

NAVY-MARINE CORPS TRIAL JUDICIARY  
WESTERN JUDICIAL CIRCUIT

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UNITED STATES	)	GENERAL COURT-MARTIAL
	)	
v.	)	GOVERNMENT MOTION FOR
	)	APPROPRIATE RELIEF
WUTERICH, F.	)	
XXX XX 3221	)	(Government Response to Defense Motion
Staff Sergeant	)	to Suppress for Lack of Corroboration)
U.S. Marine Corps	)	
	)	16 Aug 2010

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1. **Nature of Motion.**

This is the government's response to the defense motion to suppress the statement of the Accused for lack of corroboration of 2 August 2010.

2. **Summary of facts.**

a. Pursuant to Rules for Court Martial (RCM) 906(b)(13), on 31 January 2008 the Government filed a motion for a preliminary ruling that the Accused's statement of 21 February 2006 was admissible as evidence against him. The Military Judge subsequently ruled that the statement was admissible.

b. Subsequent to the IED attack, the Accused and some of the members of his squad were involved in several engagements in Haditha, Iraq.

c. As a result of those engagements, twenty-four people died.

d. The first engagement took place at the "Roadside" near the intersection of Routes Chestnut and Viper and resulted in the death of five people.

e. The second engagement took place several minutes later in a residential structure called "House 1" and resulted in the death of five people and the wounding of several others.

f. The final relevant engagement took place several minutes later in a residential structure called "House 2" and resulted in the death of eight people.

g. On 21 February 2006, Colonel Gregory Watt and Major David Mendelson and Ensign Clyde Legeaux interviewed Staff Sergeant Wuterich concerning the events of 19 November 2005 in Haditha.

h. Colonel Watt explained to the Accused verbally and in writing the purpose of the interview was to ask questions about noncombatant deaths related to the events of the 19 November 2005 Haditha complex attack.

i. Staff Sergeant Wuterich was read his Article 31(b) rights, acknowledged and waived those rights in writing, and agreed to discuss the incident and to further provide a sworn statement.

j. During this interview, Staff Sergeant Wuterich made two admissions in his written statement: that he had said "I told them to shoot first, ask questions later," and "I told them to shoot first and deal with it later."

### 3. Discussion.

#### Corroboration

An Accused's confession cannot be used as the sole basis for a conviction of a crime, there must be some independent evidence to corroborate it. Escobedo v. Illinois, 378 U.S. 478, 488-89 (1964); Smith v. United States, 348 U.S. 147, 152-53 (1954); Warszower v. United States, 312 U.S. 342, 347 (1941). The Supreme Court has held that such evidence "does not have to prove the offense beyond a reasonable doubt, or even by a preponderance...[it] merely fortifies the truth of the confession, without independently establishing the crime charged" Smith, 348 U.S. at 156. The decisions by the U.S. Court of Military Appeals mirror these decisions by the

Supreme Court in the interpretation of Mil.R.Evid. 304. Corroborating evidence must raise only an inference of truth as to the essential facts admitted, United States v. Maio, 34 M.J. 215, 218 (C.M.A.1992); United States v. Rounds, 30 M.J. 76, 80 (C.M.A.1990) and the corroboration required is “slight,” United States v. Yeoman, 25 M.J. 1, 4 (C.M.A.1987) or “very slight” United States v. Melvin, 26 M.J. 145, 146 (C.M.A.1988).

a. Staff Sergeant Wuterich’s statement was given voluntarily, with awareness of both his rights, and the “nature of the accusation” against him when interviewed by Colonel Watt on 21 February 2006.

The rights warning given to Staff Sergeant Wuterich properly informed the Accused of the “nature of the accusation” against him. Colonel Watt verbally and in writing explained to the Accused that the purpose of the interview was to ask questions about the noncombatant deaths related to the events of the 19 November 2005 Haditha complex attack. The rights waiver form states that Colonel Watt sought information, and to interview the Accused about the events of the 19 November 2005 Haditha complex attack. The conduct at issue was a specific continuous sequence of events, or circumstances, involving the death of noncombatants, occurring at a specific place (Haditha, Iraq), on a specific date (19 November 2005), and involving a specific group of personnel from Kilo Company, 3d Battalion, 1<sup>st</sup> Marine Regiment. The Accused was on notice as to the time, place, events and dead persons that Colonel Watt was gathering information and questioning him about. The Accused knew the investigation involved the death of several persons (noncombatants) at Haditha, Iraq, on 19 November 2005. Consequently, there existed sufficient information about the conduct at issue and nature of the events for the Accused to intelligently weigh the consequences and decide whether to answer the questions and provide information. Under these circumstances, the verbal and written rights advisement prior to

questioning by Colonel Watt adequately oriented the Accused to the transaction or incident that he is allegedly involved and complies with Article 31(b) UCMJ.

b. The Corroboration Requirement and Staff Sergeant Wuterich's Statement as a Whole

The purpose of corroboration of a confession is to require "slight" independent proof that need only raise an inference of the truth as to "the essential facts admitted" in the confession. U.S. v. Maio, 34 M.J. 215, 216 (C.M.A. 1992). Staff Sergeant Wuterich's statement was given voluntarily, with awareness of both his rights and the "nature of the accusation." With respect to the Accused's statement as a whole, the government has provided sufficient corroborating evidence of the events described therein. This includes the testimony of individuals on the scene during and after the events in question, physical evidence, and voluntary admissions made by Staff Sergeant Wuterich on other occasions as to his presence and actions in Haditha on 19 November 2005. All of this evidence, like the testimony of those involved on the assault of the houses and the shooting of the military aged males that fled from the white vehicle, and that of persons who later arrived on the scene and surveyed the aftermath, support the facts asserted in the statement offered by Staff Sergeant Wuterich on 21 February 2006. The burden of corroboration for this independent evidence is very low, as it needs only raise an inference of truth as to the essential facts admitted. United States v. Maio at 218.

As such, in this case, there has been ample presentation of evidence by the government to support the truthfulness of the statement made by Staff Sergeant Wuterich to Colonel Watt on 21 February 2006. The defense cites Opper v. United States, as having established a standard by which the courts may only allow the entry of statements or confessions that are "substantially" corroborated. 348 U.S. 84, 93 (1954). However, the Opper Court was clear that the corroborating independent evidence need not establish a *corpus delicti* of the offense charged.

c. “Shoot First, ask Questions Later” or words to that effect.

