

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

UNITED STATES	)	GENERAL COURT-MARTIAL
)	
v.	)	DEFENSE MOTION FOR
	)	APPROPRIATE RELIEF
FRANK D. WUTERICH)	
STAFF SERGEANT	)	(WITNESS PRODUCTION)
XXX XX 3221)	
U.S. Marine Corps	)	2 August 2010
)	

1. NATURE OF THE MOTION

The defense moves the court, pursuant to Rules for Court-Martial 703, 905(b)(4), 906(b)(7) and 1001(e), Manual for Courts-Martial, 2008, Article 46 of the UCMJ, and the Sixth Amendment of the United States Constitution, to order the government to produce necessary and relevant material witnesses for the defense on the merits and, if necessary, pre-sentencing.

2. SUMMARY OF THE FACTS

See Defense motion of 2 August 2010 to exclude the accused's statement of 21 February 2006. On April 16, 2010, the defense submitted a request for the production of witnesses to Commander, U.S. Forces Central Command. On April 21, 2010, the Government responded to the Defense' request approving some witnesses and denying others. Among those denied and that the defense now moves to have produced are:

- a. Sgt Juan Jose Maldonado denied for failing to establish relevance and materiality.
- b. Maj Jeffery Dinsmore denied for failing to establish relevance and materiality.
- c. Sgt Eric Ferrell denied as cumulative.
- d. Maj John Hahn and 1st Sgt Eric Carlson denied for being cumulative.
- e. Capt Andrew Wallace denied pending submission of briefs and litigation as to his relevance.
- f. LtCol Jeffery Chessani denied for failing to establish relevance, materiality and nexus to the accused.

3. DISCUSSION

In a court-martial, each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or an interlocutory question would be relevant and necessary. R.C.M. 703(b)(1). Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. M.R.E. 401. 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 a matter in issue. R.C.M. 703(b)(1). *See also United States v. Breeding*, 44 M.J. 345 (1996). Inconvenience, cost, or distance of the witness from the place of trial are not considerations for the Government to escape its responsibility for providing a witness. *U.S. v. Allen*, 31 M.J. 572, 611 (N.M.C.M.R. 1990). There are seven witnesses that were denied by the government that the defense now moves the court to produce.

a) **Sgt Juan Jose Maldonado, USMC**, was present in the aftermath of the events of 19 November 2005 in Haditha – the subject of these proceedings. Sgt Maldonado was part of the Explosive Ordinance Device team that responded to the blast site where LCpl Terrazas was killed. Sgt Maldonado will testify about receiving small arms fire within the vicinity of routes Chestnut and Viper on 19 November 2005, as well as being attacked by two additional IEDs. Sgt Maldonado is both relevant and necessary to SSgt Wuterich's case in that he can testify about events taking place very near in time to the alleged misconduct on the roadside and within Houses 1 and 2. His testimony is relevant to the accused's state of mind regarding the threat level, tactical readiness and enemy orientation. Moreover, his testimony is distinguished from other similar testimony in that he arrived at the scene of the IED later and is not a member of the accused's unit.

b) **Maj Jeffery Dinsmore, USMC**, was the intelligence officer for 3rd battalion 1st Marines during the battalion's deployment to Iraq from September 2005 to March or April 2006. His testimony and its relevance have been the subject of a previous motion in this case that was litigated on February 19 and 20, 2008. The military judge during that hearing found his testimony to be relevant, material, and necessary. He also found that a nexus exists between the intelligence information Maj Dinsmore provided and the accused. Specifically, there is ample evidence that the accused read the intelligence "read boards" published by Maj Dinsmore and his staff and that he was briefed by his immediate leadership the information provided by Maj Dinsmore to the battalion officers. The nature of infantry battalion operations and Marine Corps doctrine on dissemination of information as well as commander's intent establishes the nexus between the accused and the intelligence information provided by Maj Dinsmore and definitively makes him relevant.

