COURT-MARTIAL RECORD

NAME RICHMOND, EDWARD L. PFC

SSN [redacted] (6)(6-2

ACTIONS CODED:
INITIAL _____
ACCA _____
FINAL _____
COMPANION(S):

ASSIGNED TO:
PANEL 2
EXAM. DIV. _____

RETURN THIS FILE TO:

OFFICE OF THE CLERK OF COURT
US ARMY JUDICIARY
901 NORTH STUART STREET, SUITE 1200
ARLINGTON, VA 22203-1837

VOL VII OF VII VOL(S)

G

ARMY 20040787

20040787

JALS-CC FORM 24, 1 OCTOBER 2000

JUN 13 2005

017788

VII of VII

VOL ~~V of V~~

ORIGINAL COPY

VERBATIM[1]

RECORD OF TRIAL[2]

(and accompanying papers)

OF

RICHMOND, Edward L., Jr.	[redacted] (b)(6)	Private First Class
(NAME: Last, First Middle Initial)	(Social Security Number)	(Rank)
HHC, 1st Bn, 27th In, 2nd Bde, 25th IN	US Army	Kirkuk, Iraq
(unit/Command Name)	(Branch of Service)	(Station or Ship)

BY

GENERAL COURT-MARTIAL

CONVENED BY COMMANDING GENERAL

(Title of Convening Authority)

Headquarters, 1st Infantry Division

(Unit/Command of Convening Authority)

TRIED AT

FOB Danger, Tikrit, Iraq	ON	3-5 August 2004
(Place or Places of Trial)		(Date or Dates of Trial)

COMPANION CASES:

RECEIVED
CLERK OF COURT
2005 JUN 10 A 7:00
US ARMY JUDICIARY

[1] Insert "verbatim" or summarized" as appropriate. (This form will be used by the Army and Navy for verbatim records of trial only.)

[2] See inside back cover for instructions as to preparation and arrangement.

PROSECUTION EXHIBITS ADMITTED

BATES PAGEs 17791-17799 are photographic exhibits withheld based on 5 U.S.C. 552(B)(6) AND (B)(7)(C).

BATES PAGE 17800, a photographic exhibit, is nonresponsive based on application of the Judge's specific and applied rulings

UNITED STATES	)	
	)	STIPULATION OF FACT
v.	)	
	)	
Edward L. RICHMOND, Jr. PFC, US Army HHC, 1st Battalion, 27th Infantry 25th Infantry Division (Light) APO AE 09347-9998	)	

The government and defense, with the express consent of the accused, stipulate the following fact is true, susceptible of proof, and is admissible in evidence. This fact may be considered by the court-martial. The accused expressly waives any objection he may have to the admission of this fact into evidence at trial under the Military Rules of Evidence, the United States Constitution, or applicable case law.

(b)(6)-7

The name of the Iraqi man who was shot and killed in this case was [redacted]

[redacted]
CPT, JA
Defense Counsel

EDWARD L. RICHMOND, JR.
PFC, USA
Accused

[redacted]
CPT, JA
Assistant Defense Counsel

(b)(6)-2

[redacted]
MA[redacted]A
Trial Counsel

017801

Prosecution Exhibit 8 ~~for ID~~

ENLISTED RECORD BRIEF

BRIEF DATE	NAME	RANK - DOR	PMOS	SSN	COMPONENT
20040730	RICHMOND, EDWARD LYNN JR	PFC 20030522	11C	[redacted]	REGULAR

SECTION I - Assignment Information

OVERSEAS DUTY

YR/MO RTN	CTRY	MONTH	TCS	NUMBER OF TOURS SHORT	NUMBER OF TOURS LONG
	HI			0	0

DROS	DEROS
	20050930

Date Dependents Arrived OS

PMOS	11C	SQI	O
SMOS		PDSI/YRMO	/
Bonus MOS		ASI	00
Bonus Enlist Elig Dt			
Promotion Points/YRMO			
Prev Promotion Points/YRMO			
Prom Seq#		Prom Select Dt	
Promotion MOS			

ASVAB		Test # / Dt	ASVAB10 / 20020501				
GT	126	ELEC	128	FOOD	127	TECH	129
ADMIN	129	FA	129	COMMO	129		
CMBT	129	MECH	123	MAINT	128		

Delay Separation Reason

AEA / Dt L /

Flag Code	Flag Start Dt	Flag Expiration Dt
~~JA~~	~~20031009~~	
~~AA~~	~~20031007~~	

[redacted] ER (5)(6)1-2

SECTION II - Security Data

PSI Status	INELIG	Fld Det-RS Stat	NONE
PSI Invest INIT		20020325	
PSI Invest Compl		20020508	

SECTION V - Foreign Language

Language	Read	Listen	Speak

DLAB

SECTION VI-Military Education

MEL/MES

Course	Year

Correspondence Courses

Total # of Hours

SECTION III - Service Data

BASD	20020522	PEBD	20020522	BESD	20020522
ETS	20080521	DIEMS	20020325	Reenl Elig/Prohib	10
# Days Lost		AGCM Dt		AGCM Elig Dt	20050521

	PVT	PV2	PFC	SPC - CPL
DOR	20020522	20021122	20030522	

	SGT	SSG	SFC	MSG - 1SG
DOR				
DOR	SGM - CSM			

SECTION VII - Civilian Educa

LEVEL COMPLETED 4 YRS HS

DESG HIGH SCHOOL DIPLOMA

INSTITUTION GED [redacted] (5)(6)1-2

DISCIPLINE

YR 2001

INSTITUTION

DISCIPLINE

YR

NUMBER OF SEMESTER HOURS COMPLETED 0

Technical Certification

Course Name	Dt Certified	Dt Expires

SECTION VIII - Awards and Decorations

NDSM	1
GWTEM	1
GWTSM	1
ASM/ASR	1
AAM	1
[redacted]	
EIB	1

[redacted] (5)(6)1-2 ER (5)(6)1-2

SECTION IV - Personal/Family Data

Date of Birth	19830707	Birthplace	LA
Country of Citz	US	Sex/Race	MALE / CAUCAS
No of Dependent Adults/Children	0 / 0	Religion	NO PREF RECD
Marital Status	SINGLE	Spouse Birthplace/Citz	
PULHES	111111	Height/Weight	70" / 195 [redacted] (5)(6)1-2
EFMP Dt		#Cmd Sponsored	0
Physical Category	A	APFT P/F Dt	/
Last Physical Exam	20011206	MMRB Results/Dt	

Home of Record GONZALES, LA (5)(6)1-2

Mailing Address [redacted]

Mil Spouse SSN / MPC

Svc Comp / DoD

Emergency Data Verified Date

SECTION X - Remarks

HIV YRMO 200312

RGMT AFL

DATE LAST PHOTO

Date of Loss | Date of Last PCS 20021010 | Date of Last NCOER (5)(6)1-2

SECTION IX-Assignment Information

ASGT	FROM	MO	UNIT NO	ORGANIZATION	STATION	LOC	COMD	[redacted] Y TITLE	DMOS	ASI	LANG
PROJ											
Current	20031016		WAL8T0	010027INHHC	SCHOFIELD	US	P1	~~ASSISTANT~~ GUNNER	11C1O	00	
1st Prev	20030603		WAL8T0	010027INHHC	SCHOFIELD	US	P1	ASSISTANT GUNNER	11B1O	00	
2nd Prev	20021010	8	WAL8T0	010027INHHC	SCHOFIELD	US	P1	INCOMING PERSONNEL	11C1		YY
3rd Prev	20021001	0	W3RB35	USARHAW REPL D	SCHOFLD B	US	P1	INCOMING PERSONNEL	11C1		YY
4th Prev			W2L5H2	ITB 30 AG BN CO A	FT BENNIN	GA	TC				
5th Prev											
6th Prev											
7th Prev											
8th Prev											
9th Prev											
10th Prev											
11th Prev											
12th Prev											
13th Prev											
14th Prev											
15th Prev											
16th Prev											
17th Prev											
18th Prev											
19th Prev											
20st Prev											
22nd Prev											
23rd Prev											
24th Prev											
25th Prev											

017802

I Verify that an official record exists (5)(6)1-2

555TH PERSONNEL SERVICES BATTALION

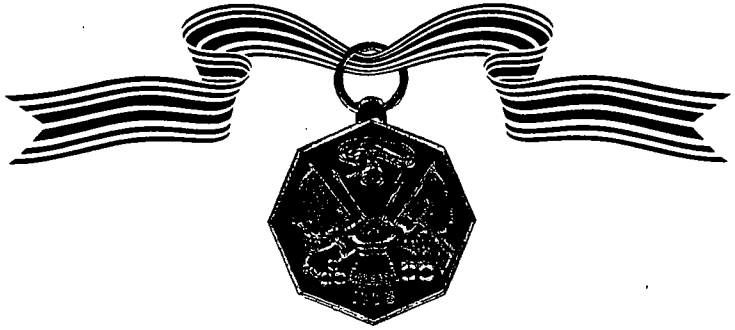
[redacted]

SGT, USA

ADET, 5[redacted] PSB

Prosecution Exhibit 15 for ID

DEFENSE EXHIBITS ADMITTED



DEPARTMENT OF THE ARMY

THIS IS TO CERTIFY THAT THE SECRETARY OF THE ARMY HAS AWARDED

THE ARMY ACHIEVEMENT MEDAL

TO PRIVATE FIRST CLASS EDWARD LYNN RICHMOND JR., UNITED STATES ARMY
HHC, 1ST BATTALION, 27TH INFANTRY, 25TH INFANTRY DIVISION (LIGHT)

FOR OUTSTANDING ACHIEVEMENT AS A SOLDIER IN THE MORTAR PLATOON DURING LIGHTNING THRUST WARRIOR. PRIVATE FIRST CLASS RICHMOND'S TIRELESS EFFORTS AND COMMITMENT TO SELFLESS SERVICE CONTRIBUTED GREATLY TO THE OVERALL SUCCESS OF THE EXERCISE. HIS ACTIONS REFLECT GREAT CREDIT UPON HIM, THE "WOLFHOUNDS," AND THE UNITED STATES ARMY.

FROM: 08 SEP 2003 To 17 SEP 2003

(b)(6)1-2

[redacted]

LTC, IN
COMMANDING

PERMANENT ORDER #311-06
Date: 07 NOV 2003
HQ, 1st Battalion, 27th Infantry
Schofield Barracks, Hawaii 96857

DE A for D

DA FORM 4980-18, NOV 97

RECOMMENDATION FOR AWARD

For use of this form, see AR 600-8-22; the proponent agency is ODCSPER

For valor/heroism/wartime and all awards higher than MSM, refer to special instructions in Chapter 3, AR 600-8-22.

