weapon in House 2. He was in charge. His Marines are throwing grenades and shooting people. If he was not also engaged in the clearing of houses then he should have been in a position to watch and supervise their activities.

Forensic analysis: Special Agent Maloney's forensic analysis identifies three shooter positions and that two shooters engaged the victims in the back room of House 2. He further finds that there was no grenade explosion in the back room and that there was sufficient lighting to identify individuals in the back room.

Safah: In her statements she claims to have seen not only a grenade thrown into the room, but a Marine enter after shooting her Aunt and begin shooting at everyone on the bed. She corroborates that there was sufficient lighting to see the victims inside the room.

Analysis of House 2 evidence

The evidence presented at the Article 32 hearing provides reasonable grounds to satisfy the first, second and fourth elements for Article 118 (2), for specification 6,7,8,9,10,11 and 12. My analysis of the evidence differs from that in the Article 32 report for US V LCpl Tatum because it focuses on the first person to enter the back room and fire at the occupants.

The key evidence of the third element of the offenses charged is the forensic evidence with regard to lighting, the witness Safah, testimony of LCpl Mendoza and the statements of LCpl Tatum. Additionally, Sgt Salinas and LCpl Tatum can possibly provide more clarification after resolving their own investigations and charges.

It is SSgt Wuterich's insistence that he did not participate in shooting inside House 2 that causes great consternation. I am left with two alternatives. He either did fire inside House 2 and the trauma of the event and through denial has convinced himself that he didn't or he was woefully derelict in his duties.

If SSgt Wuterich fired inside the room, the evidence demonstrates that there was sufficient lighting to see the occupants. Unlike in House 1, there is no evidence that a grenade exploded which would have caused decreased lighting. Perhaps SSgt Wuterich perceived a threat inside the room after hearing the Aunt scream. There is simply no evidence to support any conclusion other than he entered the room, saw the occupants and fired away. My analysis with regard to difficulty in proving the cause of death contained in US V LCpl Tatum is not the same in this case. I do not believe a charge of reckless endangerment is warranted. ~~The charge of Article 118(2) has lesser included offenses of attempt, manslaughter and negligent homicide which adequately capture culpability under these circumstances. This is not to say that SSgt Wuterich did not enter the room and formed a reasonable, honest but mistaken belief there was a threat inside the room. *It is saying on the whole of the evidence I have been provided, I believe that SSgt Wuterich's statement that he did not fire in House 2 is false, and absent a fanciful conjecture, the Government has reasonable grounds to proceed with referral of this charge.*~~

Charge II Soliciting another to commit an offense:

Specification 1

In that Staff Sergeant Frank D. Wuterich, U.S. Marine Corps, did at or near Haditha, Iraq, on or about 19 November 2005, wrongfully solicit Corporal Sanick P. Dela Cruz, U.S. Marine Corps, to make a false statement in that if asked, Corporal Dela Cruz should lie and state that Iraqi Army members shot the male passengers and that the passengers were running or words to that effect.

Specification 2

In that Staff Sergeant Frank D. Wuterich, U.S. Marine Corps, did at or near Haditha, Iraq, on or about 21 November 2005, wrongfully solicit Corporal Sanick P. Dela Cruz, U.S. Marine Corps, to make a false statement in that if asked, Corporal Dela Cruz should lie and state that he, Corporal Dela Cruz, said to the male passengers “qif, qif,” or words to that effect.

The elements of Article 134 (solicitation) are:

- (1) That (*state the time and place alleged*), the accused wrongfully ((solicited) (advised)) (*state name(s) of the person(s) solicited or advised*) to commit the offense of (*state the offense allegedly solicited or advised*) by (*specify the statements, acts, or conduct allegedly constituting solicitation or advisement*);
- (2) That the accused specifically intended that (*state the name(s) of the person(s) allegedly solicited or advised*) commit the offense of (*state the offense allegedly solicited or advised*); and
- (3) That, 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.

Evidence of solicitation

Sgt Dela Cruz: He testified that it was he who came up with the idea to say that he told the male passengers “qif” “qif”. His testimony directly refutes that SSgt Wuterich solicited him to make that statement. As such the Government should withdraw and dismiss that specification without prejudice if it has not already.

