

**WESTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY**

UNITED STATES)	GENERAL COURT-MARTIAL
)	
v.)	DEFENSE MOTION TO SUPPRESS THE
)	ACCUSED'S STATEMENT OF 19
FRANK D. WUTERICH)	FEBRUARY 2006
XXX XX 3221)	
STAFF SERGEANT)	
U.S. Marine Corps)	31 January 2008

1. **Nature of Motion.** Pursuant to Rule for Courts-Martial 905(b)(3), this is a motion to suppress statements elicited from the accused in violation of U.S.CONST. Amend. V, Article 31(b) Uniform Code of Military Justice [hereinafter UCMJ] and Mil. R. Evid. 304(a) and 305.

2. **Summary of Facts**

On November 19, 2005, SSgt Wuterich was the squad leader of 1st squad, 3rd platoon, Kilo company 3rd Battalion 1st Marine. At about 0700 on November 19, 2005, while leading a vehicular patrol through the city of Haditha in Iraq, 1st squad was attacked by an IED embedded in the road in the vicinity of routes Viper and Chestnut in Haditha. The IED destroyed the fourth vehicle in a column of four vehicles resulting in the death of one Marine and the wounding of two others, one seriously. As the members of the squad disembarked their vehicle to assess the damage and give aid to their squad-mates, they came under small arms fire (SAF) from the south side of the road. Concurrent to the IED going off and the taking of the SAF, a white sedan with five military aged males was approaching the Marine convoy from the opposite direction of route Chestnut. Several Marines became alerted to the white vehicle and its occupants. The Marines shouted various commands to the occupants of the vehicle. The five males disembarked their

vehicle and began to run away from the vehicle. The males were engaged and killed. A few minutes later, SSgt Wuterich took a fire team and moved to clear some houses to the south of route Chestnut where the SAF had originated. The team cleared the first House (House #1) and the second house (House #2). Several other houses were cleared following Houses #1 and #2. During the midmorning the team cleared another house (House #3) and a house adjacent to House #3 (House #4).

During their clearing mission, a number of apparent civilians were killed, seven in House #1 and eight in House #2. In House # 4 five men were engaged and killed. In addition to the charges before this court, SSgt Wuterich was originally charged with the killing of four civilians in House #4. Those charges have been withdrawn and dismissed. Nevertheless, the circumstances surrounding the engagement in House #4 are relevant for the purpose of this Motion and will necessarily be addressed.

Throughout the day on November 19, 2005, SSgt Wuterich provided appropriate situation reports to his higher headquarters which was the Kilo company command post. Kilo company in turn reported the events to their higher headquarters, Third Battalion First Marines. These reports were then reduced by the watch officer to electronic journal entries (JENs) Exhibit 7. In the days following November 19, 2005, the commanding officer and battalion staff inquired into the circumstances of the apparently high civilian death totals and concluded that the Marines' acted appropriately. Iraqi residents of Haditha and the deceased's next of kin challenged the conclusions of the Marines' inquiry. Marines who participated in the clearing actions accurately reported that all the Iraqi deaths in the houses were the result of these clearing actions. However, the official Marine Corps account of the incident was that fifteen civilians

were killed from the IED explosion. *See Exhibit 9, 2d Marine Division's Press release #05-141 of 20 November 2005.*

In early to mid January an alleged Iraqi human rights group contacted Time magazine and turned over what is described as a gruesome video tape recording of the houses where the killings occurred. The video tape constituted real evidence that contradicted the official Marine Corps press account. Time magazine assigned reporter Tim McGirk to investigate the allegations. On January 24, 2006, he contacted the Multi-National Force-West PAO and alleged that the killings were deliberate and wrongful. On February 10, 2006 Mr. McGirk contacted the director of the Command Public Information Center at MNF-I and presented his allegations.