1st Bn, 27th Inf Schofield Barracks, HI 96857	2. FROM Cdr, HHC, 1st Bn, 27th Inf Schofield Barracks, HI 96857	3. DATE

PART I - SOLDIER DATA

4. NAME RICHMOND, EDWARD LYNN JR	5. RANK PFC	6. SSN (b)(6)-2 [redacted]
7. ORGANIZATION HHC,1st Bn, 27th Inf Schofield Barracks, HI 96857	8. PREVIOUS AWARDS None	
9. BRANCH OF SERVICE	10. RECOMMENDED AWARD AAM	11. PERIOD OF AWARD a. FROM 08 SEP 03 — b. TO 17 SEP 03

12. REASON FOR AWARD		13. POSTHUMOUS
12a. INDICATE ACH, SVC, PCS, ETS, OR RET ACH	12b. INTERIM AWARD: YES [ ] NO [X] IF YES, STATE AWARD GIVEN	YES [ ] NO [X]

PART II - RECOMMENDER DATA

14. NAME (b)(6)-2 [redacted]		15. ADDRESS HHC 1st Bn, 27th Inf Schofield Barracks, HI 96857 (b)(6)-2
16. TITLE/POSITION SQUAD LEADER	17. RANK SGT	
18. RELATIONSHIP TO AWARDEE SQUAD LEADER		19. SIGNATURE [redacted]

PART III - JUSTIFICATION AND CITATION DATA *(Use specific bullet examples of meritorious acts or service)*

20. ACHIEVEMENTS

ACHIEVEMENT #1

g Lightning Thrust Warrior 2003, as base gun gunner in the 81mm Mortar Platoon PFC Richmond demonstrated the ability to get b done without supervision. He was instrumental in manipulating the gun system to provide timely and accurate indirect fire to destroy enemy forces. PFC Richmond's attention to detail, along with his technical and tactical proficiency, contributed greatly to the platoon's mission success.

ACHIEVEMENT #2

PFC Richmond was identified by the observer controller as the best gunner and the overall performer during Lightning Thrust Warrior. He was selected as hero of the battle because of his abilities to perform his duties above and beyond the standard.

ACHIEVEMENT #3

PFC Richmond took charge of fellow soldiers on numerous occasions in the execution of different duties and taskings. PFC Richmond performed the basic soldier skills with precision and with determination. He was always the first soldier awake and ready each day during the training exercise. He served as a role model for the other soldiers in the platoon to emulate.

ACHIEVEMENT #4

21. PROPOSED CITATION

FOR OUTSTANDING ACHIEVEMENT AS A SOLDIER IN THE MORTAR PLATOON DURING LIGHTNING THRUST WARRIOR 2003. PRIVATE FIRST CLASS RICHMOND'S TIRELESS EFFORTS AND COMMITMENT TO SELFLESS SERVICE CONTRIBUTED GREATLY TO THE OVERALL CCESS OF THE EXERCISE. HIS ACTIONS REFLECT GREAT CREDIT UPON HIM, THE OLFHOUNDS", AND THE UNITED STATES ARMY.

NAME	SSN
RICHMOND, EDWARD LYNN JR	(b)(6)-2 [redacted]

PART IV - RECOMMENDATIONS/APPROVAL/DISAPPROVAL

22. *I certify that this individual is eligible for an award in accordance with AR 600-8-22; and that the information contained in Part I is correct.*	22a. SIGNATURE [redacted]	22b. DATE 6 OCT 03
INTERMEDIATE AUTHORITY	a. TO Cdr, 1st Bn, 27th Inf Schofield Barracks, HI 96857	b. FROM [redacted] Schofield Barracks, HI 96857	c. DATE 6 OCT 03

d. RECOMMEND: ☒ APPROVAL ☐ DISAPPROVAL	UPGRADE TO:	DOWNGRADE TO:
e. NAME [redacted] (b)(6)-2	f. RANK [redacted] SPT
g. TITLE/POSITION [redacted]	h. SIGNATURE [redacted]

i. COMMENTS
AN OUTSTANDING SOLDIER AND A VITAL MEMBER OF THE TEAM. WELL DESERVED!

24. INTERMEDIATE AUTHORITY	a. TO	b. FROM	c. DATE

d. RECOMMEND: ☐ APPROVAL ☐ DISAPPROVAL	UPGRADE TO:	DOWNGRADE TO:
e. NAME	f. RANK
g. TITLE/POSITION	h. SIGNATURE

i. COMMENTS

25. INTERMEDIATE AUTHORITY	a. TO	b. FROM	c. DATE

MMEND: ☐ APPROVAL ☐ DISAPPROVAL	UPGRADE TO:	DOWNGRADE TO:
	f. RANK
g. TITLE/POSITION	h. SIGNATURE

i. COMMENTS

26. APPROVAL AUTHORITY	a. TO Orders Issuing Authority	b. FROM Cdr, 1st Bn, 27th Inf Schofield Barracks, HI 96857	c. DATE 21OCT03

d. ☒ APPROVED ☐ DISAPPROVED	RECOMMEND UPGRADE TO:	DOWNGRADE TO:
e. NAME [redacted] (b)(6)-2	f. RANK [redacted] LTC
g. TITLE/POSITION Battalion Commander	h. SIGNATURE [redacted]

i. COMMENTS

PART V - ORDERS DATA

27a. ORDERS ISSUING HQ	27b. PERMANENT ORDER NO.	31. DISTRIBUTION
Schofield Bks, HI 96857	311-06	OMPF- 1
28a. NAME OF ORDERS APPROVAL AUTHORITY [redacted]	28b. RANK SSG	MPRJ- 1
TLE/POSITION Personnel Sergeant	29. APPROVED AWARD AAM	SOLDIER- 1
28d. SIGNATURE	30. DATE 7 NOV 03	Files- 1

Expert Infantryman Badge

Established by the Secretary of War on 7 October 1943 and announced in War Department Circular Dated 27 October 1943

Is awarded to

PFC EDWARD RICHMOND
HHC, 1st Battalion, 27th Infantry, 25th Infantry Division

For the outstanding performance and completion of the Expert Infantry training and testing. Demonstrating expert technical and tactical proficiency. From 21 October 2003 through 24 October 2003.

[redacted] (b)(6)-2

CSM, USA
2d Briaade Command Sergeant Major

(b)(6)-2 [redacted]

COL, IN
2d Briaade Commander

INFANTRY TRAINING BRIGADE
UNITED STATES ARMY
INFANTRY SCHOOL

Be it known that

PV1 EDWARD LYNN RICHMOND

[redacted]

has successfully completed individual Infantry Training at the Infantry Training Brigade course number **38-02,** from **30 May 2002** To **6 September 2002** and that in testimony therefore is awarded this

DIPLOMA

given at Fort Benning, Georgia, on this

6th day of **September 2002**

(b)(6)

[redacted]

Colonel, Infantry
Commanding

017808

Bates pages 17809-17875, some of which are photographic exhibits, are nonresponsive based on application of the Judge's specific and applied rulings

PROSECUTION EXHIBITS NOT ADMITTED

RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE

For use of this form, see AR 190-30; 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 FOB Warrior, Kirkuk, Iraq	2. DATE 1 Mar 04 ER	3. TIME 1440 ER	4. FILE NO. 0040-04-CID469-79639
5. NAME (Last, First, MI) Richmond, Edward, L.	8. ORGANIZATION OR ADDRESS HHC, 1-27th IN BN FOB McHenry, Iraq		
6. SSN [redacted] (5)(6)-2	7. GRADE/STATUS E-3/PA		

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 Criminal Investigation Command as a special agent and wanted to question me about the following offense(s) of which I am suspected/~~accused~~: murder ER

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. ER
2. Anything I say or do can be used as evidence against me in a criminal trial. ER
3. *(For personnel subject othe 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. ER

   - 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. ER

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. ER

WITNESSES *(If available)*	
1a. NAME *(Type or Print)*	3. SIGNATURE OF INTERVIEWER [redacted]
b. ORGANIZATION OR ADDRESS AND PHONE	4. SIGNATURE OF INTERVIEWEE [redacted] (5)(6)-1
2a. NAME *(Type or Print)*	5. TYPED NAME OF INVESTIGATOR [redacted]
b. ORGANIZATION OR ADDRESS AND PHONE	6. ORGANIZATION OF INVESTIGATOR 43rd MP DET (CID), Tikrit, Iraq

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

017877

2. SIGNATURE OF INTERVIEWEE

ATTACH THIS WAIVER CERTIFICATE TO ANY SWORN STATEMENT *(DA FORM 2823)* SUBSEQUENTLY EXECUTED BY THE SUSPECT/ACCUSED

DA FORM 3881, NOV 89 EDITION OF NOV 84 IS OBSOLETE USAPA 2.01

[redacted]

For Official Use Only DF 1 for ID

SWORN STATEMENT

For use of this form, see AR 190-45; the proponent agency is Office of The Deputy Chief of Staff for Personnel.

LOCATION	DATE / TIME	FILE NUMBER
FOB Warrior, Kirkuk, Iraq	1 Mar 2004 ECR / 810 ECR	0040-04-CID469-79638
LAST NAME, FIRST NAME, MIDDLE NAME	**SOCIAL SECURITY NUMBER**	**GRADE/STATUS**
RICHMOND, Edward, Lynn	[redacted]	E-3/RA
ORGANIZATION OR ADDRESS		
HHC, 1-27th Infantry Battalion, FOB McHenry, Iraq	(5)(6)-2	