c) **Sgt Erick Ferrell, USMC**, was denied by the government as being cumulative. Sgt Ferrell served with SSgt Wuterich while both were members of the Mobile Assault Platoon from 2002 until 2003. Sgt Ferrell will testify as to SSgt Wuterich's good military character, character for truthfulness and character for peaceableness. Although his testimony is similar to the testimony of other character witnesses, it can be distinguished from other testimony through the witness' rank, period of association with SSgt Wuterich or the accused's billet during the relevant period

d) **Maj John Hahn and 1stSgt Eric Carlson, USMC**, were in charge of SSgt Wuterich while he was assigned as a troop handler and instructor from 2003-2005 at SOI West. They were denied by the government as being cumulative. 1stSgt Carlson and Maj Hahn can both testify to SSgt Wuterich's good military character, rehabilitative potential and truthfulness. Their testimony can be distinguished given the fact that 1stSgt Carlson is a Staff Non-

Commissioned Officer and Maj Hahn is a Commissioned Field Grade Officer. SSgt Wuterich is entitled to have both perspectives presented at his trial.

e) **Captain Andrew Wallace, USMC**, was the operational law instructor with Tactical Training and Exercise Control Group at Marine Corps Base, 29 Palms in 2006. Capt Wallace will testify that beginning in 2006 –after the Haditha incident and investigation- the Marine Corps changed how Marines should respond to certain scenarios, specifically, the response to a vehicle approaching a tactical convoy after a complex attack. Capt Wallace will be used to establish a foundation for admitting the scenarios and authenticating the power point slides used to teach ROE classes. His testimony is relevant because it may be required to impeach the testimony of Maj Navin by showing that the Marine Corps changed the ROE's, after Haditha, for a scenario similar to the one presented to the accused in what has come to be known as the road side shooting. The change is a remedial action by the Marine Corps that changed the ROE from one that permitted engagement of a vehicle that approached a tactical convoy after a complex ambush that included an IED and small arms fire to one where engagement was prohibited until a more palpable hostile act had occurred.

f) **LtCol Jeffery Chessani, USMC**, was the accused's battalion commander. When he assumed the battalion's battle space and mission. He received numerous briefs on the enemy's training, tactics and procedure. He also received briefs on the relieved unit's losses and combat casualties. The unit relieved was 3rd battalion 25th Marines. It had lost sixteen Marines in a complex attack on an amphibious tractor. LtCol Chessani will testify that he had those briefings in mind when he briefed the Battalion's officers regarding tactics. These briefs were later communicated as "commander's intent" to SSgt Wuterich and form the basis of his state of mind when he made tactical decisions on November 19, 2005. These briefs described the impending operation River Gate in Haditha in terms similar to the Fallujah campaigns in 2004 .

The Marines were told to be aggressive, avoid casualties and to be on the lookout for perfidious tactics that use civilians as shields for enemy combatants. His testimony is pivotal to the state of mind of the accused and establishes a separation line between criminal action and actions consistent with the commander's intent and the application of available intelligence to the tactical situation presented.

R.C.M. 703 requires the defense to give the government a list of witnesses whose testimony the defense considers relevant and necessary on the merits or on an interlocutory question, which list shall include the name, telephone number, if known, and address or location of the witnesses and a synopsis of expected testimony sufficient to show their relevance and necessity. Because the defense met each of these requirements with its initial request, we now move on to compulsory process.

A servicemember has the right to compulsory process for obtaining witnesses in his favor under the Sixth Amendment. He also has the right to due process of law guaranteed by the Fifth Amendment. *See Weiss v. United States*, 510 US 163, (1994). Article 46 of the UCMJ also gives each servicemember the right to obtain witnesses and evidence.

The ability to compel the attendance of witnesses is well established in military law. *United States v. Carpenter*, 1 M.J. 384. The sole factor for consideration in determining whether a witness will testify is the materiality of the witness. *Id.* at 386. Once materiality has been shown, the government must produce the witness or abate the proceedings. *Id.* at 385, 386.

There is no question that all of the above witnesses are material witnesses for the defense. There is also no question that their testimony would be necessary and relevant in the instant case and would not be cumulative.