Analysis of evidence of solicitation

I do not find Sgt Dela Cruz credible and consider most of his testimony at the Article 32 hearing as false. *Because I do not believe Sgt Dela Cruz, and he is the only source of evidence to support these specifications, I cannot find reasonable grounds to support these offenses.*

Charge III: False official statement

Specification

In that Staff Sergeant Frank D. Wuterich, U.S. Marine Corps, did at or near Haditha, Iraq, on or about 19 November 2005, with intent to deceive, make to Staff Sergeant Kelly L. McDaniel, U.S. Marine Corps, an official statement, to wit:

“...following the IED, the white vehicle pulled up and the four males engaged the convoy with firearms”

Which statement was false in that the four males did not engage the convoy with firearms, and was then known by Staff Sergeant Wuterich to be so false.

The elements of Article 107 are:

- (1) That on the day and place alleged, the accused made to SSgt McDaniel a certain official statement that is: that the men in the white sedan fired at the convoy;
- (2) That such statement was totally false;
- (3) That the accused knew it to be false at the time he made it; and
- (4) That the false statement was made with the intent to deceive.

Evidence of false official statement

The Government offered IE 115 as the sole evidence that this statement was made. SSgt Wuterich denies making this statement in both his unsworn statement and in his sworn statement to Col Watts.

Analysis of the evidence

There is no evidence that this statement, if made, was official. Contrary to Government's summary of the evidence, there is no evidence that SSgt McDaniel was discharging an official duty or acted on the information provided. The statement, if made, most closely resembles interaction between two peers which would be expected after the traumatic events that unfolded that day. The evidence further demonstrated that SSgt McDaniel shared the same berthing space as SSgt Wuterich and that they were peers. For a statement to be official, it must concern a Governmental function and must be made to a person in receiving it is discharging the functions of his or her particular office. *I find the Government has failed to provide sufficient evidence to establish reasonable grounds that the statement was official or made with the intent to deceive SSgt McDaniel.*

Recommended changes to specifications

Charge I, Specifications 1-12: They are in proper form. Lesser included offenses are Attempt, Involuntary Manslaughter and Negligent Homicide. I recommend removing the language “identified by (number) and” from each specification.

Charge I, Specification 13: The Government argues this specification is charged under Article 118(3) claiming that by SSgt Wuterich advising the Marines to “shoot first and ask questions later” that created an inherently dangerous environment leading to murder. It is reasoned that such advice is designed to encourage the Marines to disregard or ignore the ROE. I believe this theory is misapplied to the evidence and the specification, as drafted, is improper. Article 118(3) is not designed to allege aiding and abetting theories. Neither is it designed for the Government to hold a person liable for murder based on words alone. It requires a physical act. In the instant case, the accused’s actions could reasonably be interpreted as encouraging his Marines to fire their weapons without using positive identification in violation of the ROE. Under such circumstances I believe a theory of aiding and abetting is appropriate, but the charged offense should be under Article 118(2). Any person who commits an offense is a principal. Any person who knowingly and willfully counsels or commands another to commit an offense is also a principal and is just as guilty as the person who actually committed the offense. Counsel is defined as advising, recommending or encouraging. Command relates to when an order is given by one person to another, who, because of the relationship of the parties, is under an obligation or sense of duty to obey the order.

Although I am not recommending referral of any charges related to victims inside House 1, if my recommendation is not followed, I do recommend specification 13 be withdrawn and an additional charge of Article 118(2) with six specifications,¹⁴ one for each individual be referred instead.

Charge II, Specifications 1 and 2: Specification is in proper form however, an obstruction of justice is a more appropriate charge and specification than solicitation to make a false official statement. If Charge I, specifications 1 through 5 are referred to court-martial, then preferring an additional charge with one specification of Article 134 (obstruction of justice) alleging that SSgt Wuterich counseled and encouraged Sgt Dela Cruz to provide false information in the case of US V. SSgt Wuterich instead of Charge II and its specifications is recommended.

Charge III and its specifications: Specification is in proper form.

¹⁴ In drafting the recommended specifications, although aiding and abetting will be one theory of liability the Government may rely upon, the specification should be drafted placing SSgt Wuterich as the actor. It is improper to allege the theory of liability within the specification. Notice that the Government intends on proving principal liability through alternative theories should be provided to the defense and court via a bill of particulars.

Recommended Additional Charges

Violation of Article 134 (Negligent Homicide) with seven specifications.