On February 14, 2006, Col Gregory Watt, USA, was appointed to investigate the circumstances surrounding the Marines' actions on November 19, 2005. Col Watt was assisted by Maj David Mendelson, USA, ENS Clyde LeGaux, and Cpl Roger Tohme. On February 17, 2006, Col Watt and his team made their way from Camp Victory to the base at Al-Asad to meet with the Commanding Officer of Regimental Combat Team-2, (RCT-2) the higher commander of 3rd Battalion 1st Marines. The next day the Watt investigative team made their way to the Haditha Dam to meet with 3/1. Soon after arriving at 3/1 they were provided a PowerPoint brief describing the events on November 19, 2005. Following the PowerPoint brief the Watt investigative team began to interview the Marines involved in the day's events.

When the interviews began, the Watt team had knowledge that: 1) at least 24 people had died, the majority of whom were women and children in Houses #1,2, and 4; 2) the official Marine Corps account was false; 3) the Marine Corps had paid a solatia payment for fifteen civilians killed and two wounded; 4) Haditha's citizens alleged a massacre had occurred; 5) a video recording existed showing the bloody aftermath inside Houses #1, #2 and #4; and 6) Tim

McGirk of Time magazine alleged that the killings were unlawful and deliberate based on his investigation of the incidents.

On February 19, 2006, Cpl Hector Salinas was interviewed. He explained that the five males at the white vehicle were engaged and killed. He described how House #1 was cleared and what precipitated the entry into House #2. He also stated that upon returning to the houses later the same evening to collect the bodies, he picked-up the bodies of women and children.

LCpl Stephen Tatum and PFC Humberto Mendoza were also interviewed on February 19, 2006. They both related a similar story of their actions at Houses #1 and #2 on November 19, 2005. Both described the clearing of rooms by either grenades or fire. Neither stated that they positively Id'd [?] their targets before engaging. HN Kyle Hatch's interview took place on February 19, 2006, as well. He explained that he returned to Houses #1 and #2 to pick-up the bodies, many of whom were women and children.

Maj Dana Hyatt, the Civil Affairs officer was interviewed on February 19, 2006, and explained that he made solatia payments to the families of the fifteen dead and two wounded in Houses #1 and #2. He also related that the next of kin of the men in House #4 were demanding solatia payments as well.

SSgt Wuterich's interview took place on February 21, 2006, at 1930. He executed a document titled "RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE." That document provides the Article 31(b) warning. Col Watt, however, lined out the language notifying SSgt Wuterich that he is suspected of committing an offense and replaced with language stating that the investigator seeks to ask questions about the "events" of November 19, 2005.

3. **Burden of Proof**

Under Mil. R. Evid 304(d) and (e), when the defense makes a motion to suppress statements by the accused, the burden of proof is on the prosecution, by a preponderance of the evidence, to establish the admissibility of the evidence.

4. **Discussion**

WHEN EVIDENCE EXISTS THAT WOULD LEAD A REASONABLE INVESTIGATOR TO BELIEVE THAT A MILITARY PERSON COMMITTED A CRIMINAL OFFENSE, THE SUSPECT MUST BE INFORMED THAT HE IS SUSPECTED OF COMMITTING AN OFFENSE BEFORE QUESTIONING BEGINS. COLONEL WATT WAS AWARE OF FACTS THAT SUGGESTED THAT A CRIMINAL OFFENSE MAY HAVE BEEN COMMITTED BY SSGT WUTERICH. COLONEL WATT SHOULD, THEREFORE, HAVE INFORMED SSGT WUTERICH THAT HE WAS SUSPECTED OF COMMITTING AN OFFENSE PROSECUTABLE UNDER THE UCMJ.

Mil. R. Evid. 305(c) states:

A person subject to the code who is required to give warnings under Article 31 may not interrogate or request any statement from an accused or a person suspected of an offense without first: (1) *informing the accused or suspect of the nature of the accusation*; (2) advising the accused or suspect that the accused or suspect has the right to remain silent; and (3) advising the accused or suspect that any statement made may be used as evidence against the accused or suspect in a trial by court-martial.

Mil. R. Evid. 305(c) Manual for Courts-Martial (2005 ed.)(Emphasis added). In *U.S. v. Tempia*, the Court of Military Review held that an interrogation occurs when an individual is “otherwise deprived of his freedom of action in any significant way.

37 CMR 249, 256 (1967). Mil. R. Evid 305 defines an interrogation as any formal or informal questioning when an incriminating response is sought or reasonably expected.

Id.