The Accused seeks to suppress a *component* of a statement for lack of corroboration on that specific component. Specifically, the Accused seeks to suppress the words “shoot first and ask questions later.” However, despite the assertions of the defense, corroboration of this statement is resident in results of the Marines’ actions on 19 November 2005. The age, gender and non-combatant status of the alleged victims in this case are clear evidence that the Accused, in his conduct, and in leading the Marines in his charge, disregarded the requirement of positively identifying targets prior to using deadly force. In other words, the fact that non-combatant women and children were killed by the Accused and the Marines in his charge corroborates the assertion that the Accused directed his Marines to disregard the rules of engagement immediately prior to assaulting Houses one and two by directing them to shoot first and ask questions later. The number and nature of the alleged victims in this case constitutes some evidence in corroboration of the statement, “shoot first and ask questions later” or an order to that effect. The number and nature of the alleged victims in this case certainly tends to “fortify the truth of the confession.” See Smith, 348 U.S. at 156.

The defense argues the statement “shoot first, ask questions later” or words to that effect should be suppressed because none of the Marines will testify that they heard the Accused issue such an order. In essence, the defense appears to argue that if none of the Marines heard the order “shoot first and ask questions later” then the admission is not relevant. See defense motion at 6. However, in addition to the corroboration resident in the actual events of 19 November 2005, (that a significant number of non-combatants were killed that day and thus, the Marines appear to have been directed to disregard the requirement for positive identification of targets), there are other grounds that make the admission in question relevant beyond any effect it may or

may not have had on the Marines in the Accused's charge. The order, "shoot first and ask questions later" is relevant, even if no other Marine heard the admission, as evidence of the state of mind of the Accused.

The Accused has been charged with voluntary manslaughter. To be guilty of voluntary manslaughter, the government must prove beyond a reasonable doubt that the Accused intended to kill his alleged victims, and that he did so while under heat of passion. A strong argument can be made that if the Accused ordered his Marines to "shoot first and ask questions later," or used words to that effect in aftermath of a fatal IED attack on his convoy, he was under the heat of passion of the attack.

A lesser included offence of voluntary manslaughter is involuntary manslaughter. The government will request that the Military Judge instruct the Members on an involuntary manslaughter theory at the conclusion of the government's case. To be guilty of involuntary manslaughter, the government must prove beyond a reasonable doubt that the Accused demonstrated culpable negligence on 19 November 2005. Assuming *arguendo* that none of the other Marines will testify that they heard the Accused order them to shoot first and ask questions later, the admission is still relevant as circumstantial evidence that the Accused was culpably negligent with respect to his adherence to the rules of engagement. In other words, if the Accused ordered his Marines to disregard the rules of engagement by directing them to "shoot first and ask questions later," it can be inferred that the Accused too disregarded the rules of engagement and willfully failed to positively identify his targets prior to using deadly force. The Accused's culpably negligent disregard of the rules of engagement is evidenced in his order, even if no other Marine heard the order.

Finally, the government will seek an instruction under Article 77, UCMJ, after the presentation of its case. Specifically, the government will request that the Court instruct the Members pursuant to Military Benchbook Instruction 7-1-3 (Causing An Act To Be Done). The instruction reads in relevant part:

Any person who commits an offense is a principal. Anyone who willfully causes an act to be done which, if actually performed by (him) (her) would be a criminal offense, is a principal and is just as guilty of the offense as if (he) (she) had done the act (himself) (herself). (Once an act is done, a principal is criminally responsible for all the likely results that may occur from the doing of that act.)

If you are satisfied beyond a reasonable doubt that (state the name of the Accused to whom this instruction applies) willfully caused an act which (amounted to an offense) (resulted in an offense with which (he) (she) is charged) (or a lesser included offense) to be done, you may find (him) (her) guilty of that offense, even though (he) (she) was not the person who actually did the act. An act is willful if done voluntarily and intentionally and with the specific intent to do something the law forbids or to fail to do something the law requires.

Military Judge's Benchbook Instruction 7-1-3. In paragraph two, the instruction states that the members must be satisfied beyond a reasonable doubt that the Accused "willfully" caused an act that amounted to a crime. Here the government will argue that the Accused caused some of the non-combatant deaths of 19 November 2005, irrespective of whether he actually pulled the trigger. According to instruction 7-3-1, an act is willful if it is done voluntarily and intentionally, and with the specific intent to do something the law forbids, or to fail to do something the law requires.

Here, the Accused and his Marines were required to positively identify their targets prior to the use of deadly force. The order, "shoot first and ask questions later," is strong evidence that the Accused specifically intended his Marines to disregard the rules of engagement on 19 November 2005, and thus, the order, irrespective of whether others heard it, is relevant and admissible evidence of the Accused's intent that others fail to do something the law requires.

5. **Relief Requested.**

The Government respectfully requests that the court deny the defense's motion in its entirety.


6. **Evidence.**

- i. Enclosure 1 – Accused's Sworn Statement to Colonel Watt, dtd 21 February 2006.
- ii. Enclosure 2 – Staff Sergeant Wuterich's Article 32 Hearing Unsworn Statement ICO United States v. Wuterich, dtd 6 September 2007.
- v. Enclosure 3 – Article 39(a) session Military Judge's ruling on the Accused's statement to Colonel Watt of 21 February 2006, dtd 22 February 2008 (starting on p. 80 of 99).

7. **Burden of Proof.**

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


8. **Oral Argument.** The government respectfully requests oral argument in rebuttal.

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

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**Certificate of Service**

I hereby attest that a copy of the foregoing motion was served on the court and opposing counsel by electronic mail on 16 August 2010.

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



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

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

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

PROVIDED BY: SSG FRANK WUTERICH 1/3/K

WRT: INNOV 05 HADITHAH COMPLEX ATTACK

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

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

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

ACKNOWLEDGMENT

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

20060221  
Date

FRANK D WUTERICH  
Signature

FRANK D WUTERICH  
Printed Name and Rank

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ENCLOSURE (1)

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RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE

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For use of this form, see AR 180-30; the proponent agency is ODCSOPS

DATA REQUIRED BY THE PRIVACY ACT

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

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

PART I - RIGHTS WAIVER/NON-WAIVER CERTIFICATE

Section A. Rights

The investigator whose name appears below told me that he/she is with the United States Army \_\_\_\_\_ and wanted to question me about the following offense(s) of which I am

suspected/accused: Event WRT 19 Nov 05 Hadithah complex attack

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

- 1.  I do not have to answer any question or say anything.
- 2.  Anything I say or do can be used as evidence against me in a criminal trial.
- 3.  For personnel subject to the UCMJ I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. This lawyer can be a civilian lawyer I arrange for at no expense to the Government or a military lawyer detailed for me at no expense to me, or both.