Six separate specifications of negligent homicide for killing Aida Yasin Ahmed, Mohamed Yunis Salim, Aisha Unes Salim, Zainab Unes Salim, Sena Yunis Salim, Noor Salim Rasif, and Yuda Hasin Ahmed.

One specification of negligent homicide for killing Yunis. There are reasonable grounds to believe that SSgt Wuterich commanded or approved of LCpl Mendoza shooting Yunis through the front door. LCpl Mendoza's testimony that either Sgt Salinas or SSgt Wuterich were knocking on a door is corroborated by Safah who describes hearing a bell or door knocking. This logically would cause Yunis to approach his front door. LCpl Mendoza shot the man through the door with no display of hostile act or intent. His testimony is that SSgt Wuterich told him to shoot. If true, SSgt Wuterich is liable for the negligent homicide of Yunis.

Article 128, assault with a means likely to cause death or great bodily harm with two specifications:

Two separate specifications, alleging assault with means likely to cause death or great bodily harm, one for victim Abd and one for victim Eman.

Article 134 (obstruction of justice)

Advising a potential witness in a criminal investigation to lie and provide misleading and false information is an obstruction of justice.

The following additional charges are recommended as alternatives to specifications 6-12 of Charge I. As alternatives of proof, SSgt Wuterich can not be convicted of these offenses if he was a principal to the alleged offenses of specifications 6-12 of Charge I.

Article 92 (dereliction of duty and violating a lawful general order)

Two specifications of willful dereliction of duty. One for willfully failing to supervise and ensure his subordinates applied the ROE while clearing House 2 and one specification for willfully failing to accurately report the circumstances he witnessed as noncombatants inside House 2 were killed.

Two specifications of violating a lawful general order. One for failing to report a violation of the rules of engagement after witnessing LCpl Mendoza kill an unarmed man through a door and one specification for failing to report a suspected violation of the rules of engagement when he learned or witnessed Marines under his direct authority kill unarmed women and children inside House 2.

Article 78 (assessory after the fact to negligent homicide)

In that Staff Sergeant Frank D. Wuterich, U.S. Marine Corps, on active duty, knowing that at or near Haditha, Iraq, on or about 19 November 2005, Private First Class Humberto Mendoza U.S. Marine Corps and Lance Corporal Steven Tatum U.S. Marine Corps had committed offenses punishable by the Uniform Code of Military Justice, to wit: negligent homicide, did, at Haditha Iraq, on or about 19 November 2007 in order to hinder punishment of the said PFC Mendoza and LCpl Tatum, assist the said PFC Mendoza and LCpl Tatum by concealing and not reporting up the chain of command accurate details of the events that transpired in House 2.

Article 134 (misprision of a serious offense)

In that Staff Sergeant Frank D. Wuterich, U.S. Marine Corps, on active duty, having knowledge that Private First Class Humberto Mendoza, U.S. Marine Corps and Lance Corporal Steven Tatum, U.S. Marine Corps had actually committed serious offenses to wit: negligent homicide of 7 individuals within House 2, did at Haditha Iraq, on or about 19 November 2005 wrongfully conceal such serious offenses by inaccurately reporting the circumstances, number and nature of casualties inside House 2 and failing to make the same known to the civil or military authorities as soon as possible.

Legal and Witness Issues

The Government offered that all Iraqi witnesses are willing to participate if a trial was held in Iraq. The statements of these witnesses offered in this investigation are not admissible at a court-martial. A deposition taken in compliance with the Sixth Amendment may be an alternative to live testimony. It is likely that depositions of these witnesses will be sought and may serve to underscore difficulties ranging from cooperation, safety, and compliance with the Sixth Amendment.

LCpl Mendoza: He has been immunized for murder. His pre-immunized statements provided sufficient details that are corroborated by forensic evidence making prosecuting him for murder a rather simple affair. Because the Government has chosen to not prosecute the perpetrator, his claim that he fired and killed Yunis based on an order by SSgt Wuterich must be independently corroborated. Only Sgt Salinas can corroborate his version of events.

LCpl Tatum: Of all the witnesses in this investigation, it is LCpl Tatum that is most critical to any prosecution of SSgt Wuterich. His statements to NCIS are inadmissible against SSgt Wuterich. Only by having LCpl Tatum's testify can the Government place SSgt Wuterich inside the back room of House 2. Bottom line is, LCpl Tatum must testify to substantially what is contained in the statements in order to place SSgt Wuterich inside the back room of House 2.