I, Edward L. RICHMOND, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

On 28 Feb 04 around 0530 I was attached to 1st squad as a gunner and I went with this squad to a Traffic Control Point (TCP) west of the city of Taal Al Jal. The squad was supporting A Company, 1-27th Infantry Battalion who was conducting a cordon and search operation to search for weapons and selected personnel. The squad's main responsibility was to insure that nobody left the village and came into the village while the operation was being conducted. The operation had no time limit so we were never told when it would end. When we arrived at the TCP it was still dark and very foggy so we could not see very far away. We could see about 20 meters utilizing are night vision devices. Once daybreak came we began to see the town and could hear the raid being conducted. Around 0800 we began to see local Iraqi nationals walking around in the fields herding their cows and sheep's. The Iraqis herding there cows and sheep did not pose a threat to us or the infantry men conducting the raid so we left them alone. About 0900 we received a call over the radio, which stated any males in the area must be detained. There was never a reason given to why these Iraqis are being detained. Once the call came in we observed one male Iraqi Cow Herder about 200 meters away from the TCP. I saw this same farmer come out of the city and start herding his cows around 0800, but once we received the call to detainee all Iraqis myself and SGT [redacted] went out to the farmers location to detainee him. Once we saw this herder after the call came over the radio I told SGT [redacted] I would go detainee him with you. SGT [redacted] told me "lets go detainee this Iraqi herder". So SGT [redacted] and myself proceeded to the Iraqi Herders location. While we were walking towards the Iraqi SGT [redacted] stated to me that I would be the security for him and that he would be putting the flexi-cuffs on the Iraqi. Once we arrived to the location of the Iraqi SGT [redacted] informed the Iraqi to place his hands behind his back. The Iraqi just kept pointing back to the village and seemed upset that we were out at his location. Since the Iraqi did not understand English SGT [redacted] grabbed his hands and attempted to place them behind his back. The Iraqi complied with SGT [redacted] and his hands were placed behind his back, however, when SGT [redacted] attempted to place the flexi-cuffs around his wrists the Iraqi started to resist by moving his arms. SGT [redacted] then stated to me "place my weapon on his head and if he so much as moves shot him", which I did. I originally had my weapon pointed at the Iraqis chest, but when SGT [redacted] told me to place it by the Iraqis head so I did. Once I directed my weapon towards the Iraqis head I started looking though the scope and site just in case I had to shoot the Iraqi. I wanted to get a good site picture because I knew SGT [redacted] was close by and I did not want to shoot him. While I was looking through the scope and site I saw the Iraqi spin around to the left and lung towards SGT [redacted] so I shot and killed him. I shot him in the back of the head. Once I shot the Iraqi he dropped to the ground. The position of the Iraqis body when he fell to the ground was his chest was facing up and his head was turned to the left. After I shot the Iraqi SGT [redacted] complained to me that he could not hear anything because of the gunshot then he proceeded to go to the TCP to call this incident to higher. I was the only one there for about 5 minutes then SPC [redacted] came to my location. SPC [redacted] asked me if I was ok and if I wanted to smoke a cigarette. So I did. SPC [redacted] asked me if the Iraqi was flexi-cuffed, but I told him I did not no. We then sat around and waited for someone to give me guidance. About 20 minutes after I shot the Iraqi CPT [redacted] the 1SG for A Company and some other people I did know should up at my location. The 1SG then seized my weapon and told me to go sit down. About two hours later I went back to FOB McHenry. Once I arrived at FOB McHenry CSM [redacted] told me to wait in the Chaplains tent, which I did for about eight hours. From the chaplains tent I went back to my platoon for the night and then the following day I was transported to FOB Warrior.

Q: SA [redacted] ECR

A: PFC RICHMOND ECR

Q: At anytime did you ever state that you were going to kill an Iraqi?

A: Yes, but everyone talk s about that.

Q: Why would you say you would kill an Iraqi?

ECR

017873

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT	PAGE 1 OF 5 PAGES
	ECR	

ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF ____ TAKEN AT ____ DATED ____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE ____ OF ____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.

DA FORM 2823
1 JUL 72

SUPERSEDES DA FORM 2823, 1 JAN 68, WHICH WILL BE USED.

For Official Use Only PE 2 for IID IAC

STATEMENT OF PFC RICHMOND TAKEN AT FOB Warrior DATED 1 March 2004 CONTINUED

A: Because some of them are trying to kill us.
Q: Did you want to kill an innocent Iraqi?
A: No.
Q: What position was the Iraqi being detained at when SGT (b)(6)-2 was attempting to place the flexi-cuffs on him?
A: His right side was facing me. He was at a slight angle so some of his front was also facing me.
Q: Did you know the Iraqi was flexi-cuffed?
A: No, I found out after I shot him.
Q: Did SGT tell you he finished placing the flexi-cuffs on the Iraqi?
A: No. (b)(6)-2
Q: When the Iraqi was getting flexi-cuffed what were you observing?
A: In the beginning I was observing everything around us, but after the Iraqi started to resist I focused on his head.
Q: When you were focusing on the Iraqis head what did you see?
A: I was focusing on the right side of the Iraqis head. I don't know the exact spot (b)(6)-2 but it was above the Iraqis ear.
Q: What could you see through the scope of your weapon when SGT was attempting to flexi-cuff the Iraqi?
A: As far as I remember all I could see was the Iraqis chest and up.
Q: What part of the chest could you see?
A: I could see from the pectoral region and up, but I was only focused on the Iraqis head.
Q: How did you see the chest on the Iraqi if you were focused on his head?
A: That is what I could see looking through the scope. I was mostly focused on the red dot from my scope, which was placed on the Iraqis head.
Q: Did you intend on killing the Iraqi?
A: I did not intend on killing the Iraqi when we went out to detainee him; however I intended on killing the Iraqi when he lunged at SGT (b)(6)-2
Q: Why did you kill the Iraqi when you thought he lunged at SGT (b)(6)-2
A: I felt the Iraqi was attacking SGT I felt SGT life was in danger so I shot to kill the Iraqi.
Q: While you were looking through your scope on your weapon could you see the Iraqis arms?
A: Not fully.
Q: What part of the arms could you see?
A: I could see the shoulders on the Iraqi.
Q: Were the shoulders on the Iraqi canted to the front of his body?
A: I don't know.
Q: Were the shoulders in a way that you could tell the Iraqis arms were behind him?
A: I could not tell.
Q: When was the last time you saw the Iraqis hands behind his back?
A: When SGT told me to raise my weapon to his head and shot him if he moves.
Q: While you were looking through your scope on your weapon could you see SGT
A: No. (b)(6)-2
Q: How did you know the Iraqi was lunging towards SGT (b)(6)-2
A: Because the way the Iraqi turned I thought he was attempted to attack SGT
Q: Describe to me what you saw when the Iraqi lunged?
A: I saw his head and shoulders quickly turn to the left and I also saw the Iraqi move forward.
Q: Did the Iraqi say anything when he was lunging forward?
A: No.
Q: Did the Iraqi have anything covering his eyes?
A: No.
Q: How far away from the detainee were you standing?
A: About one to two meters.
Q: What is the name of the scope you have on your weapon?
A: M68.
Q: What is the M68 used for?
A: It is an aiming device and it puts a red dot on the target.
Q: Does the M68 have any type of magnification?
A: No.
Q: Why were you looking through your scope of your weapon when you were so close to the detainee?

017879

0040-04-CID469-79678

STATEMENT OF PFC RICHMOND TAKEN AT FOB Warrior DATED 1 March 2004 CONTINUED

A: Because over the last week are chain of command stressed to us that anytime we took a shot it had to be aimed. Plus, I wanted to make sure I was taking an aimed shot so I did not shot SGT [redacted]
Q: If you did not know where SGT [redacted] was why did you fire your weapon?
A: When I went to fire my weapon I opened my left eye and saw SGT [redacted] standing on the side.
Q: What type of firer are you?
A: Right handed.
Q: Which eye do you use to site in an object?
A: Right.
Q: You say you observed SGT [redacted] before you fired your weapon, did you see his hands?
A: No, I just took a quick glace to confirm SGT [redacted] was out of the way.
Q: Why did you shoot the detainee?
A: I felt like he was attempting to kill SGT [redacted]
Q: Why did you feel like the Iraqi was going to kill SGT [redacted]
A: He originally resisted being flexi-cuffed, we did not search him yet, the raid being conducted focused on old Iraqi army personnel who do not like coalition forces, and I did not know he was flexi-cuffed. So when the Iraqi lunged towards SGT [redacted] I took that as a direct threat against his life.
Q: Was the detainee searched prior to being flexi-cuffed?
A: No.
Q: Why wasn't the detainee search before he was flexi-cuffed?
A: I don't know. I was just the security personnel.
Q: Why did you not know the detainee was flexi-cuffed?
A: Because SGT [redacted] never gave me any indication the Iraqi was flexi-cuffed and I never saw the flexi-cuffs on the Iraqi.
Q: When you shot your weapon was it your intent to kill the Iraqi?
A: Yes.
Q: After the Iraqi was shot did you recover any weapons from him?
A: No.
Q: Why did you shot the Iraqi?
A: He made a threat against SGT [redacted]
Q: Describe to me what your definition of lung is?
A: Shift movement towards something.
Q: What threat did you perceive the Iraqi was making?
A: I though he was going to stab SGT [redacted]
Q: What was the Iraqi wearing?
A: He was wearing a brown coat, which was open in front. I can't remember anything else.
Q: Why did you think the Iraqi was going to stab SGT [redacted]
A: Because I could not see his hands so I thought he wasn't flexi-cuffed.
Q: Did the Iraqi make any indication he was pulling something out of his coat?
A: I could not see that area.
Q: Did you see the Iraqi lung at SGT [redacted]
A: Al I saw was the Iraqi moving towards SGT [redacted]
Q: Could it be possible that SGT [redacted] was pulling the Iraqi?
A: Yes.
Q: Did you see SGT [redacted] pull the Iraqi?
A: No, because I could not see SGT [redacted] arms.
Q: When the Iraqi lunged at SGT [redacted] what did you see?
A: I saw the Iraqis head and shoulders move towards SGT [redacted]
Q: How did you know the Iraqi lunged at SGT [redacted]
A: I assumed he was lunging towards SGT [redacted] because SGT [redacted] was in the direction the Iraqi was lunging to.
Q: Did the Iraqi touch SGT [redacted] when he lunged towards him?
A: No.
Q: Was this killing unlawful?
A: No.

(b)(6)-2

(b)(6)-2

(b)(6)-2

017880

INITIALS OF PERSON MAKING STATEMENT: [redacted]

EXHIBIT 13

For Official Use Only

STATEMENT OF PFC RICHMOND TAKEN AT FOB Warrior DATED 1 March 2004 CONTINUED

Q: Why wasn't the killing of the Iraqi unlawful?
A: According to the Rules of Engagement card I have it states a hostile intend directed towards coalition forces authorizes coalition forces to use deadly force.
Q: What was the hostile intent directed towards SGT [redacted] (b)(6)-2
A: The way I perceived the situation I thought the Iraqi was going to kill SGT [redacted]
Q: Do you feel remorseful about killing the Iraqi?
A: No. (b)(6)-2
Q: When did you find out the Iraqi was flexi-cuffed?
A: When CPT [redacted] arrived and they began to look at the body.
Q: Why did you feel the Iraqi was a threat?
A: Because there were hostile forces in the area, he wasn't searched and I did not know he was flexi-cuffed.
Q: When you shot your weapon at the detainee did you know you would kill him if you shot him?
A: Yes
Q: When did you place your weapon onto fire?
A: After I saw the Iraqi make a sudden movement towards SGT [redacted]
Q: What type of weapon did you shoot the Iraqi with?
A: M4 (b)(6)-2
Q: Were you coerced into providing this statement?
A: No
Q: How were you treated while you were being interviewed?
A: Good
Q: Were you given breaks throughout the interview?
A: Yes
Q: Do you have anything else to add to this statement?
A: No.///End of Statement/// ELR

017881

INITIALS OF PERSON MAKING STATEMENT: ELR

For Official Use Only

EXHIBIT 13 EX

0040-04-CID469-77058

STATEMENT OF Edward L. RICHMOND TAKEN AT FOB Warrior DATED 1 March 2004 CONTINUED:
STATEMENT *(Continued)*

AFFIDAVIT

I, Edward L. RICHMOND, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 5. 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.