Therefore, according to the UCMJ, supporting case law and SSgt Wuterich's constitutional rights, the government should be compelled to produce all of the above named witnesses.

4. EVIDENCE

The defense will present the following evidence:

- a. Defense Witness Request dated 16 April 2010
- b. Government response to Defense Witness Request dated 21 April 2010.
- c. The defense hereby requests the production of the transcript of the 39a hearing in this case regarding the testimony of Maj Dinsmore that was conducted on 19 and 20 February 2010.
- d. Defense response to Government motion to preclude the testimony of Maj Jeffery Dinsmore.

5. BURDEN OF PROOF

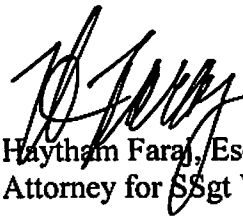
Pursuant to R.C.M 905(c) the burden of proof is on the defense as the moving party. The standard for the burden of proof on this motion shall be a preponderance of the evidence.

6. RELIEF REQUESTED

The defense respectfully requests that the Court compel the government to produce the above named witnesses at SSgt Wuterich's General court-martial.

7. ARGUMENT

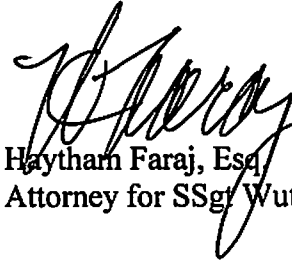
Oral argument is requested.



Haytham Faraj, Esq.
Attorney for SSGt Wuterich

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was served on the court and trial counsel on August 2, 2010.


Haytham Faraj, Esq.
Attorney for SSgt Wuterich

Neal Puckett, Esq.
BAR: VA

Haytham Faraj, Esq.
BAR: IL, MI, DC



THE LAW FIRM OF PUCKETT AND FARAJ, PC

April 16, 2010

Via Email

Commander
U.S. Marine Corps Forces Central Command
Tampa Florida

Via: Trial Counsel, *United States v. SSgt Wuterich*

Ref: Article 46, UCMJ
RCM 703(c)(2)(B), MCM (2008 ed.)

1. The accused, by and through undersigned counsel, hereby requests the production of the following witnesses. All requested witnesses are necessary, relevant and material to the defense' case in chief or for presentencing should that become necessary. The defense acknowledges this request is submitted past the due date. The complexity of the case and counsel's schedule were factors in the late submission. This request in not submitted late for any tactical reasons.

2. The below witnesses are all percipient witnesses to the events of the day on November 19, 2005. They will provide direct evidence of events in Haditha Iraq or evidence that will assist the fact finder in determining the accused's state of mind.

- a. Captain Lucas McConnell.
- b. 1stLt William Kallop
- c. Sgt Sanick Dela Cruz
- d. LCpl Rene Rodriguez
- e. LCpl Justin Sharratt
- f. PFC Humberto Mendoza
- g. Mr. Stephen B. Tatum
- h. Sgt Hector Salinas

- i. Mr. Brian David Whitt
- j. Cpl James Crossan
- k. LCpl Trent Graviss
- l. SSGT Travis Fields
- m. Cpl Jarrett Bilskie
- n. LCpl James Prentice
- o. Maj Kathryn Navin
- p. Cpl Jose Sanchez

3. The following witnesses may not be percipient witnesses but will provide relevant evidence that will be illustrative of the battle situation on or about November 19, 2005, or will provide evidence that will be probative to establishing the accused's state of mind at the time he made certain decisions or took or failed to take certain actions that have been charged or form a basis for charges on the charge sheet.