In determining who must warn, the Court of Military Appeals in *United States v. Duga*, held that Article 31(b) applies “to those situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry.” Accordingly, the Court established a two-part test to determine whether a person is “a person subject to this chapter” for the purposes of Article 31(b): 1) was the questioner subject to the UCMJ acting in an official capacity in the inquiry or was the questioning based on personal motivation; and 2) did the person questioned perceive the inquiry involved more than a casual conversation. 10 M.J. 206 (C.M.A. 1981).

Col Watt is a military officer who was acting in an official capacity. He is subject to the Code. Accordingly he was required to give an Article 31(b) warning during his interrogation or formal questioning of SSgt Wuterich. When Col Watt began his interrogation of SSgt Wuterich, he did not provide a complete Article 31(b) warning. The warning was, therefore, deficient. SSgt Wuterich was, in fact, was specifically informed that he was *not* suspected of an offense. Based on that instruction, he, therefore, agreed to provide a statement. At the time that questioning began the setting was in every sense of the word an interrogation or formal questioning. SSgt Wuterich was directed to meet with Col Watt and his team at a certain time and in a certain location. At the time of the interrogation SSgt Wuterich was a sergeant. He was called to appear before a Colonel, a Major, and an Ensign and to answer their questions. At the time of the interrogation SSgt Wuterich was deployed to Iraq, in a war zone. He was a member of a disciplined combat arms unit whose members give great deference and respect to officers,

especially senior officers. His liberty was, therefore, restricted. In other words, he was deprived of his freedom of action. During his meeting with the investigators he was going to be interrogated. And, he was, in fact, interrogated. Accordingly, Col Watt was required to provide a valid warning before his questioning began.

Col Watt was also most certainly acting in an official capacity. He was appointed to conduct a formal investigation surrounding the killing of at least 15 civilians, the majority of whom were women and children. He was a Colonel speaking to a Sergeant. They had had no previous relationship. This was not a casual conversation and the questioning was not driven by personal motivations. This was an official investigation that sought to discover whether a crime had been committed. Col Watt clearly should have recognized that a warning should be given as he and his team began to conduct their interviews. He, however, failed to give a proper warning that put SSgt Wuterich on notice that his statements may become evidence in criminal prosecution.

A person who is affirmatively told that he is not suspected and that the sole motivation for the interview is to merely discover the facts in question has no reason to terminate an interview by exercising his right to remain silent. By lining-out the “suspected” language, the Watt investigative team misled SSgt Wuterich into believing that not only was he not suspected of a crime but that his statement would not become evidence. It was but another piece of the narrative being put together for November 19, 2005. The representation that he was not a suspect makes the statement and the effort to collect it an exercise similar to a unit compiling situation reports. There is no reason not to speak. In fact, a Marine has an affirmative duty to speak and report the various events he encounters as part of his official duties. Such representation clearly failed to put SSgt Wuterich on notice of his rights. He was, therefore, left

disarmed with respect to his constitutional rights, making the statement involuntary and inadmissible.

To be admissible, military confessions must withstand two inquiries: 1) was the accused *properly* warned, and 2) was the confession obtained as a result of coercion, unlawful influence, or unlawful inducement? If a confession fails either of those two proscriptions, it must be excluded from evidence. *United States v. Williams*, 2 U.S.C.M.A. 430, 433 (C.M.A. 1953) (emphasis added). In *Williams* the suspect was informed that he was not required to answer questions that would tend to incriminate or degrade him but that he was required to answer questions that would clarify the investigation and help solve the crime. *Id.* at 432-3. In this case the investigators did not even tell SSgt Wuterich that he did not have to respond if his answer would incriminate him. But they certainly left him with the impression that they were on a search for answers to *clarify* their investigation and that he was not a suspect in a crime. Such a deficient warning clearly fails to put one on notice that the statements he might make may be used against him regardless of the boiler plate language on the rest of the rights waiver executed before interrogation began.

Of course the law does not require a warning when an incriminating response is not sought and it is not reasonably believed that one is likely. Although an argument may be advanced that the Watt investigative team did not believe a crime had been committed and was, therefore, not required to give a warning, an objective consideration of the available evidence at the time of the interview inexorably leads to the conclusion that a reasonable person should have believed that an incriminating response may be elicited. But even a subjective analysis of the facts surrounding the investigation leads to the conclusion that the Watt investigative team suspected that an offense had been committed.