- OR -

(For civilians not subject to the UCMJ) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. I understand that this lawyer can be one that I arrange for at my own expense, or if I cannot afford a lawyer and want one, a lawyer will be appointed for me before any questioning begins.

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

5. COMMENTS (Continue on reverse side)

Section B. Waiver

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

WITNESSES (If available)		3. SIGNATURE OF INTERVIEWEE	
1a. NAME (Type or Print)			
b. ORGANIZATION OR ADDRESS AND PHONE		4. SIGNATURE OF INVESTIGATOR	
2a. NAME (Type or Print)		5. TYPED NAME OF INVESTIGATOR	
		COL Gregory A. Wait	
b. ORGANIZATION OR ADDRESS AND PHONE		6. ORGANIZATION OF INVESTIGATOR	
		USA	

Section C. Non-waiver

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

2. SIGNATURE OF INTERVIEWEE

ATTACH THIS WAIVER CERTIFICATE TO ANY SWORN STATEMENT (DA FORM 2829) SUBSEQUENTLY EXECUTED BY THE SUSPECT/ACCUSED

DA FORM 3881, NOV 89

EDITION OF NOV 84 IS OBSOLETE

USAPA 2.01

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APPELLATE EXHIBIT 4X

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

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

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

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

- or -

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

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

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

THE WAIVER

"Do you understand your rights?"

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

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

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

"Do you want a lawyer at this time?"

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

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

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

SPECIAL INSTRUCTIONS

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

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

PRIOR INCRIMINATING STATEMENTS:

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

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

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

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

COMMENTS (Continued)

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STATEMENT

For use of this form, see AR 180-45; the proponent agency is ODCSOPS

PRIVACY ACT STATEMENT

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

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

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

I was attached to Kilo Co. 3rd Battalion, 1st Marine Regiment on November 19, 2005. I was also a Sergeant at the time.
There were 4 vehicles in our patrol that day. I was driving the third vehicle and LCPL Graviss was the Adriver. I had Doc in the back along with 3 IAs. There were other IAs in the 2nd vehicle also. The HMMWV's were highbacks. I had no crew serve weapons on board. We were moving onto route Chestnut from River Rd. My truck was even with route Viper, maybe a little before route Viper. I could see the lead vehicle, it was a little pass route Zebra on the right side when the IED went off. After the blast went off, I pulled up a little bit and LCPL Graviss was the first out of the vehicle. Doc was already on scene I was still on the radio. We were taking SAF from the south. It was coming from the first house, south of route Chestnut. It was just an AK. We were not pinned down or anything. Doc was assessing casualties. I immediately noticed a white 4 door sedan at the intersection of route Zebra. There were 5 MAMs inside the sedan. The vehicle was already pulled off the road. I know as soon as I was walking towards them, they were getting out of the car. It was already not a permissive/hostile environment so I and CPL Salinas engaged the MAMs outside my vehicle about 25 meters from them. CPL Salinas was in the lead vehicle. I have also been told that the IAs engaged but, I don't remember them engaging.

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

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

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

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

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

ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT TAKEN AT DATED

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

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STATE OF TEXAS SSGT Frank D. Waterich

TAKEN AT Hadithah Dam

DATED 2006/02/21

9. STATEMENT (Continued)  
outside.

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

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

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

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

AFFIDAVIT

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

[Signature]  
(Signature of Person Making Statement)

WITNESSES:

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

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

[Signature]  
(Signature of Person Administering Oath)

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

COL Gregory A. Watt  
(Typed Name of Person Administering Oath)

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

\_\_\_\_\_  
(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT  
FDW

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UNCLASSIFIED

FOUO

000150

FOUO

UNCLASSIFIED

WATERBURY + SHARZAT

SAW SHARZAT BRACE OUT ENTERED w/ 9mm SAW MAN w/ 1x ALL. 4x MANS

LIVING ROOM EMPTY MYC ROOM EMPTY BED ROOM SHARZAT LEAD CURTAINS 2 MAN STACK. PANTS

25x TOTAL MIA/D HELPED LOAD. 2x KIDS EVACUED

WOMEN + CHILDREN DIRECTED TO #4 SHARZAT TO GUARD UNDER

STARTED w/ 12 MACHINES LOST 3x 4x MAN FIRE IN NORTH. 3x SEIZING PUL. VEN. STRENGTHENED

DID NOT USE IA'S TO CLEAR. IA'S GORDON BRIST SITE.

21930 FEB 06 BRANK D WATERBURY FD D M

BELIEVES INSURGENTS RELOC COUNTRY TO THE SOUTH.

ENGAGED PEOPLE IN BACK ROOM 5-8 PEOPLE NO PID. DID NOT

TOOK NO FIRE FROM THE NORTH OR EAST.

RETURNED TO OVERWATCH UNTIL 2000 HRS.

FURGED ENTRY HOUSE EMPTY OCCUPIED BURNED.

SET WATERBURY. DEVRZ.

LEAD GRAMMIS ANSWER. 4x WHITT IN BACK. 3x ID.

ENGAGED.

FOR IN BACK

4x MAN STACK. SGT WATERBURY. CPU SHAMMS. CPU TATUM. PFC MENDOZA.

SAF (AD) VIC #1 330

#2

#1

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

HOSTILE ENTRY. SHOOT FIRST ASK QUESTIONS LATER.

FOUO

SSGT Wuterich

UNCLASSIFIED

FOUO

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

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

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

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

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

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000153  
Enclosure (4)

SSGT Wuterich

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

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

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

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

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



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

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

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

**MJ:** Sure.

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

**ACC:** Proceed now, sir.

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

**ACC:** Yes, sir.

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

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

Mr. Puckett, you may proceed.

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

*UNSWORN STATEMENT*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**MJ:** You may.

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

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

**ACC:** No, sir.

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

**ACC:** No, sir.

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

**ACC:** No, sir.

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

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

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

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

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

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

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

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

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

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

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

ACC: Yes, sir.

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

ACC: Yes, he did, sir.

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

ACC: Yes, I did, sir.

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

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

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

ACC: Yes, sir.

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

ACC: Absolutely, sir.