- a. LtCol Kevin Gonzalez, (714)313-5523
Summary: LtCol Gonzalez is the former Operations Officer of 3/1. He will testify about the type of training the battalion received prior to deployment. He will testify about the various field exercises and specific training evolutions where MOUT training was taught. He will also talk about the ROEs as they applied to the battalion's mission on 19 November, 2005, how he oriented the battalion's Marines on the likely threats and how he proposed they deal with it. He will also give his impression of the general discipline of Kilo company and its application of the ROE's and EOF.
- b. Maj Shannon Neller, MCSF Bangor, WA; (949)338-2553
Summary: Maj Neller is the former Lima 3/1 company commander and battalion operations officer. Maj Neller will testify that Kilo company was the most disciplined company in the battalion, that the Marines were well trained and executed on 19 November in accordance with their training. He will also testify that on 19 November the enemy was conducting a complex operation against the Marines in Haditha and that the events in the vicinity of Routes Viper and Chestnut were part of a larger attack in which his company was also engaged to the east.
- c. SgtMaj Sax, Edward, Marine Corps Detachment, U.S. Army Training Center Fort Leonardwood, Mo. (573)596-0752
Summary: Sgt Maj Sax was the 3/1 SgtMaj on 19 November 2005. He will testify about Kilo company's training and disciplined application of the ROEs. He will also testify

about SSgt Wuterich's discipline and reputation for good military character in the battalion.

- d. Miss Safa Yunis Salem (Salim)
Summary: Ms. Salem will testify that the shooter in the back bedroom in house #2 was the first Marine to open the bedroom door and that he began firing immediately. She will also testify that the shooter was shorter than her.
- e. John Robert Gooch.
Summary: A former member of H&S company EOD security at Haditha Dam. He responded to the blast site along with the EOD team. Confirms that they came under SAF and responded causing two enemy casualties.
- f. Sgt Juan Jose Maldonado, H&S Co. 3/1.
Summary: Responded with EOD to the blast site. En route he reports being attacked by small arms fire and possibly two IEDs.
- g. Major Jeffery Dinsmore. Intelligence officer 1st Reconnaissance Bn, 1st Marine Division.
Summary: Major Dinsmore will testify about the general enemy situation that he personally briefed to Kilo 3/1, and specifically SSgt Wuterich and his squad. His briefs are pivotal to establishing the mind-set of the Marines as they were attacked on November 19, 2005. He also provides evidence concerning enemy tactics and procedures, evidence that is directly relevant to the defense of the charges in this case.
- h. Maj Dana Hyatt- Civil Affairs Group, 3/1 det OIC.
Summary: Maj Hyatt will testify that schools were not supposed to be shut down in Haditha. He will also testify that the town was "technically" not locked down. Yet on the morning of the IED attack the schools were in fact shut.
- i. GySgt Larry Dunlap, Company Gunnery Sergeant, Kilo 3/1
GySgt Dunlap, was in the CoC when the attack occurred. He will testify about the general situation as it developed based on reports received throughout the day.
- j. LCpl James Prentice, Kilo co. 3/1
Summary: LCpl Prentice was a member of the QRF on November 19. He will testify that there was small arms fire when the QRF arrived. He will also testify that based on intel briefs that the platoon received an IED attach is normally followed by a VBIED, mortar fire, an ambush, or small arms fire. He will also testify that he was taught that structures may be declared hostile.
- k. LCpl Salvador Guzman
Summary: Cpl Guzman will bolster or impeach LCpl Guzman by testifying about conversations that he had with LCpl Mendoza concerning the events of November 19.
- l. Lt Shanen E. Dawson, TBS, 1-925-518-4088.

Summary: 1stLt Dawson was a vehicle commander with Mobile Assault Platoon from Jan 2006 – January 2007. 2ndLt Dawson will testify about SSgt Wuterich's military character, character for truthfulness and peaceableness

- m. Sgt Eric Ferrell, 3/1, 760-201-5658.
Summary: Sgt Ferrell was a vehicle commander with the Mobile Assault Platoon during the same time as SSgt Wuterich. He will testify about SSgt Wuterich's good military character, truthfulness, and peaceableness.

- n. Mr. Brian McDermott, 760-429-5355.
Summary: Mr. McDermott has been a friend of SSgt Wuterich since 1997. They went to boot camp together and subsequently were assigned to 1st BN 3rd MAR then SOI West as Combat Instructors. Mr. McDermott will offer evidence of SSgt Wuterich's peaceableness and truthfulness.