Edward L. Richmond
(Signature of Person Making Statement)

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 1st day of March, 2004
at FOB Warrior, Kirkuk, Iraq

[redacted] (b)(6)-1
(Signature of Person Administering Oath)

ORGANIZATION OR ADDRESS

SA [redacted]
(Typed Name of Person Administering Oath)

ORGANIZATION OR ADDRESS

Article 136, UCMJ
(Authority To Administer Oaths)

017882

INITIALS OF PERSON MAKING STATEMENT ELR

EXHIBIT B

For Official Use Only

Ex

RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE

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

LOCATION: Kirkuk, Iraq DATE: 29 Mar 04 TIME: 1005 ER
FILE NUMBER: 0040-04-CID469-79638
NAME (Last, First MI): RICHMOND, EDWARD L. SSAN: [redacted] GRADE / STATUS: PFC
ORGANIZATION OR ADDRESS: HHC, 1/27th Infantry Battalion, FOB McHenry, APO, AE 09347 ER

RIGHTS WAIVER/NON-WAIVER CERTIFICATE

The investigator whose name appears below told me that he/she is with the United States Army Criminal Investigation Command as a Special Agent and wanted to question me about the following offense(s) of which I am suspected ~~accused~~: Murder; False Official Statements; False Swearing ER
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:

ER
1. I do not have to answer questions or say anything.
ER
2. Anything I say or do can be used as evidence against me in a criminal trial.
ER
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.

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

5. COMMENTS:

ER
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. ER

Witness-1 [redacted] (b)(6)-1
Signature of Witness

[redacted] (b)(6)-1

Witness-2

Signature of Witness

Edward Richmond
Signature of Interviewee

[redacted] (b)(6)-1
Signature of Investigator or Special Agent
SA [redacted]
22nd MP BN (CID)
APO, AE 09342

NON-WAIVER CERTIFICATE

I do not want to give up my rights: I want a lawyer: ☐ I do not want to be questioned or say anything: ☐

Signature of Interviewee: _____

DA Form 3881-E

017883

FOR OFFICIAL USE ONLY

EXHIBIT
PE3 for ID

SWORN STATEMENT

LOCATION: Kirkuk, Iraq
FILE NUMBER: 0040-04-CID469-79638
DATE: 29 Mar 04
TIME: 1419 ER
NAME: RICHMOND, EDWARD L.
SSAN: [redacted] (b)(6)-2
GRADE/RANK: PFC
ORGANIZATION OR ADDRESS: HHC, 1/27th Infantry Battalion, FOB McHenry, Kirkuk, Iraq, APO, AE 09347

I, Edward L. RICHMOND, want to make the following statement under oath:
I provided a sworn statement on 1 Mar 04 concerning the incident in which I shot and killed an Iraqi farmer during a raid. Looking back on the entire situation, I would like to make some corrections to that statement at this time. Prior to the raid, the rules of engagement were put out that if anyone tried to flee the villiage, we were to shoot them. After arriving to the villiage and setting up, I could hear some shotgun blasts going off in the villiage where the raid was taking place. I then noticed an Iraqi male walking his cattle away from the villiage. Since the rules of engagement were put out that we were to shoot anyone fleeing the villiage, I asked if I should shoot the farmer because he was leaving the village. I was told by SGT [redacted] to not shoot him. About an hour later, someone, maybe CPT [redacted], put out over the radio to apprehend all males leaving the villiage. At that time, we decided to apprehend the farmer. Myself and [redacted] each had a set of flexicuffs and began walking into the field where the farmer was still with his cattle. My adrenaline was already pumping because of the raid and then even more so as we approached the farmer to apprehend him. Myself and [redacted] decided that [redacted] would place the flexicuffs on the farmer, while I stood guard. The farmer seemed to be directing our attention to something else as we approached him, and then as SGT [redacted] began placing the flexicuffs on him, he started resisting. Already at that point I had a lot of adrenaline going through my system and [redacted] shouted at me to point my rifle at the Iraqi's head. I then pointed my rifle at his head and he stopped resisting. In my previous statement I put in that I did not realize the Iraqi was wearing flexicuffs when I shot him. Looking back now, I think it would be more accurate to say that I did not register in my mind that he was wearing flexicuffs. The adrenaline was affecting my perception of the situation. I remember seeing [redacted] putting flexicuffs on him and I saw him with his arms behind his back as I pointed my rifle at his head. I had to know he had on flexicuffs before I shot him, but it just did not register in my mind at the time. Also in my previous statement, I said that the Iraqi lunged at [redacted] Again, looking back on it now, I don't think the Iraqi actually lunged. What happened is [redacted] turned him to walk away; however, because of the adrenaline, when [redacted] moved the Iraqi out of my sight picture, I just reacted by shooting him. I would have never shot that man had I been thinking clearly. I would never shoot someone who was wearing flexicuffs if I registered in my mind that they were wearing them. It is everything combined between the pressure of the raid, the new rules of engagement, the Iraq resisting his detention, and the whole situation in general that caused me to not be react like I normally would. ER

(b)(6)-2

EXHIBIT
PE 4 for ID
1 of 2

Sworn Statement of PFC Edward L. RICHMOND, taken at Kirkuk, Iraq, 29-Mar-04, CONTINUED:

Q. SA [redacted] (b)(6)-2
A. PFC RICHMOND
Q. Did you hear [redacted] tell you "he's good, let's go"?
A. No. He might have said it, but if he did, I did not hear it because of the adrenaline and the situation. It just did not register.
Q. How do you feel you were treated today?
A. Good.
Q. Were you given the opportunity to drink, eat, and use the restroom today?
A. Roger.
Q. Is there anything else you would like to add to this statement?
A. No///End of Statement/// ER

AFFIDAVIT

I, Edward L. RICHMOND, 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. ER

Witness #1: (b)(6)-2 [redacted] 5593

Witness #2:

Edward L Richmond
(Signature of Person Making Statement)

Subscribed and sworn before me, a person authorized by law to administer oaths, this 29th day of March 2004, at Kirkuk, Iraq

[redacted]
(Signature of Person Administering Oath)

(b)(6) SA [redacted]
(Typed name of Person Administering Oath)

Article 136 (b) (4) UCMJ
(Authority to Administer Oath)

0040-04-CID414-79678

SWORN STATEMENT

For use of this form, see AR 190-45; 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	2. DATE (YYYYMMDD)	3. TIME	4. FILE NUMBER
FOB McHenry	20040228	14:05	

5. LAST NAME, FIRST NAME, MIDDLE NAME	6. SSN	7. GRADE/STATUS
Richmond, Edward Lynn	[redacted]	PFC

8. ORGANIZATION OR ADDRESS
HHC, 1/27IN (MTRs)

9.
I, PFC Edward Richmond, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

Q what was your mission?
A: Responsible for watching fields and make sure no one ran away, and to prevent vehicles and personnel from entering the city
Q: How do you prevent them from running away?
A: I was briefed that if people were running away during the raid, that I was to engage them. Stop them w/ the direct fire.
Q: who briefed you that
A: SGT [redacted] (b)(6) briefed the squad because he was at the qpord. I believe it was the company qpord.
Q: Did he make any distinction between whether you should shoot if they did not have a weapon?
A: He said just to engage during the time of the raid. If it wasn't during the time of the raid, it was to my understanding that we use common sense.
Q: WAS there shooting today during the time of the raid
A: No, not really, the raid had slowed down.
Q: was individual running away or standing in the field
A: The individual was just standing in the field. We had seen him come from the town we were conducting the raid

10. EXHIBIT	11. INITIALS OF PERSON MAKING STATEMENT	PAGE 1 OF 5 PAGES
	EER	

ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT ____ TAKEN AT ____ DATED ____

017886

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

0040-04-CID469-19638

USE THIS PAGE IF NEEDED. IF THIS PAGE IS NOT NEEDED, PLEASE PROCEED TO FINAL PAGE OF THIS FORM.

STATEMENT OF _____ TAKEN AT _____ DATED _____

9. STATEMENT *(Continued)*

on approximately 1 hr before. We were keeping an eye on him

Q: Why didn't you detain him before when he came out of the town

A: He wasn't running and we didn't perceive him as a threat.

Q: What triggered you to detain him?

A: It came out over the radio that all males in the town should be detained and any in the general vicinity that came from the town should be detained

Q: Did the farmer have a weapon?

A: NO

Q: Did the farmer resist you from trying to detain him?

A: Roger. At first when we approached him, he tried to redirect us. When SGT [redacted] tried to flexcuff him, he resisted. (b)(6)-2

Q: What was your responsibility in detaining the individual

A: Pull security on the individual and make sure he did not hurt either one of us.

Q: What did you perceive as a threat (b)(6)-2

A: First, he resisted the flexcuffing; second, he appeared to make a lunging move at SGT [redacted]; third, he hadn't been searched before we attempted to flexcuff him, so I was worried about what he had in his pocket.

From the angle I was looking, I could not tell if he had been flexcuffed. [before shooting] and after the fact.

INITIALS OF PERSON MAKING STATEMENT ELR

0040-04-CID419-79638

SWORN STATEMENT

For use of this form, see AR 190-45; 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	2. DATE *(YYYYMMDD)*	3. TIME	4. FILE NUMBER
FOB McHenry	20040228	14:05	

5. LAST NAME, FIRST NAME, MIDDLE NAME	6. SSN	7. GRADE/STATUS
Richmond Edward Lynn	[redacted] (5)(6)-2	PFC

8. ORGANIZATION OR ADDRESS
HHC, 1/27IN (MTRs)

9.
I, PFC Edward Richmond, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

Q: Where were you aiming?
A: At his head.
Q: Who directed you to aim at his head?
A: SGT [redacted] (5)(6)-2 I understood that it was not a command to fire, but ~~[illegible]~~ more as a show of force.
Q: What sight were you using
A: GS
Q: Did you have one eye closed.
A: One eye was closed. I could see the back of his head and upper shoulders. [through the sights]
Q: What triggered you to fire.
A: I felt he was attacking SGT [redacted] (5)(6)-2
Q: What did you think he was attacking him with
A: Don't Know. I felt it could be a knife or something but could only see the backside
Q: Did SGT [redacted] (5)(6)-2 give you any indication that he had the detainee flexcuffed
A: Negative

10. EXHIBIT	11. INITIALS OF PERSON MAKING STATEMENT	PAGE 3 OF 5 PAGES
	ECR	

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.

USE THIS PAGE IF NEEDED. IF THIS PAGE IS NOT NEEDED, PLEASE PROCEED TO FINAL PAGE OF THIS FORM.

STATEMENT OF _____ TAKEN AT _____ DATED _____

9. STATEMENT *(Continued)*

Q: Were you at the incident with the ied the week before and did you receive any further ROE guidance afterwards

A: Roger

Q: what was that guidance

A: We are now only going to take armed shots and we will shot when your life feels threated or another soldiers life is threatened.

Q: Did you perceive someones life being threatened?

A: Roger. [SCT [redacted] (b)(6)-2

Q: If a person is running away from you when you told them to stop, would you shoot?