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

ACC: Yes, sir.

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

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

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



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

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

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

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

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

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

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

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

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

**ACC:** No, sir.

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

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

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

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

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

ACC: Yes.

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

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

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

ACC: He was a sergeant.

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

ACC: Sergeant.

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

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

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

ACC: Same day.

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

ACC: Yes I did.

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

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

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

ACC: Yes, I did.

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

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

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

ACC: Never.

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

ACC: No, I haven't.

CC (Mr. Puckett): Why not?

ACC: Because it never happened.

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

ACC: I never thought that it happened.

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

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

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

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

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

ACC: No, he was not.

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

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

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

ACC: No, he is not.

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

ACC: Yes, I did. Later on.

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

as Sergeant McDaniel, did he?

ACC: I believe so. Yes.

CC (Mr. Puckett): Same platoon?

ACC: Yes, sir.

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

ACC: I did later on that evening.

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

ACC: Yes, I did.

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

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

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

ACC: Yes, I did.

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

ACC: Same brief description of what happened that day.

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

ACC: No, they were not.

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

ACC: Yes, we were.

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

check." What does that mean in normal --

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

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

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

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

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

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

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

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

**ACC:** I did not.

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

**ACC:** No, sir.

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

**ACC:** No, sir.

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

**ACC:** No, sir.

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

ACC: No, sir.

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

ACC: No, sir, I did not.

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

ACC: All the time, sir.

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

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

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

ACC: Yes, sir.

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

ACC: Yes, sir, I do.

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

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

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

ACC: Yes, sir.

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

ACC: I did, sir.

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

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

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

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

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

**ACC:** He did.

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

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

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

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

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

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

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

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

I'm going to say.

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

**ACC:** Seven months.

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

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

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

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

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

**ACC:** I did.

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

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

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

**ACC:** Yes, I did.

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

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



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

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

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

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

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

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

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

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

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

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

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

going to happen.

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

ACC: I didn't.

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

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

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

ACC: I do.

CC (Mr. Puckett): Why?

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

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

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

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

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

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

ACC: I do.

CC (Mr. Puckett): How often?

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

CC (Mr. Puckett): Pleasant dreams?

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

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

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

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

ACC: Yes, I did.

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

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

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

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

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

ACC: Correct.

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

ACC: Yes.

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

ACC: No.

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

ACC: Yes.

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

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

CC (Mr. Puckett): No, sir.

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

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

GC (LtCol Sullivan): Yes, sir.

CC (Mr. Puckett): Yes, sir.

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

Knowing that, defense, do you have any objection?

CC (Mr. Puckett): No, sir.

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

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

GC (LtCol Sullivan): Roger that, sir.

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

GC (LtCol Sullivan): Roger.

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

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

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

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

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

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

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

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

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

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

Thank you, counsel. This hearing is in recess.

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

The Article 39(a) session recessed at 1149, 22 February 2008.

The Article 39(a) session was called to order at 1345, 22 February 2008.

MJ: Court is called to order. All parties present when the court last recessed are again present. I would also note that present in the courtroom at one of the tables is counsel for CBS.

What I'm going to do is announce my -- my rulings first on the suppression motion and then on the privilege issue, and then I'll take questions if the parties have any questions about them.

With respect to the defense motion to suppress the statement of the case:

At trial, the government provided notice to the defense of their intent to offer a statement made by the accused to members of an investigative team on 21 February 2006 at Haditha, Iraq, wherein he admits to involvement in the deaths of Iraqi civilians and states that he directed his squad to don't worry about making positive identification of targets before engaging them.

Prior to trial on the merits, the accused may raised a motion to suppress under Military Rule of Evidence 304 and the Fifth Amendment stating -- and Article 31 of the UCMJ, stating that in pertinent part, the statements of the accused were obtained in violation of the requirements of Article 31(b) of the Uniform Code of Military Justice to notify the accused of the nature of the offense prior to obtaining any statement.

As seen by the court the issue is as follows:

Does an Article 31(b) rights advice to a person reasonably believed to have committed a violation of the UCMJ which informs him, although not directly suspected of an offense, that he is going to be questioned concerning his involvement in a combat engagement in which civilians were killed, fully inform him -- fully informs him of his rights under Article 31(b) and *Miranda* and includes the fact that any statement that he makes can be used against him in a criminal prosecution which subsequently obtains a waiver of those rights and informs him that he can terminate the interview at any

time, comply with the requirements of Article 31(b) to first inform the accused of the nature of the accusation?

Findings of fact. In accordance with Military Rule of Evidence 304, the court finds that the government established the following facts by a preponderance of the evidence:

One, that on the 14th of February of 2006, Colonel Gregory Watt was assigned to conduct an AR15-6 investigation into allegations of combat related deaths of civilians during an engagement in Haditha, Iraq on 19 November 2005. He was assisted by Major Mendelson, an Army judge advocate with extensive administrative law experience, including the requirement of conducting -- requirements for conducting an AR15-6 investigation. And, then Ensign LeGaux a Navy information specialist.

This investigation was occasioned by news reports from the Hammurabi Group, an Iraqi Human Rights Organization, which showed video of dead women and children as a result of the conduct of the Marines on that date and a report from TIME Magazine alleging commission of war crimes by members of 3rd Battalion's 1st Marines.

This investigation was appointed to determine the facts underlying the complex attack occurring in Haditha on that -- on that date.

Two, at the time of the interview of Staff Sergeant Wuterich on 21 February 2006, the investigators had copies of reports from the Marine Corps unit concerning the attacks of that date. A copy of the video footage of dead civilians from the Hammurabi Group. A copy of the *TIME Magazine* article concerning the events. Knowledge of the nature of the complaints and the fact that the government had paid solatia compensation to the families of dead civilians. And also military journal traffic concerning the assault.

The official reports did not -- did not define the death of the civilians as being the product of a war crime. However, this information in the position of the investigative team included evidence of 15 Iraqi women and children being killed by apparent Marine gunfire during the attack. At the time of the investigation, the members of the investigating team were aware of the

existence of the standing rules of engagement, which required positive identification of a target as demonstrating hostile act or hostile intent before engaging the target with deadly force. Based on the facts available to the investigators at the time of the questioning of Staff Sergeant Wuterich, a reasonable person would have suspected him of, at a minimum, being negligent in his duty to comply with the positive identification requirements of the rules of engagement.