- o. SSgt Inranil Das, MECEP program, Iowa State University, 760-774-9430
Summary; SSgt Das is a friend of SSgt Wuterich. They served together at I/3 as well as Combat Instructors. He will provide evidence of SSgt Wuterich's, truthfulness and peaceableness.

- p. Martha-Anne Hawley, 203-915-3708
Summary: Ms. Hawley was a high school classmate of SSgt Wuterich she will testify about his truthfulness and peaceableness as well as rehabilitative potential, if necessary

- q. Mr. Mike Largen, 760-805-6205
Summary: Mr. Largen served with SSgt Wuterich as Combat Instructors together. Mr. Largen will testify about SSgt Wuterich military character, rehabilitative potential and peaceableness

- r. Maj. John Hahn, 916-871-9001
Summary: Maj Hahn was SSgt Wuterich's former company commander at SOI West. He will testify about SSgt Wuterich's truthfulness, good military character and rehabilitative potential.

- s. 1stSgt Eric Carlson,
Summary: 1stSgt Carlson was SSgt Wuterich's company gunnery sergeant during his tour with SOI West. He will testify about his military character rehabilitative potential, and truthfulness.

- t. Mr. David Wuterich (SSgt Wuterich's father), 24 Retreat Ave., Meriden, CT. 06451 (203)634-0148.

- u. Mrs. Rosemarie Wuterich (SSgt Wuterich's mother) 24 Retreat Ave., Meriden, CT. 06451 (203)634-0148.

- v. **Capt Wallace, Andrew M., OpLaw instructor TTECG; (760)830-77210**
Summary: Capt Wallace is the operational law instructor with Tactical Training and Exercise Control Group at Marine Corps Base, 29 Palms. Capt Wallace will testify that beginning in 2006 the Marine Corps began to train Marines on certain ROE scenarios. Capt Wallace will be used to establish a foundation for admitting the scenarios and authenticating the power point slides used to teach ROE classes. The ROE slides are relevant because they contradict the ROEs taught to SSgt Wuterich by Maj Navin before he deployed to Iraq in September 2005. The changes in the ROEs demonstrate that the Marine Corps changed its position on how Marines respond to a scenario that replicates the events at Roadside.

- w. **1stLt Frank, Warren, Lima Co. 3/1 (760)763-7594**
Summary: 1stLt Frank was the platoon sergeant of SSgt Daniels. He will testify that on November 19, 2005, he and SSgt Daniels went to SSgt Wuterich in the late morning. He will testify that he does not remember SSgt Wuterich reporting that the men in the white car fired on them. His testimony contradicts that of SSgt Daniels and is therefore material, relevant and necessary.

- x. **Khalid Salman Rassif Hussein-**
Summary: He gave a statement that at about 0730 on 19 November he heard a very loud explosion followed by "very strong firing. Defense will stipulate to testimony as a substitute for his production.

- y. **SSgt Justin Laughner. HET assigned to Kilo 3/1.**
Summary: SSgt Laughner will testify that on November 19, 2005, en route to the location of the IED blast, he was in a convoy that received SAF. He fired at some men that he saw running but who did not pose a threat at the time of their movement. He will also testify consistent with statements that the early reports on November 19, 2005, were that Marine heard an AK-47 racking before the entered house #1. He will also testify that he inspected and took photos of the area around the white car which was consistent with SSgt Wuterich's statement that the men around the white car were engaged from the convoy area. He will also testify that an unknown Marine told him that 8 AK-47s were recovered from the white car.

- z. **LtCol Jeffery Chessani.**
Summary: LtCol Chessani was the accused's battalion commander. When he assumed the battalion's battle space and mission he received numerous briefs on the enemy's training, tactics and procedure. He also received briefs on the relieved units losses and combat casualties. LtCol Chessani will testify about briefs he gave to the Battalion's officers regarding tactics. These briefs were later communicated as "commander's intent" to SSgt Wuterich and form the basis of his state of mind when he made tactical decisions on November 19, 2005.

