WESTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY

UNITED STATES v. FRANK D. WUTERICH XXX XX 3221 STAFF SERGEANT U.S. Marine Corps	GENERAL COURT-MARTIAL DEFENSE MOTION IN LIMINE (EXCLUSION OF COMMENTS IN ACCUSED'S STATEMENT OF 19 FEBRUARY 2006 AND DISMISSAL OF RELATED CHARGES) 02 August 2010

1. **Nature of Motion.** Pursuant to Rule for Courts-Martial 905(b)(3), this is a motion to suppress specific statements elicited from the accused in violation of Mil. R. Evid. 304(g) and the dismissal of related charges

2. **Summary of Facts**

On 19 November 2005, SSgt Wuterich was the squad leader of 1st squad, 3rd platoon, Kilo Company 3rd Battalion 1st Marine. At about 0700 on 19 November 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 pursuant to a command from his platoon commander to "clear south," 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 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 Those charges have been withdrawn and dismissed.

Throughout the day on 19 November 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. Marines who participated in the clearing actions accurately reported that all the Iraqi deaths in the houses were the result of these clearing actions. The official Marine Corps account of the incident, however, was that fifteen civilians were killed from the IED explosion. Iraqi residents of Haditha and the deceased's next of kin challenged the official Marine Corps' narrative of events.

In early to mid January a group claiming to be an 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 24 January 2006, he contacted the Multi-National Force-West PAO and alleged that the killings were deliberate and wrongful. On 10 February 2006 Mr.

McGirk contacted the director of the Command Public Information Center at MNF-I and presented his allegations.

On 14 February 2006, Col Gregory Watt, USA, was appointed to investigate the circumstances surrounding the Marines' actions on 19 November 2005. Col Watt was assisted by Maj David Mendelson, USA, ENS Clyde Legeaux, and Cpl Roger Tohme. On 17 February 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.

SSgt Wuterich was interviewed on 21 February 2006. As a result he provided a written statement where he made two specific related admissions: "I told them to shoot first, ask questions later" and "I told them to shoot first and deal with it later." The Government asserts these two admissions were made to Cpl Hector Salinas, LCpl Stephen Tatum and PFC Humberto Mendoza as they prepared to clear House #1. All three Marines were interviewed by Col Watt on 19 February 2006,

On 21 December 2006, SSgt Wuterich was charged with a violation of Article 92, UCMJ, for having "willfully failed to ensure that the Marines under his charge obeyed the Rules of Engagement, as it was his duty to do, by ordering the Marines under his charge to 'shoot first, ask questions later,' or words to that effect, prior to entering a structure identified as House 1."

However, none of the Marines interviewed by Col Watt corroborated that SSgt Wuterich made any such statement. Cpl Hector Salinas, LCpl Stephen Tatum and PFC Humberto Mendoza were all also interviewed on several occasions by the Naval Criminal Investigative Service. At no time did any of them corroborate that SSgt Wuterich made any such statement.

Trial Counsel has openly admitted to this Court that no corroboration for these two statements exists.

3. **Burden of Proof**

Under Mil. R. Evid 304(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. *See also* R.C.M. 905(b)(3)

4. **Discussion**

THE GOVERNMENT'S RELIANCE ON UNCORROBORATED "ADMISSIONS" VIOLATES SSGT WUTERICH'S CONSTITUTIONAL RIGHTS REQUIRING ALL REFERENCES TO BE SUPPRESSED FROM THE TRIAL AND CHARGE ONE, SPECIFICATION TWO MUST BE DISMISSED AS A MATTER OF LAW

In *Opper v. United States*, 348 U.S. 84 (1954), and *Smith v. United States*, 348 U.S. 147 (1954), the Supreme Court held that corroboration was needed to establish the truthfulness or trustworthiness of a confession before it could be used as evidence:

> [T]he corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti*. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. . . . [Citation omitted.] It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. . . .

Opper, 348 U.S. at 93. *See also Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964)(Same). Historically, this inquiry has involved two competing theories: independent proof of the corpus delicti or independent evidence establishing the truthfulness of the statement. 1 John W. Strong et al., *McCormick on Evidence* §§ 146-47 (5th ed. 1999). There is no general requirement, however, that the independent corroborating evidence be sufficient for conviction by itself. *United States v. Afflick*, 18 U.S.C.M.A. 462, 40 C.M.R. 174 (1969). The Court explained:

> It is agreed that the corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a preponderance, as long as there is *substantial* independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty. [Citations omitted.] . . .

Smith, 348 U.S. at 156. (Emphasis added). This view of the scope of the corroboration rule is well established.[1] The same rule of corroboration also exists in the military. *United States v. Melvin*, 26 M.J. 145, 147 (1988).

Mil. R. Evid. 304(g) requires that a confession may not be admitted in evidence without corroboration. What constitutes adequate corroboration? The Rule provides:

> (1) *Quantum of evidence needed.* The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the essential facts admitted. The amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.
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> (2) *Procedure.* The military judge alone shall determine when adequate evidence of corroboration has been received. Corroborating evidence usually is to be introduced before the admission or confession is introduced but the military judge may admit evidence subject to later corroboration.