Three, on the days leading up to the investigation of the accused, Colonel Watt and his team interviewed members of the accused's squad concerning the IED attack that instigated combat operations on that day. And the assault conducted on two houses by the accused and members of his squad resulted in the death of civilians.

They also discussed the death of five individuals, military aged males, at a vehicle near the convoy. The investigators also walked the ground where the assaults occurred. This information appeared to indicate that members of the squad operated on an assumption that the houses had been declared hostile and could be assaulted without the need for further positive identification.

Four, on 21 February 2006, the investigative team interviewed the accused at Haditha. Prior to asking any questions, the members of the team advised the -- had the accused sign a privacy act statement that advised him of his Article 31(b) and *Miranda* rights.

In writing, the investigative team informed the accused as follows:

The investigator whose name appears below told me that he/she was with the U.S. Army and wanted to question me about the following event WRT -- which is an acronym meaning "with reference to" -- 19 November '05, Haditha complex attack. Before he/she asked me any questions about the events, however, he/she made it clear to me that I have the following rights:

Colonel Watt further advised the accused orally that he wanted to know what the accused knew, not any hearsay, about the deaths of the Iraqi civilians. He focused Staff Sergeant Wuterich on the engagement that occurred that day, what his role had been in the engagement, the fact that a Marine had died in the course of the



engagement, and the fact that civilians had died in the course of the engagement.

Five, in giving the written rights advice, Colonel Watt struck the words "offenses of which I am suspected/accused" and substituted the word "event." He also struck the word "offenses" in each location that it appeared on the form and substituted the word "event."

Six, after advising the accused of the event as indicated above, Colonel Watt orally and in writing advised the accused of his right to remain silent, that anything he said could be used against him in a criminal proceeding, concerning his rights to an attorney, his right to terminate the interview at any time. The accused knowingly and consciously waived these rights.

Seven, at the time of the interview, the accused was alert, oriented, and aware of the situation that he was in and the fact that the conduct of his squad in causing the death of Iraqi civilians was under investigation. He indicated orally and in writing that he understood what the interview was going to focus on and that his responses could be used against him at a criminal persecution. The breadth of his understanding of the potential negative penal impact to questions put to him is underscored by the statement he made prior to questioning; that is, I, as squad leader, was responsible for the conduct of my squad on that day or words to that effect.

Eight, at the time of the questioning, the accused was approximately 26 years old, a successful Marine Corps staff sergeant of average intelligence with over seven years of service and a strong record of performance in the Marine Corps. He was professional in his appearance and demeanor and outwardly displayed the confidence, competence, and capabilities of a professional Marine staff non-commissioned officer. There is no evidence of any mental deficits that would have impacted on his ability to understand the nature of the investigation or the fact that it had potential, negative penal consequences.

Nine, during the course of the questioning, the accused made a number of inculpatory statements, including the statement, I told them -- referring to his squad members -- to treat it as a hostile environment. I told

them to shoot first ask questions later.

Statement of law. Military interrogation of suspects involves advice as required by Article 31(b) of the UCMJ and the requirements for advice of rights in a custodial interrogation found in *Miranda versus Arizona*, 384 U.S. 436, 1966. In the instant case, the defense has not raised the issue that the government failed to comply with the constitutional requirements of *Miranda*. Instead, the defense argues that the government failed to comply with the requirements of Article 31(b) of the UCMJ.

Now Article 31(b) UCMJ provides, No person subject to this chapter may interrogate or request any statement from an accused or a person suspect of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

Generally, Article 31(b) prohibits the use of statements obtained from a person in violation of Article 31(b) as evidence against that person at trial by court-martial.

The government has the burden of establishing compliance with the rights warning requirements by a preponderance of the evidence as shown in Military Rule of Evidence 304(e). And when the case of *U.S. v. Simpson* at 54 MJ 281 decided by the court of appeals of the armed forces in 2001. The court lays out the following standards for evaluating whether the informing of the accused of the nature of the accusation meets the requirements under Article 31(b). The court states:

The requirement in Article 31(b) that the accused or suspect be informed of the nature of the accusation has been the subject of many appellate cases. See *U.S. v. Wright* at 29 CMR 340. This court said, The purpose of informing a suspect or accused of the nature of the accusation is to orient him to the transaction or incident in which he is allegedly involved. It is not necessary to spell out the details of his connection with the matter under inquiry with technical nicety.

In you -- *United States v. Davis* at 24 CMR 157, this

court stated: Advice as to the nature of the charged need not be spelled out with particularity of a legally sufficient specification. It is enough, if from what is said and done, the accused knows the general nature of the charge. A pretrial advice considered in light of the surrounding circumstances and the manifest knowledge of the accused can be sufficient to satisfy this requirement of Article 31.

Now, the court goes on to state that the precision and expertise of an attorney in informing an accused of the nature of the accusation of Article 31 is not required. See *United States v. Johnson* at 43 CMR 160. It is not necessary that an accused or suspect be advised of each and every possible charge under investigation nor that the advice include the more serious or any lesser included charges being investigated. Nevertheless, the accused or suspect must be informed of the general nature of the allegation to include the area of suspicion that focus the person toward the circumstances surrounding the event. See *United States versus Huelsman* at 27 MJ 511, an Army court of military review, 1988.

Among the possible factors to be considered in determining whether the nature of the accusation requirement has been satisfied or whether the conduct is part of a continuance subsequence of events. Whether the conduct was within the frame of reference supplied by the warnings or whether the interrogator has previous knowledge of the unwarned offenses.

Now, in the instant case -- this is my discussion -- in the instant case, the orientation of the accused to the subject matter of the investigation is clear. He was informed of the time, date, and location of the attack being investigated in writing and orally advised that the focus of the questioning would be on the death of the Iraqi civilians. He manifestly stated that he understood what the subject of the -- matter of the inquiry was and further indicated a clear understanding of the issues of responsibility that the investigation was looking into when he stated that he was responsible for his squad's conduct. This orientation is a time, place, and circumstances specifically as it related to the civilian deaths and his involvement in them was underscored by the remainder of the rights advice given which informed him that his responses could be used

against him in a criminal prosecution.

Now, the alteration of the language of the rights advice form by Colonel Watt does not constitute the best practice in advising an individual of his rights. Although Colonel Watt may have actually not suspected the accused of any offense at the time of the advice, his modification of the form does create a potential for confusion. That does not, however, end the inquiry.