- aa. **NCIS SA Brady and NCIS SA Maloney**

NCIS Special Agents Brady and Maloney completed a scene reconstruction to include shooter positions and blood spatter of alleged crime scenes named in the charges. Some of their findings and conclusions are exculpatory to SSgt Wuterich

4. If the government decides to deny any of the requested witnesses, the defense requests notice specifying the reason for the denial.

Respectfully Submitted,

/s/
Haytham Faraj
Attorney for the accused



UNITED STATES MARINE CORPS

LEGAL SERVICES SUPPORT SECTION
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BOX 555607
CAMP PENDLETON, CALIFORNIA 92055-5607

5800
LSST-E
20APR10

RETURN ENDORSEMENT on Mr. Faraj's ltr of 16 April 2010

From: Trial Counsel

To: Mr. Haytham Faraj, Esq., Defense Counsel

SUBJ: RESPONSE TO REQUESTS FOR PRODUCTION OF WITNESSES ICO U.S. V. WUTERICH

Ref: (c) RCM 703, MCM (2005 Ed.)

(d) TC ltr 5800 LSST-C of 26 Feb 07 w/ encls (Subj: Discovery of 26 February 2007)

1. Readdressed and returned pursuant to paragraph (c) (2) (D) of reference (c). Additionally, per the trial schedule ordered by the military judge in this case, the defense request for witnesses was due on 5 April 2010. The basic correspondence is dated 16 April 2010. As a result of the untimely submission of your witness request, the trial counsel was unable to contact all of the witnesses to determine their location, or if they can even be contacted with the information provided. Consequently, the government reserves the right to revisit any witness granted herein, who after additional investigation turns out to be deployed, is unavailable, or whom the trial counsel is unable to contact after making a reasonable effort to do so with the information provided.

2. Your request for the production of the witnesses identified in the basic correspondence at paragraph 2a-2p is granted. The subparagraphs below provide a witness-by-witness determination.

- a. Captain Lucas McConnell. This witness will be produced.
- b. First Lieutenant William Kallop. This witness will be produced.
- c. Sergeant Sanick Dela Cruz. This witness will be produced.
- d. Lance Corporal Rene Rodriguez. This witness will be produced.
- e. Lance Corporal Justin Sharratt. This witness will be produced.
- f. Private First Class Humberto Mendoza. This witness will be produced.
- g. Stephen B. Tatum. This witness will be produced.
- h. Sergeant Hector Salinas. This witness will be produced.
- i. Brian David Whitt. This witness will be produced.
- j. James Crossan. This witness will be produced.
- k. Trent Graviss. This witness will be produced.
- l. Gunnery Sergeant Travis Fields. This witness will be produced.

Exhibit B

SUBJ: RESPONSE TO REQUESTS FOR PRODUCTION OF WITNESSES ICO U.S. V. WUTERICH

- m. Jarrett Bilskie. This witness will be produced.
- n. James Prentice. This witness will be produced.
- o. Major Kathryn Navin. This witness will be produced.
- p. Jose Sanchez. This witness will be produced.

3. Your request for the production of the witnesses identified in the basic correspondence at paragraph 3a-3aa is granted in part and denied in part. The subparagraphs below provide a witness-by-witness determination.

- a. Lieutenant Colonel Kevin Gonzalez. Denied. Your request fails to establish this witness' relevance or materiality.
- b. Major Shannon Neller. Denied. Your request fails to establish this witness' relevance or materiality.
- c. Sergeant Major Edward Sax. Pursuant to the Court's order of 20 February 2008, this witness will be produced.
- d. Safa Yunnis Salem. Denied. The government has no mechanism under the law to obtain the presence of the requested witness.
- e. John Robert Gooch. Denied. Your request fails to establish this witness' relevance or materiality.
- f. Sergeant Juan Jose Maldonado. Denied. Your request fails to establish this witness' relevance or materiality.
- g. Major Jeffery Dinsmore. Denied. Your request fails to establish this witness's relevance or materiality.
- h. Major Dana Hyatt. Denied. Your request, as drafted, fails to establish this witness' relevance or materiality, or the admissibility of the proffered testimony.
- i. Gunnery Sergeant Larry Dunlap. This witness will be produced.
- j. James Prentice. As indicated in paragraph 1(n) above, this witness will be produced.
- k. Salvador Guzman. Denied. Your request, as drafted, fails to establish this witness' relevance or materiality and call for inadmissible testimony.
- l. Shanen E. Dawson. This witness will be produced.
- m. Sergeant Eric Ferrell. Denied. This witness is cumulative.
- n. Brian McDermott. This witness will be produced.
- o. Staff Sergeant Inranil Das. Pursuant to the Court's order of 20 February 2008, this witness will be produced.
- p. Martha-Ann Hawley. This witness will be produced.