A: No, but this morning guidance was if they are running away, shoot them. otherwise, the person must have a weapon in hand [as a general rule when they are running away].

Q: who gave you the amended ROE guidance after the IED incident?

A: The CSM, the BC, my PL and SL. Everyone did.

Q: Was the shooting today within that guide

A: Roger. The BC, the CSM. ... everyones.

Q: What did you understand the guidance was on detainees?

INITIALS OF PERSON MAKING STATEMENT LLR

For Official Use Only

STATEMENT OF _____ TAKEN AT _____ DATED _____

9. STATEMENT *(Continued)*

A: After they are flexcuffed, then it is stay alert, but no reason to have your weapon pointed at them. Treat them with as much respect and dignity as possible.

——— Nothing Follows ———

Person Asking Questions: MAJ [redacted] 53 1-27
(b)(6)-2

AFFIDAVIT

I, Edward Richmond, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1, AND ENDS ON PAGE 5. 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.

Edward Richmond
(Signature of Person Making Statement)

(b)(6)-2

WITNESSES:

[redacted]
MAJ
53, 1/27 IN
ORGANIZATION OR ADDRESS

Subscribed and sworn to before me, a person authorized by law to administer oaths, this _____ day of _____, _____ at _____

(Signature of Person Administering Oath)

(Typed Name of Person Administering Oath)

ORGANIZATION OR ADDRESS

(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

PAGE 5 OF 5 PAGES

PRIVATE FIRST CLASS EDWARD L. RICHMOND JR., was called by the Investigating Officer to make an unsworn statement, and testified as follows:

QUESTIONS BY THE INVESTIGATING OFFICER

Q. Please state your full name, grade, organization, and branch of service please.

A. Edward L. Richmond, Jr., E3, PFC, HHC, 1-27 Infantry, sir.

Q. How long have you been in Iraq now?

A. Approximately two and a half months now, sir.

Q. Okay, and you've been with the Wolfhounds the whole time?

A. Roger, sir.

Q. How many missions of this type, cordon and search or TCP missions, have you been on since you've been with the Wolfhounds in Iraq.

A. I'd say approximately ten, sir.

Q. Prior to the day in question, 28 February, how many -- or have you ever provided security during -- while attempting to take someone into custody?

A. Roger, sir

Q. Roughly how many times have you've done that excluding the 28th?

A. Twice, sir.

Q. On your sworn statement on the 29th of March, you stated that ----

017891

PE6 for ID
1 of 5

DC: May I ask for a minute to get that out for him, sir?

IO: Certainly.

[The defense counsel retrieved the statement.]

IO: What I'm going to do is cross reference it to -- the 29 March is the one where you clarify your testimony from the previous sworn statements.

ACC: Roger, sir.

Q. Originally you had said the Iraqi had lunged at Sergeant [redacted] (b)(6)-2

A. Roger, sir.

Q. And then in the statement you now have before you, you changed it to read that Sergeant [redacted] (b)(6)-2 must have been turning the Iraqi, is that correct? Is that what you meant?

A. That's - its like my perception of the events -- since I know all the facts now, sir, knowing everything, hearing testimony, reading statements, roger, I would say Sergeant [redacted] (b)(6)-2 was turning and moving the Iraqi, sir, but that's not what I thought or knew at the time, sir.

Q. I understand. So this change and understanding of the facts came over time as you reran the events?

DC: Sir, I'll be able to address some of that in the closing argument to kind of put some of the missing pieces together, sir.

IO: Okay.

During this time the adrenalin, the pressure, the stress is affecting your perception, according to your statement. Now the moment the Iraqi moved out of your sight picture you stated that you reacted by shooting him, just going off of your statement. Now you consciously took the weapon off of safe and squeezed the trigger; based off of what you said, "He moved out of my sight picture and I reacted by shooting him."

A. That's one way of putting it, sir. I wouldn't say that has everything involved in the situation present when it's stated like that, sir, but ----

Q. Okay, how would you put it?

A. I mean the reason I shot him, sir, is the way I saw it he was attacking Sergeant [redacted] (b)(6)-2. That was my perception of the events and looking back on it, I mean, it's easy to say okay, Sergeant [redacted] was pulling the guy and, you know, he might have tripped but the (b)(6)-2 way I saw it this guy was jumping at Sergeant [redacted] (b)(6)-2.

Q. Okay. That's really all I wanted to discuss based off of your - you're going to discuss some of that other stuff in your closing statement so -- the rest of it is in your statement. Would you like to add anything?

A. Sir, looking back on the statement now I think it appears somewhat misleading. Towards the bottom of it says, and I quote "I had to know he had on flexicuffs before I shot him but it just did

not register in my mind at the time." That can be misinterpreted, sir, like the way I meant that to sound and to mean, the way it means to me, sir, is that I had to know this if I was to be able to address the situation properly. If I was to be able to deal with a detainee tripping and falling I would have to know that he was detained and flexicuffed, and by saying it did not register in my mind at the time that means I did not know, sir. I could not take everything in consideration being that I did not know these facts at the time, sir. It was like a split second decision, I just had to react.

Q. Okay. So you never saw the back of the Iraqi now?

A. I -- his back was facing me, sir, but I did not see his arms or hands.

Q. Why was that?

A. Because the way I was facing him, sir, I was facing the front right of the person and Sergeant [redacted] and the person's hands were, like, out of my sight picture because I could see the guy's chest right there and then once Sergeant [redacted] told me to raise my weapon to his head, "if he moves, fucking shoot him" that's where I was looking, sir. I was very close to him. I was two or three feet away, like, just the length of the barrel, a little bit more for space, and I was just looking at his head, sir, just like this. So, I mean, when he turned around swiftly like that I just didn't see it, sir, with everything there.

(b)(6)-2

Q. Okay and you didn't hear Sergeant [redacted] say anything about he's good to go or anything of that nature? (b)(6)-2

A. Negative, sir.

Q. How many times did you make eye contact with Sergeant [redacted] (b)(6)-2

A. The only time I remember making eye contact with him is when the guy started resisting putting on his flexicuffs because he had his hands behind his back like this, and when Sergeant [redacted] (b)(6)-2 noticed the guy was resisting he looked into my eyes and that's when he basically screamed at me. He was like, "Put your fucking weapon on his head, if he fucking moves shoot him" like screaming at me, "Roger, sergeant" you know, and that's when I did it, sir.

Q. Do you have anything else you would like to add?

A. Negative, sir.

I certify that this is a true and accurate verbatim transcript of PFC Richmond's testimony during the Article 32 Investigation in the case of U.S. v PFC Edward L. Richmond, Jr.

[redacted] (b)(6)-2

SSG, U.S. Army
Senior Court Reporter

Bates pages 17896-17898, which are photographic exhibits, are nonresponsive based on application of the Judge's specific and applied rulings.

Richmond, Edward Lynn

(b)(6)-2 [redacted] E3

After hearing on the radio to detain any males who had left the village on foot, Myself and Sgt. [redacted] (b)(6)-2 began walking toward a single man who appeared to be watching over some cows. We approached him, and I was designated the person to pull security on the individual, I had my weapon on his chest while Sgt [redacted] (b)(6)-2 began attempting to flex cuff him. The man began talking and moving his hands and arms around, and Sgt. [redacted] b(a)-2 told me to raise my weapon to his head. After that, I was focused

PE 12 for ID

on his face, and I saw him turn around swiftly and lunge toward Sgt. [redacted] I shot him once in the head.
(b)(6)-2

Nothing Follows

28 Feb 04 0930
Edward Richard

Witnessed by:
28 Feb 04 0930
SG [redacted] (b)(6)-2

RICHMOND, EDWARD LYNN
[redacted] (5)(6)-2

RIGHTS READ @ 0940 28FEB03
Q: AT WHAT TIME DID YOU NOTICE MALE WALKING AWAY FROM VILLAGE?
A: 1 HR AGO
Q: WHAT WAS HE DOING THAT DRAW YOUR ATTENTION?
A: NOTHING RECEIVED ORDERS TO DETAIN ALL MALE LEAVING VILLIAGE.
Q: WHAT HAPPEN WHEN YOU WALKED OVER TO MALE SUBJECT.
A: MALE DID NOT MAKE ANY MOVEMENT THAT CAUSED US CONCERN AS I APPROACHED.
Q: WHAT ORDERS DID YOUR NCO GIVE YOU AS YOU APPROACHED
A: I WAS SECURITYMAN AND WAS TOLD TO RAISE MY WPN AND POINT IT AT HIS HEAD.
Q: WHAT DID YOUR NCO SAY TO THE MALE SUBJECT AS YOU APPROACHED HIM
A: PUT YOUR FUCKING HANDS BEHIND YOUR BACK.

PE 13 for ID

Q: WHAT DID THE MALE SUBJECT DO?

A: HE WAS TALKING TO US BUT IT DID NOT SEEM TO BE FRIENDLY.

Q: DID NCO MOVE BEHIND SUBJECT TO FLEX CUFF HIM.

A: ROGER THAT, SUBJECT WAS ~~IS~~ MOVING AROUND WHILE NCO WAS ATTEMPTING TO FLEX CUFF HIM. NCO STATED TO RAISE MY WEAPON TO HIS HEAD.

Q: AFTER SUBJECT WAS FLEXCUFFED WHAT DIRECTION OR ORDERS WERE GIVEN.

A: I DID NOT KNOW HE WAS FLEX CUFFED AND NO ORDERS WERE GIVEN.

Q: WHAT HAPPEN WHILE NCO WAS ATTEMPTING TO FLEX CUFF.

A: YOU THINK HE SWIFTLY TURNED AND LUNGED AT THE NCO.

Q: WHICH WAY WAS THE SUBJECT FACING WHEN YOU SHOT HIM.

A: HE WAS FACING AWAY FROM ~~YOU~~ ME 1 TO 2 METERS AWAY. TURNING TOWARDS THE NCO.

Q: DID [redacted] NCO SEARCH HIM WHEN ATTEMPTING TO FLEX CUFF HIM.

A: NO

Q: WHAT MADE YOU THINK SUBJECT WAS A THREAT TO NCO.

A: 1ST CAUSED PROBLEM WHILE FLEX CUFFING HIM.

2ND CAUSE OF HIM MOVEMENT WAS LUNGING TOWARD NCO.

3RD HE HAD NOT BEEN SEARCHED.

4TH AT TIME DID NOT NO HE WAS FLEX CUFFED.

Q: DID YOU RECOMMEND TO SEARCH FOR WPN.

A: NO, I'M JUST A PVT AND I THOUGHT HE WOULD AFTER HE WAS FLEX CUFFED.

[redacted]

A: I FELT HE WAS A THREAT.

[redacted]

A: [redacted] NCO GAVE ORDER PUT YOUR WEAPON TO HIS HEAD AS HE WAS TRYING TO FLEX CUFF HIM.

NO OTHER STATEMENTS.