"The rationale behind Mil.R.Evid. 304(g) is to ensure that the confession is true." *United States v. Hall*, 50 M.J. 247, 251 (1999). Moreover, other uncorroborated confessions or admissions by the accused may not be used to supply this independent evidence. Mil R. Evid. 304(g). As stated in *United States v. Maio*, 34 M.J. 215, 218 (1992), the "bottom line is that the corroborating evidence must raise only an inference of truth...." Commentators have observed that this rule is easier to state than to apply, and that the military courts have struggled with how

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[1] *See United States v. Garth*, 773 F.2d 1469, 1479 (5th Cir.1985), *cert. denied*, 476 U.S. 1140 (1986); *United States v. Pennell*, 737 F.2d 521, 537 (6th Cir.1984), *cert. denied*, 469 U.S. 1158 (1985); *United States v. Moore*, 735 F.2d 289, 293 (8th Cir.1984); *United States v. O'Connell*, 703 F.2d 645, 648 (1st Cir.1983); *United States v. Fasolino*, 586 F.2d 939, 941 (2d Cir.1978).

much is enough. *See* Stephen A. Saltzburg, et al, *Military Rules of Evidence Manual* 188-89 (4th ed. 1997).

A. Any Reference To "Shoot First, Ask Questions Later", Or A Related Statement, Must Be Suppressed

SSgt Wuterich was interviewed by Col Watt on 21 February 2006. As a result he provided a written statement where he made two specific related admissions: "I told them to shoot first, ask questions later" and "I told them to shoot first and deal with it later." The Government asserts these two statements were made to Cpl Hector Salinas, LCpl Stephen Tatum and PFC Humberto Mendoza as they prepared to clear House #1. All three Marines were interviewed by Col Watt on February 19, 2006. And all have consistently denied hearing such a statement. The disjunctive between the Government's allegation based on the Wuterich statement and what the Marines heard illustrates why the corroboration rule exists and why it is fair and necessary. It is irrelevant if Wuterich made such a statement if no one heard it. If the Marines did not hear him say "shoot first and ask questions later," the statement would have had no impact on the assault force' state of mind. Alternatively, and more likely, SSgt Wuterich made no such statement but in taking responsibility made the statement to Col Watt under the belief that he was required to take responsibility for everything his squad did or failed to do during the investigation. These facts demonstrate the importance of the corroboration rule in admitting statements against an accused to prove an offense. The fact that SSgt Wuterich repeated the statement to reporters or during the investigation is of no relevance. Mil. R. Evid. 304(g) specifically addresses this scenario and prohibits the use of later statements to corroborate a previous statement. The corroborative evidence must be independent and substantial. *Smith*, 348 U.S. 156.

In this case there should be no difficulty in either stating the rule or applying it as there is no evidence, in whole or in part, outside of the defendant's own statement that serves to corroborate

the "admission" alleged to have been made by the accused. The Government itself has openly conceded that absolutely no independent corroborating evidence exists.

Notwithstanding the Government's self-admitted knowledge that no corroborating evidence has ever existed, on 27 December 2007, the Government referred charges against SSgt Wuterich alleging violations of Article 92, UCMJ, for having "willfully failed to ensure that the Marines under his charge obeyed the Rules of Engagement, as it was his duty to do, by ordering the Marines under his charge to 'shoot first, ask questions later,' or words to that effect, prior to entering a structure identified as House 1."

Given the uncontested fact that no corroborating evidence exists proving SSgt Wuterich ordered anything of the sort, other than SSgt Wuterich's own statements, any reference to this "admission" must be redacted from his 21 February 2006 statement to Col Watt. The Government must be precluded from referencing any related statement during its case including, but not limited to, "shoot first, ask questions later", "shoot first and deal with it later", and "don't hesitate to shoot". Additionally, Charge I, Specification II, must be dismissed as a matter of law. *See United States v. Baum*, 30 M.J. 626, 628 (N.M.C.M.R. 1990)(dismissing charge where sole evidence was accused's uncorroborated admissions, thus evidence was insufficient as a matter of law).

B. Any Reference To Cpl Salinas Engaging The Occupants At The White Car At Roadside Must Be Suppressed

In his 21 February 2006 statement to Col Watt, SSgt Wuterich stated: "It was already not a permissive/hostile environment so I and CPL Salinas engaged the MAMs outside my vehicle about 25 meters from them." This statement is inaccurate as Cpl Salinas was not involved with the incident at the Roadside. Most likely it is due to SSgt Wuterich's inadvertant confusion between Cpl Salinas and Cpl Sanick P. Dela Cruz. Regardless of why the statement is

inaccurate, it is uncorroborated and it can potentially be used by the Government to undermine SSgt Wuterich's credibility.

Based on the legal arguments set forth above, this sentence must be redacted from any copy of the statement provided to Members and all references must be excluded from the trial.

5. **Relief Requested**.

SSgt Wuterich, by and through his counsel, moves this honorable court to exclude all references in the trial to any statement of SSgt Wuterich that he

(a) told his Marines to "shoot first, ask questions later", "shoot first and deal with it later", "don't hesitate to shoot", or any words to that effect;

(b) stated that "CPL Salinas engaged the MAMs outside my vehicle";

(c) dismiss Charge I, Specification II.

6. **Argument**.

Requested.

Haytham Faraj, Esq.
Attorney for SSgt Wuterich

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I Certify that a copy of this motion was served upon the court and trial counsel via e-mail on August 2, 2010.

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