SUBJ: RESPONSE TO REQUESTS FOR PRODUCTION OF WITNESSES ICO U.S. V. WUTERICH

- q. Mike Largen. Denied. This witness is cumulative.
- r. Major John Hahn. Denied. This witness is cumulative.
- s. First Sergeant Eric Carlson. Denied. This witness is cumulative.
- t. David Wuterich. This witness will be produced.
- u. Rosemarie Wuterich. This witness will be produced.
- v. Captain Andrew Wallace. Pursuant to the Court's order of 20 February 2008, this witness is denied pending the submission of briefs and litigation of his relevance and materiality.
- w. Captain Warren Frank. This witness will be produced.
- x. Kahlid Salman Rassif Hussein. Denied. The government has no mechanism under the law to obtain the presence of the requested witness.
- y. Justin Laughner. This witness will be produced.
- z. Lieutenant Colonel Jeffery Chessani. Denied. Your request, as drafted, fails to establish this witness' relevance or materiality, and fails to establish any nexus to the Accused.
- aa. Special Agent Thomas Brady and Mr. Michael Maloney. These witnesses will be produced.

N. L. Gannon 20 APR 2010
N. L. Gannon

N. L. GANNON
Major, USMC

Copy to:
SJA, MARCENT
File

EXHIBIT C

Transcript of 39a
Conducted on 19 and
20 February 2008

Production requested from Government

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

UNITED STATES	)	GENERAL COURT-MARTIAL
)	
v.	)	DEFENSE RESPONSE TO
	)	GOVERNMENT MOTION IN LIMINE TO
FRANK D. WUTERICH	)	PRECLUDE THE TESTIMONY OF MAJ
XXX XX 3221	)	JEFFERY DINSOMRE
STAFF SERGEANT)	
U.S. Marine Corps)	
	)	07 FEBRUARY 2008

1. **Nature of Motion.** This is a response to the Government's motion seeking to preclude the testimony of Major Jeffery Dinsmore, former intelligence officer of Third Battalion First Marines.

2. **Summary of Facts**

The defense adopts the Government's facts and alleges the following additional facts:

a. Major Jeffery Dinsmore was the intelligence officer of Third Battalion First Marines from June 2005 until May 2006.

b. SSgt Wuterich was a member of Third Battalion First Marines from May, 2005 until Jan, 2007.

c. Third Battalion First Marines deployed to Haditha Iraq in September of 2005.

d. During the deployment, Major Dinsmore engaged in daily collection, analysis, and dissemination of intelligence on the enemy order of battle, and tactics, techniques, and procedures. He also conducted intelligence preparation of the battlefield and developed CCIRs which were transmitted to the battalion's Marines.

e. Major Dinsmore also tracked operations by the enemy against coalition and, specifically, Marine Corps units in the battalion's area of operations to keep all the battalion's staff and Marines apprised of the threat.

f. Major Dinsmore met at least weekly with the battalion's company commanders including Captain Luke McConnell, the Company K commander to brief him on the latest intelligence.

g. Captain McConnell always briefed his Marines on the latest intelligence as he received it from Major Dinsmore.

h. Major Dinsmore's intelligence briefs was critical to SSgt Wuterich's awareness of the enemy situation, tactics and techniques, probable courses of action, and likely threats. The intelligence briefs served to mentally orient him on the enemy's action and probable threats and were a pivotal factor in his decision making process on November 19, 2005.