Sgt Salinas: He is neither charged nor immunized for his actions on 19 November 2005. Resolution of his status is needed. Sgt Salinas may provide additional information that may exonerate or implicate SSgt Wuterich. Sgt Salinas can support LCpl Tatum that SSgt Wuterich led into the room in House 1 after the grenade exploded. He can also confirm if SSgt Wuterich was inside House 2 and what reaction if any he witnessed on LCpl Tatum and SSgt Wuterich when they returned from inside House 2. Finally, he may be able to provide evidence of who stated there was a runner causing the fire team to leave House 1.

Counsel Requests for Comments

The Government requested I make specific comments on every exhibit. I decline to do so. I have commented in as concise a manner as possible on the key pieces of evidence that either supports or refutes reasonable grounds. Commenting on all 200 plus exhibits seems neither productive nor useful for my recommendation. I will provide one general comment, that the Government submitted hundred of pages and hours of videos that are neither admissible nor relevant at a court-martial. The defense was also not immune to doing this as well. It is not the number of pages or hours of video that is convincing, it is the quality and character of the incriminating or exculpatory evidence.

I can boil this entire investigation down to four dispositive witnesses, Sgt Salinas, Sgt Dela Cruz, LCpl Mendoza and LCpl Tatum. Two of these witnesses in my opinion have very low credibility. I do not have a specific opinion on Sgt Salinas or LCpl Tatum because neither has testified, although LCpl Tatum did provide a brief unsworn statement at his Article 32 hearing. Ultimately this case hinges on the truthfulness of these witnesses.

The Government also requested I comment on each witness that testified. Throughout my report I have commented on the key witnesses that testified. The following are additional comments on witnesses that are not fully discussed in my report:

Capt Capers: He is articulate, professional and detached. He did not train SSGt Wuterich or his Marines for MOUT or SASO. The Government may offer him as an expert but ultimately his testimony will not be dispositive.

Capt Navin: She is articulate although she does not present herself as an expert on the subject of the rules of engagement. The Government attempted to have her give simplistic answers to questions that ultimately always end up with “it depends on the circumstances.”

SSgt Laughner: He is credible, detached and appears tired of being a witness. It is obvious to me that he has been subjected to numerous hours of questioning and his testimony has become mechanical.

SSgt Fields: He is credible and an important exculpatory witness. Although the Government sponsored him, he is one of the central Marines that testified that he was trained that there is such a thing as a hostile house. He also testified consistently with what I described as the MOUT training for the Marines of Third Battalion, First Marines.

SSgt Wuterich: He provided an unsworn statement. He appeared well prepared, articulate and intelligent. His voice was confident but not cocky. His professional appearance and demeanor will be a stark contrast to Sgt Dela Cruz and LCpl Mendoza if he testifies at trial.

Recommended disposition of Charges

Charge I:

Specifications 1-5- withdraw and dismiss

Specifications 6-12- withdraw and dismiss

Specification 13- withdraw and dismiss

Charge II:

Specification 1- withdraw and dismiss

Specification 2- withdraw and dismiss

Charge III:

Specification- withdraw and dismiss

Prefer and Refer the Following Charges

Charge I, Article 134 (Negligent homicide)

Seven specifications of negligent homicide, one for each victim within House 2.

Charge II, Article 92

Two specifications of willful dereliction of duty

Two specifications of violating a lawful general order

Charge IV, Article 78

One specification of accessory after the fact for negligent homicide

Charge V, Article 134 (misprision of a serious offense)

One specification of misprision of negligent homicide.

Analysis of Recommendations

Charge I, Specifications 1-5

The charges involving the white sedan are based entirely on the testimony of Sgt Dela Cruz. The evidence does suggest that the men were not running away, but that does not discount SSgt Wuterich's belief they were running. One or more of the men started to move as Sgt Dela Cruz shot them. The Government points to numerous supportive exhibits but each ties back to Sgt Dela Cruz and his credibility is the key issue. The competence, professionalism and attention to detail by Government counsel are obvious and impressive. However, regardless of how competent the counsel are, the facts remains that these charges rest upon an immunized Marine whose character for truthfulness, incentive to please the Government and obvious self interest are, in my opinion, obstacles too great to overcome. Therefore I recommend withdrawing and dismissing Specifications 1-5 of Charge I and Charge II and its specifications.