As the oral component of the advice concerning the nature of the inquiry and the accurate language of the rights advice itself including informing of the accused of the penal consequences of his responses and his right to remain silent, to seek the assistance of an attorney, and to terminate the interview at any time cleared up that potential for the confusion. The accused waived his rights knowingly and voluntarily, with a full understanding of the consequences of that waiver.

Based on these findings, the court finds that under the totality of the circumstances in this case, the accused was fully oriented as to the nature of the accusation and the subject matter of the investigation and the potential criminal consequences of his responses. He fully understood his rights under the circumstances and voluntarily and knowingly waived those rights. His statement was given voluntarily and the motion to suppress is denied.

Do I have any questions?

I take it that's a no from the defense?

DC (Maj Faraj): No, sir.

MJ: Okay.

Government?

TC (Maj Plowman): Nothing, sir.

MJ: All right.

Now, with respect to the motion to quash the subpoena made by counsel for CBS.

The findings of this court to the previous motion

impacted upon my decision -- or impact on my decision as it relates to this particular motion. Based on the review of the evidence currently available, the government has the following information, which they intend to present at court concerning the events surrounding the offenses of 19 November of 2005. That is:

The statement of the accused to Colonel Watt made on the 21st of February of 2005. Including the diagram prepared by Colonel Watt concerning the sequence of the events on that day and the accused acknowledging -- acknowledgment of the accuracy of the information contained on that diagram.

Second, the unsworn statement of the accused made at the Article 32 investigation.

Third, statements of the accused made to HM Whitt and Captain McConnell in close proximity to the events in question.

Fourth, the testimony of all of the members of the accused's squad who were direct percipient witnesses to the assault. Many of whom have provided statements and testimony at Article 32 proceedings and all of whom are currently either available directly or have been immunized and will be available for testimony at trial.

Forensic -- and finally, forensic evidence, photographs and other physical evidence, obtained from the scene of the offenses.

Having reviewed the witness lists provided by the government, there also appears to be a significant amount of secondary evidence concerning the events of that day through other witnesses the government is capable of presenting. The evidence in the possession of the government was sufficient to prefer the charges, conduct an Article 32 investigation, and justify a referral of the charges to this court-martial.

The evidence -- having viewed the *60 Minutes* program of 18 March 2007, the statements of the accused made therein, coupled with the representation that there are several hours of outtakes in the possession of CBS which contain information concerning the accused's view of the events that occurred on the 19th of November of 2005,

the court clearly finds that this could be admissible into the evidence as statements of the accused under Military Rule of Evidence 801(d).

Now, in evaluating the issue of quashing the subpoena, but first -- the court first applied the requirements of materiality, relevance, and necessity under Rule for Court-Martial 703(f)(1). Now in the discussion of this rule the drafters state that relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on the matter in issue.

In the instant case, the contents of the *60 Minutes* interview of the accused are clearly relevant as they are statements of the accused concerning his involvement in the charged offenses. The information in the on-air interview clearly establishes the materiality and the relevance of this evidence. The focus of the court's evaluation then is on its necessity; however, with respect to the outtakes, the contents of the accused's comments are speculative at this point and the court is concerned that the subpoena in this case likely qualifies as a fishing expedition.

Having evaluated the evidence currently presented to the court, it would appear, especially in light of the detailed information contained in the sworn statement of the accused to Colonel Watt coupled with the diagramming of the assault that is the subject of this case and acknowledges being accurate by the accused, the information desired here by the government from CBS would be cumulative with what is already in the hands of the government.

The court finds that under Rule for Court-Martial 703, the requirement of necessity has not been met and the motion to quash the subpoena is granted.

Now I would note, that although not required based on these findings announced above, the court is persuaded that a qualified reporter's privilege under the First Amendment does, in fact, exist under federal common law.

As the court does not find the subpoena meets -- subpoena meets the lower standard articulated under R.C.M. 703, it is a logical conclusion that the greater standard required for disclosure under this qualified

privilege has not been met. I would note that this last here is provided as dicta is not a holding, as the court does not believe I need to reach that particular holding.

Do you have any questions concerning the ruling of the court?

TC (Capt Gannon): Your Honor, we have no questions; however, the government moves the court for -- moves the court to reconsider its ruling and order an in camera inspection to determine whether or not the material in question is in fact cumulative, Your Honor, given the fact that the military judge has not had an opportunity to review, sir.

MJ: Understood. The request is denied.

TC (Capt Gannon): Understood, Your Honor.

MJ: Very well.

Based on that ruling does CBS have any questions?

CC (Mr. Levine): No, Your Honor.

MJ: Very well.

At this point then, I'm going to excuse you. If you'd like to step to the back of the courtroom or you can leave the courtroom, I think we have a few administrative matters to take care of.

CC (Mr. Levine): Thank you very much, Your Honor.

CC (Mr. Berlin): Thank you, Your Honor.

*The CBS News representatives withdrew from the courtroom.*

MJ: All right. What other issues do we need to take up today?

CC (Mr. Zaid): We could address the 704 issue if you wanted, Your Honor.

MJ: Have you marked that at this point?

CC (Mr. Zaid): We have not.

MJ: The 407 issue -- or the -- which issue?

CC (Mr. Zaid): 407. Mr. Puckett threw me off. Has not marked that for yet[sic].

MJ: Have you provided a copy to the government at this point?

CC (Mr. Zaid): The Corporal has not come back with the copies.

MJ: All right. Then it's probably not right to address at this point. If you could provide me a copy of it after we have completed today so at least I can read it and see what we're dealing with.

I have received the proposed voir dire from the defense. I'll note that I did a very quick curser review of it. I'm not prepared to intelligently discuss it at the moment.

Where are we at when it comes to the modification to the convening order, questionnaires, and those particular issues?

TC (Maj Plowman): Sir, over the break, I was advised that it was done. I haven't had a chance to review it but our clerks did provide three copies of questionnaires which I was told was the modification and those were the questionnaires that were going to be applicable in this case.

If I could provide one to the court, one to the defense, and I have one. I haven't had a chance to operate and look at it nor look at the mod to the convening order yet, because I haven't seen it.

MJ: All right. The accused -- has the accused entered pleas and requested forum?

CC (Mr. Puckett): Yes, sir, we have.

MJ: We have. And that was not guilty --

CC (Mr. Puckett): Not guilty; court by members with enlisted participation.

MJ: Enlisted members. Okay. Very well.