[redacted] (b)(6)-2

CPT [redacted]

ACO, 1-27 IN(L)

COMMANDING

Bates Page 17905, a photographic exhibit, is a duplicate found at Bates Page 17898 which is nonresponsive based on applications of the Judge's specific and applied rulings.

APPELLATE EXHIBITS

(b)(6)-2

To: [redacted]@us.army.mil [SMTP:[redacted]@us.army.mil];jenn

Cc: [redacted]@us.army.mil [SMTP[redacted]@us.army.mil];Hall

Subject: Production of Mr. Richmond for U.S. v. Richmond

Counsel -

I have carefully considered both sets of pleadings on the issue of whether Mr. [redacted] must be produced for trial or not. I find that Mr. [redacted] has relevant, material, and necessary evidence to present on behalf of the accused, that to deny Mr. [redacted]s presence is to deny a substantial right of the accused under Article 46, UCMJ, and that there is no adequate substitute for his live testimony which would enable the court-martial to determine an appropriate sentence.

(b)(6)-2

(b)(6)-2

Significant to my decision were the following facts and conclusions: Mr. [redacted] is willing to pay his way to Kuwait. Mr. [redacted]s willing to sign a hold-harmless agreement; he knows of and accepts the risk of coming into theater. The accused is facing a murder charge, and life imprisonment. There is no one else on earth, arguably, who knows the accused better than his father. It is my duty to ensure that this court-martial is conducted in the same manner as any other court-martial held

(b)(6)-2

017907

Appellate Exhibit I 1 of 22

Counsel -

I have carefully considered both sets of pleadings on the issue of whether Mr. [redacted] must be produced for trial or not. I find that Mr. [redacted] has relevant, material, and necessary evidence to present on behalf of the accused, that to deny Mr. [redacted] presence is to deny a substantial right of the accused under Article 46, UCMJ, and that there is no adequate substitute for his live testimony which would enable the court-martial to determine an appropriate sentence.

(b)(6)-2

Significant to my decision were the following facts and conclusions: Mr. [redacted] is willing to pay his way to Kuwait. Mr. [redacted] is willing to sign a hold-harmless agreement; he knows of and accepts the risk of coming into theater. The accused is facing a murder charge, and life imprisonment. There is no one else on earth, arguably, who knows the accused better than his father. It is my duty to ensure that this court-martial is conducted in the same manner as any other court-martial held worldwide, whether the unit is deployed or not. Civilian counsel have fairly routinely been flown in on milair to conduct trials in theater. Civilian counsel also hold the military harmless for their time in theater. The right of equal access to witnesses and evidence is a substantial right, which can not be automatically refused because the unit is deployed.

(b)(6)-2

I expect that Mr [redacted] will be present for trial in Tikrit on 3-5 August 2004.

Cases I considered include the following:

U.S. v. Thornton, 24 C.M.R. 256 (CMA 1957)
U.S. v. Scott, 5 M.J. 431 (CMA 1978)
U.S. v. Combs, 20 M.J. 441 (CMA 1985)
U.S. v. McDonald, 55 M.J. 173 (2001)

Thanks.

LTC [redacted] (b)(6)-2

[redacted] LTC (Judge)

From: (b)(6)-2 [redacted]@us.army.mil
Sent: Saturday, July 17, 2004 2:37 PM
To: [redacted] LTC
Cc: [redacted] MAJ
Subject: Mtn to Compel Production of Overseas Witness

Mtn to Compel Production.pdf

Ma'am,

As referenced in an e-mail sent yesterday, attached please find a defense Motion to Compel Production of PFC Richmond's father, [redacted]

(b)(6)-2

V/R,

[redacted]

(b)(6)-2

CPT, JA
Trial Defense Counsel
Tikrit Branch Office (FOB Danger)
Region IX
DNVT: [redacted]-9383 or [redacted]3362
E-mail: [redacted]us.army.mil

ATTENTION: This electronic transmission may contain attorney work-product or information protected under the attorney-client privilege. Portions of this transmission may contain information protected from disclosure under the Freedom Of Information Act, 5 USC 552. Do not release this information without prior authorization from the sender. If this has inadvertently reached the wrong party, please delete this information immediately and notify the sender.

017909

UNITED STATES	)	
	)	
v.	)	MOTION TO COMPEL
	)	PRODUCTION OF OVERSEAS
PFC Edward L. Richmond, Jr.	)	WITNESS
U.S. Army	)	
Headquarters and Headquarters Co.,	)	
1st Battalion, 27th Infantry Regiment	)	
25th Infantry Division (Light)	)	17 July 2004
APO AE 09347	)	

COMES NOW the accused, PFC Edward L. Richmond, Jr., by and through counsel, to move for the production of Mr. [redacted], pursuant to Rule for Courts-Martial (R.C.M.) 703, R.C.M. 906(b)(7), and R.C.M. 1001(e). (b)(6)-2

A. Relief Sought

The defense respectfully requests that the defense Motion to Compel Production of Overseas Witness be granted and that [redacted], be permitted to come to Iraq to testify at his son's General Court-Martial. (b)(6)-2

B. Burden of Proof & Standard of Proof

As the proponent of the motion, the defense bears the burden of proof by a preponderance of the evidence. R.C.M. 905(c). The standard of appellate review for denials of requests for the production of witnesses is abuse of discretion. *See United States v. Reveles*, 41 M.J. 388, 393-94 (C.A.A.F. 1995).

C. Facts

On or about 15 June 2004, the government, the defense, and a representative of the trial judiciary informally agreed upon 1-3 August 2004 as the trial dates for the above-captioned case.

On 17 June 2004, the defense submitted to government counsel a request for the production of PFC Richmond's father, [redacted] to testify at his son's General Court-Martial. (b)(6)-2

On 2 July 2004, fifteen days after the submission of the defense request, government counsel indicated that the government would not produce Mr. [redacted]. On that same day, the defense submitted a request for production to the Commanding General of the 1st Infantry Division, the General Court-Martial Convening Authority [hereinafter 'convening authority']. (b)(6)-2

On 4 July 2004, government counsel notified the defense of the witnesses it intends to call at trial. Two of the listed witnesses are active duty service members stationed at Ft. Hood, Texas. The government will produce those witnesses for trial.

On 16 July 2004, two weeks after the submission of the 2 July defense request, the convening authority denied the defense request for production of [redacted] (b)(6)(b)-2

Mr. [redacted] is willing to come to Iraq for his son's court-martial. He is willing to do so at his own expense. He will reimburse the government, if necessary, for any transportation, meals and/or lodging arranged at government expense. He is willing to sign a government-drafted "hold harmless" agreement in order to travel to Iraq. (b)(6)(b)-2

The defense requests judicial notice of the fact that the government does not have federal subpoena power to compel production of witnesses at a General Court-Martial in Iraq.

Mr. [redacted] is the only overseas witness of whom PFC Richmond requested government production.

If PFC Richmond is convicted of the charge for which he stands trial, he is facing a maximum confinement of life in prison.

D. LAW

The defense relies on the following authorities in support of its motion:

R.C.M. 703
R.C.M. 905
R.C.M. 906
R.C.M. 1001
Weiss v. United States, 510 U.S. 163 (1994)
United States v. Breeding, 44 M.J. 345 (C.A.A.F. 1996)
United States v. Reveles, 41 M.J. 388 (C.A.A.F. 1995)
United States v. Harmon, 40 M.J. 107 (C.M.A. 1994)
United States v. Credit, 8 M.J. 190 (C.M.A. 1980)
United States v. Williams, 3 M.J. 239 (C.M.A. 1977)

E. EVIDENCE

The defense requests consideration of the following documentary evidence, attached to this motion:

1. Memorandum for Commander, 1st Infantry Division, from CPT [redacted] dated 2 Jul 04 (with Enclosures A & B) (b)(6)(b)-2

017911

(b)(6)-2

2. Memorandum for Commanding General, 1st Infantry Division, from LTC [redacted] dated 15 Jul 04

3. Memorandum for CPT [redacted], Trial Defense Services, from MG John R.S. Batiste, dated 16 Jul 04

4. E-mail for CPT [redacted] from Mrs. [redacted] dated 6 Jul 04

If the Court requires additional information, the defense respectfully requests the opportunity to file a Supplemental Brief to present additional evidence or affidavits to the Court.

F. ARGUMENT

At trial, a criminal accused is entitled to present witness testimony in defense, extenuation or mitigation. *See United States v. Harmon*, 40 M.J. 107, 108 (C.M.A. 1994) (recognizing the constitutional right of the defense to call witnesses and to determine which witnesses they want to call). Further established is a criminal accused's right to due process of law as guaranteed by the Fifth Amendment. *See Weiss v. United States*, 510 U.S. 163 (1994). A criminal accused is entitled to the production of witnesses at trial to the same extent as the government. R.C.M. 703(a); *see also United States v. Breeding*, 44 M.J. 345, 353 (C.A.A.F. 1996)(Sullivan, J., concurring)(finding that "[a] servicemember has the right to 'compulsory process for obtaining witnesses in his favor' under the Sixth Amendment").

Production is required when a witness' testimony is "relevant and necessary." R.C.M. 703(b)(1). The moving party must set forth "a synopsis of the testimony" and "reasons why the witness' personal appearance will be necessary." R.C.M. 703(c)(2)(B)(ii). The testimony of Mr. [redacted] is relevant as it 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." *See, e.g., United States v. Credit*, 8 M.J. 190, 193 (C.M.A. 1980); *United States v. Williams*, 3 M.J. 239 (C.M.A. 1977). Further, the testimony of Mr. [redacted] "is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence." R.C.M. 1001(e)(2)(A). For presentencing proceedings, a request for witness production is evaluated by additional factors outlined in the Manual for Courts-Martial. R.C.M. 1001(e). Ultimately, a balancing of the factors of R.C.M. 1001(e)(2)(E) shows that the significance of personal appearance by Mr. [redacted] weighs any practical difficulties of producing Mr. [redacted]

(b)(6)-2

1. Costs of producing the witness. In his 16 July 2004 denial of the defense request for production, the convening authority does not allege cost as a prohibitive factor in the production of M[redacted]. The government has conceded in verbal discussions that the cost of producing Mr. [redacted] s not a factor. Indeed, if necessary, Mr. [redacted] will pay for all costs associated with travel, food and lodging in Iraq.

2. Timing of the request for production of the witness. The defense submitted its initial request for the production of Mr. [redacted] ver six weeks prior to the scheduled start of the court-martial. All significant delays are attributable to the government and should not be held

against PFC Richmond. Further, Mr. [redacted] already has a reserved seat on a flight into Kuwait with ample time to then travel to Iraq.

3. Potential delay in the presentencing proceeding that may be caused by the production of the witness. The defense asserts that timely action on the pending request will cause no delay in the presentencing proceedings.

4. Likelihood of significant interference with military operational deployment, mission accomplishment or essential training. The defense asserts that the production of Mr. [redacted] causes little interference with such unspecified missions.