Charge I, Specification 6-12:

Although there are reasonable grounds to believe the accused committed the offenses as alleged in Specifications 6-12 of Charge I, confusion as to how the events unfolded, coupled with the unique stresses of combat operations will make proof beyond a reasonable doubt of murder or manslaughter unlikely. The most likely mens rea which may be proved under these circumstances is simple negligence. Accordingly I recommend changing these specifications to the lesser offense of Negligent Homicide and pursue the theory that SSgt Wuterich failed to exercise due care in identifying the occupants of the back room of House 2.

It is my opinion that the accused was in the back room of House 2 and his denial of any participation is born out of a lack of memory of the traumatic events, or a deliberate denial because he is aware he acted criminally within the room. In the event a trier of fact believes he did not enter House 2 and fire his weapon, his actions in failing to supervise the Marines as they cleared House 2 was willfully derelict. The Marines had no knowledge of a runner entering House 2. Unlike House 1, no one saw or reported fire coming from House 2. The Marines knocked on the door and LCpl Mendoza shot an unarmed man through the door that responded to the knocking. It is reasonable to expect SSgt Wuterich to use more due care in searching for a runner he did not see and to halt the assault into House 2 and assess the situation after witnessing LCpl Mendoza kill an unarmed man through a door.

Finally, if he did not participate in the shooting, he had a duty to report accurately what occurred. If he witnessed these events but willfully failed to take action to accurately report these events to superiors he may be held liable under several alternative charges ranging from accessory after the fact under Article 78 for negligent homicide, misprision of a serious offense under Article 134 and/or Article 92 for willful dereliction of duty and violating a lawful general order.

Charge I, Specification 13

The ambiguity in this investigation with regard to the events in House 1 (Charge I, specification 13) is different from related cases because SSgt Wuterich was in charge and led the fire team in the assault.

What this investigation has demonstrated most clearly is there was, or is, a conflict between what was taught to Marines in Third Battalion, First Marines concerning the Rules of Engagement (ROE) and the tactics for clearing a room in Military Operations in Urban Terrain (MOUT).

I still believe that pursuing any charges under the theory that further positive identification after entering a room you reasonably believe contains enemy combatants inside would significantly impact combat operations and is an unwarranted, ill conceived, and dangerous application of restraint. I also believe that SSgt Wuterich and his Marines were taught MOUT techniques that cannot reasonably be used within the ROE in place on 19 November 2005. Our Marines should be able to rely upon being taught tactics which will not later subject them to criminal liability if properly employed. Teaching a Marine to use a tactic and then holding that Marine legally liable when he uses that tactic is simply wrong. If the tactic is illegal, then more education and interaction between the judge advocates and the tactics instructors is the answer, not prosecuting those that employ the tactic.

Charge II and its specifications:

If a decision to refer specifications 1 through 5 of Charge I is made, then the Government believes that Sgt Dela Cruz is credible, and therefore dismissing Charge II and its specification and preferring and referring an additional charge of Article 134 (obstruction of justice) is recommended. If Sgt Dela Cruz is to be believed, that he provided false information upon advice of SSgt Wuterich, it is illogical to allege that as a solicitation to make a false statement. Clearly it is an obstruction of justice and the Government should draft the specification in general terms, something along the lines of alleging he "advised Sgt Dela Cruz to provide false information" and supplement that with a bill of particulars.

Charge III and its specification:

I recommend dismissing Charge III as there is no evidence to support reasonable grounds that the statement alleged in the specification, if made, was official.

Conclusion

I am recommending that the Government pursue the lesser offense of negligent homicide and not murder because I believe after reviewing all the evidence, no trier of fact can conclude SSgt Wuterich formed the criminal intent to kill. The evidence is contradictory, the forensic analysis is limited and almost all witnesses have an obvious bias or prejudice. The case against SSgt Wuterich that he committed murder is simply not strong enough to prove beyond a reasonable doubt. What the evidence does point to is that SSgt Wuterich failed to exercise due care in his own actions or in supervising his Marines. When a Marine fails to exercise due care in a combat environment resulting in the death of innocents, the charge of negligent homicide, not murder is the appropriate offense. Accordingly I believe the elements and theory of negligent homicide best fits the evidence of what occurred inside House 2.

Finally, although I believe the Government will fail to prove beyond a reasonable doubt that SSgt Wuterich committed any offenses other than dereliction of duty, due to the serious nature of the charges, I recommend referral to a general court-martial.