The possibility of other issues arising between today and next Monday -- not next -- the Monday after next is high. What we will do then is we will take up any matters, both the administrative matters and any other motions that arise between 0800 and 1300 on Monday. At 1300, I want the members to be present and we'll begin with voir dire of the members.

Is there any issues with that?

TC (Capt Gannon): There are -- there are no issues with that, Your Honor. We do have a couple of issues we'd like to bring to the court's attention.

MJ: Please.

TC (Capt Gannon): We have received over the break a letter from counsel for Lance Corporal Tatum. We would like to provide a copy of that to the court and they weren't CC'd on it, so I don't think I'm babying the defense. I don't think they have a copy of it. If that's okay, Your Honor, put that into the record. It basically says he's not going to cooperate.

*Captain Gannon handed a copy of the document to the military judge.*

TC (Maj Plowman): Sir, obviously we raise that because that creates a potential issue -- off the top of my head, there's a potential issue of unavailability of Lance Corporal Tatum in this case and of course if that's the case then we would need -- we would, of course, file a motion with regard to that and seek to admit his statements as statements against interest under M.R.E. 804.

MJ: There's a supreme court case out there that might have some impact on that particular issue.

TC (Maj Plowman): Yes, sir. I understand, sir. I mean, potentially --

MJ: Well, get it -- get it in, okay?

TC (Maj Plowman): Yes, sir.

MJ: I'm not sure how you get around the *Crawford* aspects of that.

TC (Maj Plowman): Yes, sir. I know. We're aware of that.

MJ: But I'm prepared to see how you accomplish that.

I -- other than that, you know, if he is refusing the order, that appears to be an issue as to his penal interest.

TC (Maj Plowman): Yes, sir. I'm just saying we have -- you know, there's a potential issue out there with this witness' testimony.

MJ: Then be prepared to litigate it.

TC (Maj Plowman): Yes, sir.

MJ: I want -- well, what I'll direct you to do then is any motions that you believe we need to litigate Monday the 3rd in the morning, I want the moving party to have those motions to me by close of business on Tuesday. And the responding party to me by 1200 on Friday.

When I say have it to me -- although, I have previously said if you can physically bring copies to me, I still encourage that, but also send it to me by e-mail as I will be attending a judge's conference in Reno, so I will not be physically in the area.

Other than the issue as it relates to Tatum, is there going to be a litigation concerning the admissibility of the CBS presentation?

TC (Maj Plowman): Yes, sir.

MJ: Okay.

TC (Maj Plowman): Yes, sir. We would give -- under R.C.M. 908(b), we would give notice orally right now, 72 hours, to consider appealing the military judge's in this case -- decision in this case on that ruling.

MJ: Well, I'm not sure how this is case dispositive.

TC (Maj Plowman): Yes, sir. Well, again, we believe it is potentially. We're not doing this for purposes of delay. We also believe it effects the charges in this case and its substantial --

MJ: How so? Just help me to understand here, counsel, how you believe that -- that, especially in light of the fact that the accused's statements are admissible, what it is you believe makes this case dispositive.

TC (Maj Plowman): Sir, we believe that the -- at least one of the things is the rendition of events with regard to the ROE and his understanding of the ROE and how it applied in this case is not substantially covered in anywhere near to detail that it is in Colonel Watt's statement.

Additionally, I would note another issue is with regard to the witnesses. While several have been immunized, as we've gone before, these witnesses have been begrudging to talk to us and, for example, the letter of Lance Corporal Tatum. Lance Corporal Tatum will not talk to us. His counsel will not let him talk to us. There are several issues like that.

MJ: All right. So you formally are giving notice, you're wanting me to stay this, you can take your 72 hours, and then give notice of a potential government appeal of the discovery denial?

TC (Maj Plowman): Yes, sir.

MJ: Okay. Very well. Would you please put that in writing?

TC (Maj Plowman): Yes, sir. As I'm required to under the rule, I will.

MJ: Anything else?

CC (Mr. Puckett): Yes, sir. Mr. Zaid has an issue to raise.

MJ: Please.

CC (Mr. Zaid): Your Honor, we're running into a similar problem, although I would say I can't unfortunately get around to you. I'll give it to you. And second --

*The bailiff retrieved the documents from Mr. Zaid and handed them to the military judge.*

CC (Mr. Zaid): Sergeant Dela Cruz through his counsel is refusing to talk to us at all. That is what I've handed up -- a course of e-mails and prior correspondence on this issue. Although it's a little bit different in the

Tatum situation; in that, Lance Corporal Tatum is not talking to either the defense or the prosecution, Sergeant Dela Cruz is talking apparently very freely to the prosecution with no equal access under R.C.M. 701 (e) with respect to the defense --

MJ: Are you aware of the issue here or the problem, trial counsel?

TC (Maj Plowman): I saw an e-mail from Mr. Zaid this morning with regard to this respect, sir. That -- is this that e-mail, sir?

CC (Mr. Zaid): Yes, sir. The first one is the one that was sent out last night. I will just say this is not the first time that this issue, as you'll see from reading the paperwork, Your Honor, that this issue has come up. It's just the most recent of it.

MJ: Has Dela Cruz appeared at the Article 32 investigation and do you have his testimony?

CC (Mr. Zaid): Yeah, I mean, if that's for us -- yes, of course.

MJ: Okay. And normally if you've got a witness that's uncooperative, I'd order a deposition; however, you've had an opportunity to cross-examination him.

Were you aware of the problem here?

TC (Maj Plowman): This is the first time I've received notice in this case, sir. Whether there's been problems in the past, I don't know. I would have to take Mr. Zaid on his word. If it's been a problem in the past, it's been a problem in the past. This is the first time I've been notified of it.

MJ: Well, I would encourage you to encourage Dela Cruz to submit to an interview with the defense. And then if that's -- that's a problem, we'll take it up.

Please file your motion.

CC (Mr. Zaid): Yes, sir.

MJ: Okay. Anything else?

CC (Mr. Puckett): That's it for today, sir. Wait a minute, maybe

it's not.

TC (Maj Plowman): Nothing else, sir.

CC (Mr. Puckett): Sir, so the -- just to give you a little background on the whole Sergeant Dela Cruz situation. I will tell you, first of all, that Colonel Vokey and Major Faraj were the main attorneys dealing with this issue, but they made repeated attempts to -- it really is kind of a problem -- made repeated attempts to try to interview him well before the Article 32 investigation and since the Article 32 investigation. And the issue here is just -- this is just by way of notifying so you're not surprised.