i. The Marine Corps' mission orders process which is also known as the Five Paragraph Order specifically lists "Enemy situation" under paragraph I, Situation. The orders process is a doctrine whose use is mandatory by all Marine Corps units including company K. Receiving intelligence briefs before beginning a mission is not only routine but mandated by Marine Corps warfighting publications and doctrinal publications. *See Marine Corps Doctrinal Publication 1, 1-0, 2, and 5.*

3. **Discussion.**

ON NOVEMBER 19, 2005, SSGT WUTERICH MADE CERTAIN DECISION BASED ON A STATE OF MIND THAT WAS DIRECTLY AFFECTED BY INTELLIGENCE INFORMATION HE RECEIVED ABOUT THE ENEMY IN HADITHA. MAJOR DINSMORE WAS THE INTELLIGENCE OFFICER WHO PROVIDED THAT INFORMATION, EITHER DIRECTLY OR INDIRECTLY, TO SSGT WUTERICH. MAJOR DINSMORE SHOULD BE PERMITTED TO TESTIFY ABOUT ALL THE INTELLIGENCE

HE PROVIDED TO THE MARINES OF 3/1 FROM ARRIVAL IN IRAQ UNTIL NOVEMBER 19, 2005.

Mil. R. Evid. 401 defines relevant evidence as "any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Manual for Courts-Martial (2005 ed.). It is axiomatic that intelligence briefs provided to Marines engaged in combat operations are relevant to the state of mind and the actions of those Marines in those operations.

The prosecution in this case is conveniently ignoring that which all the members –most of whom are veterans of the global war on terrorism- of the prosecution team know, that intelligence briefs are an essential part of every Marine Corps mission order and a substantial factor in the planning process during operations, especially in combat. The Situation paragraph of the five paragraph order, which includes the subparagraph "enemy situation," is taught to every officer at TBS, including the lawyers. To challenge the relevancy of the intelligence officer's putative testimony on the basis that he did not personally brief the accused in this case deliberately evades the facts of how Marine Corps units operate and more specifically how infantry units operate, the importance of disseminating information, and the roles and responsibilities of certain staff members, such as the intelligence officer, in providing that information.

Major Dinsmore updated the intelligence on a daily basis and briefed it weekly. Although he may not have provided that information directly to SSgt Wuterich, his briefs and the read boards he and his staff created provided constant orientation on the latest enemy situation and threats. That orientation specifically sets a state of mind which then impacts certain decisions. Those decisions resulted in SSgt Wuterich moving with a fire team to clear houses that resulted in the deaths of some civilians. SSgt Wuterich is on trial for those deaths. That makes

the briefs, read boards, and even rumors of the enemy's situation, tactics, techniques, and procedures relevant.

Mil. R. Evid. 403 Excludes relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice, confusing of the issues, cumulative, causes undue delay, wastes time or misleads the members. Manual for Courts-Martial (2005 ed.). The putative evidence to be offered by Major Dinsmore fits none of the factors that keep relevant evidence out, nor has the government raised a legal relevance objection. But, if such an objection does exist, it may be raised at trial.

5. Relief Requested.

The defense respectfully requests that Major Dinsmore be allowed to testify about the intelligence briefs and enemy situation in and around Haditha before and during the battalion's deployment until November 19, 2005.

6. Evidence.

A. Exhibits

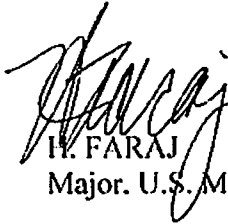
None

B. Witnesses

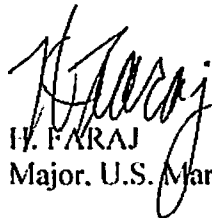
1. Maj Jeffery Dinsmore
2. Capt Luke McConnell
3. 2ndLt William Kallop
4. SSgt Travis Fields
5. Cpl Hector Salinas

7. Argument.

Requested.


H. FARAJ
Major, U.S. Marine Corps

I Certify that a copy of this motion was served upon trial counsel on 07 February, 2008.


H. FARAJ
Major, U.S. Marine Corps