Col Watt interviewed Cpl Salinas, LCpl Tatum, PFC Mendoza, and Maj Hyatt before he interviewed SSgt Wuterich. The order of the interview, on its face, suggests that the investigators had a cross examination state of mind and were intent on collecting evidence that they could use to test the veracity of SSgt Wuterich's statement. The investigators wanted to get the story from the junior Marines so that they would have enough information to cross examine SSgt Wuterich at the time of his interview. Major Hyatt's interview before SSgt Wuterich is also instructive because it provides the Iraqi side of the story and presents the Marine Corps' position on the deaths of the people inside the houses. The perception was that the Marine Corps would not have paid solatia if it believed the deaths were justified; for example, if the people inside the houses were cooperating with insurgents or if they were insurgents themselves.

The facts collected from the interview of the Marines before SSgt Wuterich was questioned along with the allegations raised by Mr. McGirk of Time magazine and the people of Haditha, should have led Col Watt to the conclusion that an offense may have been committed for which SSgt Wuterich may be held responsible. But even if Col Watt did not, for whatever reason, harbor a subjective belief that an offense had been committed, a warning should nonetheless have been given because viewed objectively the facts would lead a reasonable person to conclude an offense had been committed.

A person is a suspect if, considering all facts and circumstances at the time of the interview, the government interrogator believed, or reasonably should have believed, that the one being interrogated committed an offense. *United States v. Morris*, 13 M.J. 297, 298 (C.M.A. 1982). The interrogator's subjective belief that the subject has committed an offense will trigger the warning requirement. However, even if there is no subjective belief, if the totality of the

circumstances would cause a reasonable person to believe that the subject had committed an offense, a warning is required. *United States v. Leiffer*, 13 M.J. 337, 341 (C.M.A. 1982).

In this case there is substantial evidence that the investigation could lead to charges of one form or another. 3/1 had conducted an inquiry that was found to be insufficient. Col Watt was brought in from another service to conduct an investigation to determine whether the allegations made by the Time reporter and the Iraqi town people had merit. Col Watt was aware that at least 15 civilians had been killed, the majority of them women and children. His investigation team included two officers who are attorneys. This was a criminal investigation in every sense of the word. Col Watt likely viewed the incident of November 19, 2005, as what it was, a combat action that resulted in the unfortunate deaths of civilians. Unfortunately for SSgt Wuterich, however, no benefit accrues to him from Col Watt's beliefs. In any event, even Col Watt concluded in his investigation that the squad failed to properly apply the Rules of Engagement which is a colorable offense under the UCMJ. *Watt Report of Investigation*.

5. **Relief Requested.**

SSgt Wuterich, by and through his counsel, moves this honorable court to exclude SSgt Wuterich's statement of February 21, 2006, because SSgt Wuterich was not provided proper Article 31(b) warning thus making the statement involuntary.

6. **Evidence.**

A. Exhibits

1. SSgt Frank Wuterich's statement of 21 February 2006
2. Cpl Hector Salinas statement of 19 February 2006

3. LCpl Stephen Tatum's statement of 19 February 2006
4. PFC Humberto Mendoza' statement of 19 February 2006
5. Maj Dana Hyatt's statement of 19 February 2006
6. 3/1 events roll-up power point
7. RCT-2 JENs of 19 November 2005
8. Col Watt AR-15 investigation appointment letter of 14 Feb 2006
9. 2d Marine Divisions Press release #05-141 of 20 November 2005
10. Watt Report of Investigation

B. Witnesses

1. Col Gregory Watt
2. Maj David Mendelson
3. LtGen Peter Chiarelli, USA
4. BGen Donald M. Campbell, Jr., USA
5. Cpl Roger Tohme
6. SSgt Frank Wuterich

7. **Argument.**

Requested.

//S//
H. FARAJ
Major, U.S. Marine Corps

I Certify that a copy of this motion was served upon trial counsel on 31 January, 2008.

H. FARAJ
Major, U.S. Marine Corps