The issue is Sergeant Dela Cruz has had all of his charges with respect to the Haditha incident dismissed with prejudice. And he has been granted -- been granted immunity and been ordered to cooperate with all counsel involved in the case. He has cooperated with all counsel, apparently, according to his attorney with the exception of the Wuterich team, because of some personal animosity that's apparently been built up between Lieutenant Colonel Vokey and Mr. Marino, who you may have known as Captain Marigliano [ph] when he was in the Marine Corps. He got out and changed his name, but in any case, it's the same guy.

MJ: What was the name again?

CC (Mr. Puckett): Marigliano. Dan Marigliano.

MJ: Okay.

CC (Mr. Puckett): And the issue here is we tried to resolve the issue by -- I won't belabor this, but the defense took the position that since he is -- he is now in the position of a -- as an example, a Marine in 2/5 whose been ordered by senior officers as a witness in the case to come and talk. He's not suspected of anything. He can't be charged with anything. And we actually believe that under military law, he is not entitled to an attorney. He has an attorney attached to him, however, who seems to be unattached.

MJ: Well, let me ask you this, let's cut through it: You have the right to equal access to the witnesses.

CC (Mr. Puckett): Yes, sir. And we've --

MJ: Okay. But if you -- if you tick the witness off and -- because he thinks that you're a turkey in dealing with him, he doesn't want to talk to you anymore -- you've got access, but you don't necessarily -- if the guy doesn't want to talk to you --

CC (Mr. Puckett): No, sir. The point here is --

MJ: Is it between Dela Cruz and Lieutenant Colonel Vokey or is it between Marino and Vokey?

CC (Mr. Puckett): No. It's the -- it's between the attorneys. And the issue is not -- the issue is not he doesn't want to talk to us. The issue is his attorney is preventing him from talking to us. So we went -- so we sought assistance from the prosecution and they refuse to assist and in fact we ask that he be charged with a violation of the order -- of the order to cooperate and General Mattis at the time refused our request to charge him with a violation of the order.

But back to -- back to his circumstance --

MJ: Okay. So this isn't the first time you've heard about this?

TC (Maj Plowman): Sir, with regard to Lance Corporal D -- I mean as the government, I'm sure the other prosecutors assigned to this case were aware of it. I only recently came on --

MJ: Well, Captain Gannon is sitting right there.

TC (Capt Gannon): Your Honor, I had no idea that General Mattis was ever asked to charge anybody with anything. I knew that there was --

MJ: Who was the -- which prosecutors did you deal with?

CC (Mr. Puckett): Lieutenant Colonel Sullivan, sir, originally.

TC (Capt Gannon): I knew --

CC (Mr. Puckett): Lieutenant Colonel Jamison knows about it. Lieutenant Colonel Atterbury knows about it. Major Erickson knows about it.

TC (Capt Gannon): I knew that there was a -- an incident several weeks ago where there was some raised voices in terms of trying to get this to happen, but then I hadn't heard anything of it since until this morning -- or last night, I guess.

MJ: So in other words, you're aware that there's a problem here.

TC (Capt Gannon): But I wasn't aware the --

MJ: You're not being taken by surprise. The government's aware of the problem. It would appear -- it would appear that you've got an issue in your case that perhaps you two are not aware of but other members of your team are.

TC (Capt Gannon): I -- I certainly am aware of that raised voice incident several weeks ago and I don't know what became of that, but as far as any recent iteration of the problem last night when I was Mr. Zaid's e-mail was the first time it had come to my attention.

CC (Mr. Puckett): Sir, there's more you need to know. I'm sorry, I don't mean to -- again --

MJ: That's fine. I'm just trying to figure out what's going on.

CC (Mr. Puckett): Right. Well, after we requested that he -- we were claiming -- we claimed to the government that we weren't getting equal access to the witness as we believe we're entitled and asked that he be required to interview with us by the government who has control over him as a witness. And that went all the way up to General Mattis. And General Mattis said, Okay. You want access to him. I'll give you access to him. I'm ordering a deposition. So a deposition was ordered. And a deposition was opened. And there was a deposition officer appointed; however, the counsel -- the civilian counsel who showed up to represent Sergeant Dela Cruz basically obstructed the deposition. Didn't allow him to answer any of the questions that we had. So -- although there was a deposition which is the remedy that the court is suggesting perhaps that we might seek, was -- was --

*The defense team conferred.*

CC (Mr. Puckett): When -- when -- he answered some preliminary questions, but when we went to the heart of the matter to ask him questions that would be useful for us at trial -- this is hearsay, too, because Colonel Vokey was the one doing this -- his counsel prevented him from answering the questions.

And our position here, sir, is that we may be in a situation where we might be asking the court -- I mean, since a deposition didn't work, we may be in a position where -- and this is why I wanted to give you advance notice -- after he testifies, we may need a recess to --

MJ: And that would --

CC (Mr. Puckett): -- interview him.

MJ: -- be commonly the remedy --

CC (Mr. Puckett): As -- as --

MJ: -- I would give.

CC (Mr. Puckett): -- from experience, I know.

MJ: All right. And I appreciate that.

CC (Mr. Puckett): So that's a heads-up for you.

MJ: Okay.

CC (Mr. Puckett): And that's -- oh, sir, also because owing to the occasion of the absence of some members of the defense team, the work product that's coming back may require additional time that would push -- that would cause us to ask for a delay in the start of the trial.

MJ: Okay. Run that by me one more time.

CC (Mr. Puckett): Okay. There is work product --

TC (Capt Gannon): If I may --

CC (Mr. Puckett): There is work product that's being produced overseas and --

MJ: All right. I understand what you're saying now. Okay. And you're somewhat talking on belief to me at the



moment.

CC (Mr. Puckett): Yes, sir. Sir, well, I'm alerting you to the possibility that -- and I'm only bringing this up because you're going to be gone.

MJ: Understood.

CC (Mr. Puckett): So I understand --

MJ: What assets do we currently have available to ensure that that work product is processed in a usable form?

TC (Capt Gannon): I think we should just take this up in an 802, so we can speak more freely, Your Honor.

MJ: Do you have any problem with that?

CC (Mr. Puckett): No, sir.

MJ: Okay. Any other issues that we need to take up on the record?

CC (Mr. Puckett): No, sir.

TC (Capt Gannon): No, Your Honor.

MJ: Court stands in recess.

*The Article 39(a) session recessed at 1425, 22 February 2008.*