The logistics cited by the convening authority as a reason to deny production do not outweigh the presence of Mr. [redacted] at trial. Logistical coordination is minimal. Mr. [redacted] already holds a reserved seat on a flight from Louisiana to Kuwait City. Once in Kuwait City, Mr. [redacted] will be met by a paralegal from Camp Doha who will escort him onto the military base and make arrangements for him to take a military C-130 flight into Balad or Baghdad. If Mr. [redacted] flies into Balad, he will be met by the assistant defense counsel who will arrange for them to fly together by military Black Hawk to Tikrit. If Mr. [redacted] flies into Baghdad, he will be met by a paralegal from the Camp Victory Trial Defense Services Office who will arrange for him to fly to Tikrit with the regional defense counsel. In Tikrit, Mr. [redacted] will be met by defense counsel and PFC Richmond in an uparmored military vehicle. Upon his initial arrival in Iraq, Mr. [redacted] will borrow an extra Kevlar and OTV with SAPI plates that will be returned to the government upon Mr. [redacted] s departure from the Central Command (CENTCOM) area of operations (AO).

Worth noting is that the "logistics," which are of such concern to prohibit Mr. [redacted] attendance at trial, will not prevent the government from bringing two of their own witnesses into the 1st Infantry Division AO to testify against PFC Richmond.

If the venue for this case was the continental United States or PFC Richmond's regular duty location at Schofield Barracks, Hawaii, Mr. [redacted] could travel to the site of the trial and testify without the permission of the government. Mr. [redacted] could travel at his own expense and stay in a hotel of his choosing. He could arrange for his own meals and other amenities.

The venue of this case is Tikrit, Iraq. The government selected this venue. By trying this case in Iraq, the government has not simply limited the voluntary participation by civilian overseas witnesses, but rather has strictly prohibited it. Mr. [redacted] wants to testify for his son, but as a U.S. citizen he can not simply book a commercial flight into Iraq, lease a rental car, drive to Tikrit, and check into a local hotel. In order to enter into the CENTCOM AO, he must have the permission of the U.S. government. It is this permission that the government refuses to give. The government need only issue Invitational Travel Orders (ITO) for Mr. [redacted] to testify at trial at his own expense.

Military personnel and civilian dignitaries enter the 1st Infantry Division (1ID) AO on a regular basis for, arguably, far less important missions. Civilian musicians and rock bands, with no connection to the military, are invited by the convening authority into the AO for the morale of the troops. Civilian representatives of the former Coalition Provisional Authority have flown into the 1ID AO for simple 'meet-and-greet' sessions with soldiers at the dining facility. These invitations are at the discretion of the convening authority. Yet, the government is choosing to prevent Mr. [redacted] from testifying in person at his son's trial, in which PFC Richmond is facing life in prison, if convicted.

(b)(6)-2

R.C.M. 1001(e)(2)(C) acknowledges that alternate forms of testimony may be appropriate in certain cases. However, the Rule also recognizes that there may exist "an extraordinary case when such a stipulation of fact would be an insufficient substitute for the testimony." The pending case is such an extraordinary case. PFC Richmond just turned 21-years-old. He is extremely close to his family. If PFC Richmond is convicted, Mr. [redacted] will be the defense's key sentencing witness. Mr. [redacted] s the only witness that can and will talk about PFC Richmond's upbringing; his relationship with his family; his grades in high school; his development to becoming a young adult. Mr. [redacted] will testify about why his son joined the Army and his progression as a young soldier. Mr. [redacted] will testify as to PFC Richmond's significant rehabilitative potential in society. This testimony is all unique to Mr. [redacted] when the court considers that the accused is only 21-years-old with limited world experience. The only other defense sentencing witnesses will be military witnesses who have known PFC Richmond for no more than approximately 2 years.

(b)(6)-2

Alternate forms of testimony are not appropriate before the enlisted panel in front of which PFC Richmond has elected to be tried. A stipulation of fact or stipulation of expected testimony can not convey a father's excitement in his son's joining the military, his pride in his son's deployment to Iraq, his confidence that his son can be rehabilitated, and his certainty that his son can recover in society from the stigma of a murder conviction. Neither telephonic nor video-teleconferencing (VTC) technology provides an adequate substitute. Both audio connections are marginal at best. The audio has a delay in transmission from the speaker to the listener. With the question and answer format of trial examination, this form of testimony will inevitably contain unavoidable talking over one another and repetition of questions and answers. Such testimony begs of judicial inefficiency. Further, the video feed is not guaranteed to match the audio feed, resulting in the audio and video being projected out of sync. The electricity in the courtroom is not reliable to ensure such testimony as an adequate substitute. If the electricity shuts off for even one second, the audio and video feeds will be terminated. A new telephone/VTC call must then be initiated. Understandably, power outages have no set schedule, however, to force PFC Richmond to proceed to trial under such circumstances invites prejudice to the soldier and judicial inefficiency.

G. CONCLUSION

The significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production of the witness. R.C.M. 1001(e)(2)(E). The defense Motion to Compel Production of Overseas Witness should be granted and the government should authorize Mr. [redacted] to travel to Iraq to testify at his son's General Court-Martial.

(b)(6)-2

RESPECTFULLY SUBMITTED:

[redacted]
CPT, JA
Trial Defense Counsel (b)(6)-2

I certify this I served this defense Motion to Compel Production of Overseas Witness on the government trial counsel via e-mail at [redacted]@us.army.mil and on the military judge via e-mail on 17 July 2004.

(b)(6)-2

[redacted]
CPT, JA
Trial Defense Counsel

DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
REGION IX, FOB DANGER BRANCH OFFICE
APO AE 09392

REPLY TO
ATTENTION OF:

AETV-BGJA-TDS

2 July 2004

MEMORANDUM THRU Staff Judge Advocate, 1st Infantry Division, FOB Danger, Tikrit, Iraq, APO AE 09392

FOR Commander, 1st Infantry Division, FOB Danger, Tikrit, Iraq, APO AE 09392

SUBJECT: Request for Production of Overseas Witness – U.S. v. PFC Edward L. Richmond, Jr.

(b)(6)-2

1. The defense requests government production of [redacted] to testify at his son's court-martial beginning on 1 August 2004. PFC Richmond will stand trial for one charge of murder. If convicted, he faces a maximum punishment of life in prison.

2. Defense counsel submitted to the government on 17 June 2004 (enclosure A) a request for the production of [redacted] The trial counsel denied this request by e-mail on 2 July 2004 (enclosure B).

(b)(6)-2

(b)(6)-2

3. Mr. [redacted] is a relevant and necessary witness for the sentencing phase of this case. He is the only witness that can testify to many aspects and areas of his 20-year-old son's life. Mr. [redacted] will be the key defense sentencing witness to mitigate a military panel's option to impose the maximum sentence of life in prison. Mr. [redacted] is the only overseas witness that the defense is requesting.

(b)(6)-2

4. PFC Richmond will not waive the right to have his father present as a sentencing witness at his General Court-Martial. Neither a written stipulation nor telephonic testimony is an adequate substitute for live testimony when a soldier is facing life in prison.

5. If this request is denied, the defense requests that you reduce to writing your reasons for the denial of the soldier's request.

6. POC is the undersigned at DNVT: 553-9383 or via unsecured e-mail at [redacted]@us.army.mil.

(b)(6)-2

(b)(6)-2

[redacted]
CPT, JA
Trial Defense Counsel

Encl
as

017916

UNITED STATES	)	
	)	
v.	)	REQUEST FOR PRODUCTION OF OVERSEAS WITNESS
	)	
PFC Edward L. Richmond, Jr.	)	
U.S. Army	)	
Headquarters and Headquarters Co.,	)	
1st Battalion, 27th Infantry Regiment	)	
25th Infantry Division (Light)	)	
APO AE 09347	)	17 June 2004

The accused, by and through his detailed defense counsel, hereby requests government production of the following overseas witness for the presentencing phase of the proceedings, pursuant to R.C.M. 701(b)(1)(B)(i), 703(a), 703(b)(2) and 703(c)(2) and 1001(e):

[redacted] home phone: [redacted] (b)(6)-2 (b)(6)-2

PFC Richmond, 20, is the eldest of two children of [redacted] Mr. [redacted] will testify at the presentencing phase of the proceedings. He is the one witness that can testify about the accused's upbringing, his family roots, his education, and his employment experiences prior to joining the military. Mr. [redacted]s testimony is relevant to extenuation and mitigation at any presentencing proceedings. If convicted of the charged offense, his son faces life in prison and Mr. [redacted] testimony is highly relevant in enabling the military judge or panel to adjudge an appropriate sentence. Mr. [redacted] presence at trial is necessary so he can provide live testimony about his son, why his son joined the Army, and the pride PFC Richmond felt at becoming an infantryman and deploying with his unit. Mr. [redacted] will provide testimony about the type of support his family can provide to PFC [redacted] and about his son's future for rehabilitation.

The defense will provide the government with an additional request for government production of witnesses once notified of the names of the witnesses the government intends to call to testify at trial.

Mr. [redacted] is the only overseas civilian witness whose presence the accused intends to request.

RESPECTFULLY SUBMITTED:

(b)(6)-2

[redacted]
CPT, JA
Trial Defense Counsel

Enclosure A

017917

CERTIFICATE OF SERVICE

I certify that on 17 June 2004 this defense Request for Production of Overseas Witness was served on the government via e-mail to [redacted]@us.army.mil.

(b)(6)-2 [redacted]

CPT, JA
Trial Defense Counsel

017918

From [redacted]@us.army.mil
Sent Friday, July 2, 2004 4:40 am
To [redacted]@us.army.mil
Cc
Bcc
Subject Re: Fwd: Notice of Plea & Forum

[redacted]

Sorry, but marching orders from Division are to deny the Defense request to produce PFC Richmond's father for the trial. I will be happy to enter into a reasonable stipulation; or I will not object to telephonic testimony.

V/R

MAJ [redacted]

----- Original Message -----
From: [redacted]@us.army.mil
Date: Saturday, June 26, 2004 12:48 pm
Subject: Fwd: Notice of Plea & Forum

> Ma'am,
>
> I am forward the Defense's Notice of Forum & Plea in U.S. v. Richmond.
>
> V/R,
>
> [redacted]
> CPT, JA
> Trial Defense Counsel
> Tikrit Branch Office (FOB Danger)
> Region IX
> DNVT: [redacted]
> E-mail: [redacted]@us.army.mil
>
> ATTENTION: This electronic transmission may contain attorney work-
> product or information protected under the attorney-client
> privilege. Portions of this transmission may contain information
> protected from disclosure under the Freedom Of Information Act, 5
> USC 552. Do not release this information without prior
> authorization from the sender. If this has inadvertently reached
> the wrong party, please delete this information immediately and
> notify the sender.
>

Sir,
Please see attached.

V/R,

[redacted]
CPT, JA
Trial Defense Counsel
Tikrit Branch Office (FOB Danger)
Region IX
DNVT: 553-9383 or 553-3362
E-mail: [redacted]@us.army.mil

(b)(6)-2

ATTENTION: This electronic transmission may contain attorney work-product or information protected under the attorney-client privilege. Portions of this transmission may contain information protected from disclosure under the Freedom Of Information Act, 5 USC 552. Do not release this information without prior authorization from the sender. If this has inadvertently reached the wrong party, please delete this information immediately and notify the sender.

DEPARTMENT OF THE ARMY
Headquarters, 1st Infantry Division
Office of the Division Commander
APO AE 09036

REPLY TO
ATTENTION OF:

AETV-BGJA

JUL 15 2004

MEMORANDUM FOR Commanding General, 1st Infantry Division, APO AE 09036

SUBJECT: Defense Request for Production of Overseas Witness

1. On 17 June 2004, defense counsel for PFC Edward L. Richmond, Jr. requested that the government produce PFC Richmond's father, [redacted], as a sentencing witness at trial. On 2 July 2004, the trial counsel gave defense counsel notice that Mr. [redacted] would not be produced and offered to enter into a stipulation of expected testimony or arrange for telephonic testimony. The same day, defense counsel submitted the enclosed request for you to produce Mr. [redacted] stating that alternate forms of testimony are not adequate.

2. A military judge may order production of a witness under certain circumstances. In determining whether to produce a witness, the judge will consider the importance of the testimony, the adequacy of alternate forms of testimony and the willingness of the government to agree to alternate forms of testimony. The judge will also balance the significance of the personal appearance of the witness against the practical difficulties of producing the witnesses. Factors to be considered when weighing the difficulties of production of the witness include: likelihood of significant interference with military operational deployment or mission accomplishment, the costs of producing the witness, the timing of the request for production of the witness, and the potential for delay in the proceedings if the witness is produced.

3. Considering the likelihood of significant interference with mission accomplishment, the significant cost of producing the witness, the adequacy of alternate forms of testimony, and the physical safety of Mr. [redacted] I recommend that you deny the defense request.

[redacted]
LTC, JA
Staff Judge Advocate

017921

DEPARTMENT OF THE ARMY
Headquarters, 1st Infantry Division
APO AE 09392

JUL 16 2004

AETV-BGCG

MEMORANDUM FOR Captain [redacted] U.S. Army Trial Defense Services, FOB Danger, Tikrit, Iraq APO AE 09392 (b)(6)-2

SUBJECT: Request for Production of Overseas Witness

1. I have reviewed your request for the production of Mr. [redacted] and your request is denied. In making this determination, I have considered the safety of Mr. [redacted], the logistics involved with having Mr. [redacted] appear in court, R.C.M. 703, and R.C.M. 1001(e)(2)(E). (b)(6)-2

2. The government will agree to alternate forms of testimony from this witness such as a written stipulation of expected testimony or telephonic testimony.

[redacted]
Major General, USA
Commanding

[redacted]

017922

(5)(6)-2

From [redacted]@pearceusa.com>
Sent Tuesday, July 6, 2004 7:55 pm
To [redacted](E-mail)" <[redacted]us.army.mil>
Cc "at home (E-mail)" <[redacted]premier.net>
Bcc
Subject Flight arrangements

[redacted]

We made the flight arrangements for my husband today. He will arrive in Kuwait City at 7:30 pm on July 28, 2004. The last connection will be from Frankfurt, Germany, Lufthansa-Deutsche airlines, flight number 636. Please let me know if you need any additional information. I'm sending this from my work e-mail, but I would appreciate it if you could respond, in the future, to both my work and home e-mail addresses so I can respond to you ASAP with any questions, etc. that you may have.

(5)(6)-2

Thanks, [redacted]

Home e-mail: [redacted]@premier.net
Work e-mail: [redacted]@pearceusa.com
[redacted]
Phone: [redacted]
Fax: [redacted]
[redacted]@pearceusa.com
[redacted]

017923

Close

(b)(6)-2

From: [redacted]@us.army.mil [SMTP:[redacted]@us.army.mil]
To: [redacted]@us.army.mil
Cc: [redacted] LTC (Judge); [redacted]@us.army.mil; [redacted]@us.army.mil
Subject: RE: Mtn to Compel Production of Overseas Witness
Sent: 7/21/2004 6:07 PM **Importance:** Normal

Ma'am and CPT [redacted]

Re: US v. Richmond Motion to Compel. 1ID OSJA informed me that they have VTC capability. The Government therefore offers VTC as another form of alternative testimony.

V/R

[redacted]

(b)(6)-2

----- Original Message -----
From: [redacted]@us.army.mil>
Date: Tuesday, July 20, 2004 9:03 pm
Subject: Re: RE: Mtn to Compel Production of Overseas Witness

> Ma'am,
>
> Government response to subject motion is attached.
>
> I apologize for the delay. I have another job outside the wire,
> and sometimes do not get to see my e-mail (or do computer work)
> until late at night.
>
> V/R
>
> [redacted]
>
> ----- Original Message -----
> From: "[redacted] LTC (Judge)" [redacted]@HQ.1ID.ARMY.MIL>
> Date: Tuesday, July 20, 2004 4:27 pm
> Subject: RE: Mtn to Compel Production of Overseas Witness
>
> > Government - I need your pleading NLT Midnight 21 Jul. I don't
> > want this
> > issue to delay the trial.
> > LTC [redacted]
> >
> > -----Original Message-----
> > From: [redacted] LTC (Judge)
> > Sent: Tuesday, July 20, 2004 6:37 PM
> > To: [redacted]
> > Cc: [redacted]@us.army.mil';
> > '[redacted]@us.army.mil'> Subject: RE: Mtn to Compel
> Production of Overseas Witness

(b)(6)-2

017924

> >
> >
> > Government -
> >
> > Please provide ASAP your response to this motion, with caselaw
> > authority,for why the government believes that Mr. [redacted] need
> > not be given
> > government transport to Tikrit from Kuwait for his son's murder
> > trial.
> >
> > LTC [redacted]
> >
> > -----Original Message-----
> > From: [redacted]@us.army.mil
> > [redacted]@us.army.mil]
> > Sent: Saturday, July 17, 2004 2:37 PM
> > To [redacted] LTC [redacted]
> > Cc: [redacted] A [redacted]
> > Subject: Mtn to Compel Production of Overseas Witness
> >
> >
> > Ma'am,
> >
> > As referenced in an e-mail sent yesterday, attached please find
> > a
> > defenseMotion to Compel Production of PFC Richmond's father,
> > [redacted]
> > Sr.
> >
> > V/R,
> > [redacted]
> > CPT, JA
> > Trial Defense Counsel
> > Tikrit Branch Office (FOB Danger)
> > Region IX
> > DNVT: 553-9383 or 553-3362
> > E-mail: [redacted]@us.army.mil
> >
> > ATTENTION: This electronic transmission may contain attorney
> > work-
> > product or
> > information protected under the attorney-client privilege.
> > Portions of this
> > transmission may contain information protected from disclosure
> > under the
> > Freedom Of Information Act, 5 USC 552. Do not release this
> > information> without prior authorization from the sender. If this
> > has inadvertently
> > reached the wrong party, please delete this information
> > immediately and
> > notify the sender.
> >
> >
>

(b)(6)-2

UNITED STATES	)	
	)	GOVERNMENT RESPONSE TO
v.	)	DEFENSE MOTION TO
	)	COMPEL PRODUCTION OF
Edward L. RICHMOND, Jr.	)	OVERSEAS WITNESS
PFC, US Army	)	
HHC, 1st Battalion, 27th Infantry	)	
25th Infantry Division (Light)	)	20 July 2004
APO AE 09347-9998	)	

Government responds to Defense Motion to Compel Production of Overseas Witness.

FACTS

The First Infantry Division Commander, the General Court-Martial Convening Authority in the above case, denied Defense's request to produce Mr. [redacted] due to safety concerns for Mr. [redacted] and logistical difficulties.

Iraq is a combat environment. (b)(6)(1-2

Travel in Iraq, including air travel, is dangerous. The cities of Baghdad and Balad are often attacked, particularly in areas used by Coalition Forces.

(b)(6)(1-2 [Defense assertion that travel from Kuwait to Baghdad/Balad, and from Baghdad/Balad to Tikrit, is safe and logistically simple is wholly inaccurate.] Arranging special flights for Mr. [redacted] would be cost prohibitive, so he would travel in space available status. It is common knowledge that tactical flights in Iraq are unreliable. Soldiers often have to wait days for flights from Kuwait, Baghdad, and Balad. A noncombatant civilian would require special security protection, administrative clearances to enter the combat zone and Coalition installations, briefings and training regarding the dangers in Iraq, qualified escorts, accommodations at various locations, etc.

The two Government-listed witnesses that the Government may bring to Iraq are US Army personnel on Active Duty, both of whom have already served tours in OIF2.

Trial Counsel offers to enter into a stipulation of fact regarding Mr. [redacted] sentencing testimony, or agrees to telephonic testimony.

(b)(6)(1-2

LAW & ARGUMENT

RCM 1001(e)(2) analysis:

- 1001(e)(2)(A). For motion purposes the Government assumes Mr. [redacted] expected testimony to be necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence.

(b)(6)-2

- 1001(e)(2)(B). The requested witness is the Accused's father. While the [redacted] family would assign great weight to the testimony, the court will assign weight according to the bias inherent in a parent's concern for his or her child. Therefore, weight of Mr. [redacted] testimony would not be of substantial significance to the determination of an appropriate sentence. *See United States v. Combs, 20 M.J. 441, 443 (C.M.A. 1985);* Credibility of the expected testimony is not an issue.

(b)(6)-2

- 1001(e)(2)(C).
    - Government will enter into a reasonable stipulation of fact.
    - A stipulation of fact would be a sufficient substitute for the testimony - this is not an extraordinary case in relation to 1001(e)(2). See United States v. Briscoe, 56 M.J. 903 (AFCCA, 2002). Note that the context of the word "extraordinary" refers to the sufficiency of the substitute stipulation, not the charges or circumstances of the court-martial. The testimony proffered in the Defense motion would be ordinary testimony from a parent that can be easily captured by a stipulation of fact or telephonic testimony.
- 1001(e)(2)(D). Telephonic testimony is among other forms of evidence that would be sufficient to meet the needs of the court-martial in the determination of an appropriate sentence. *See generally, United States v. McDonald, 55 M.J. 173 (CAAF, 2001).*
- 1001(e)(2)(E).

(b)(6)-2

    - The significance of the personal appearance of Mr. [redacted] to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, does not favor production of the witness. In the Defense motion, Counsel overstates the significance of personal appearance, and grossly understates the practical difficulties of producing the witness.

(b)(6)-2

    - The significance of the personal appearance of Mr. [redacted] to the determination of an appropriate sentence, when balanced against the likelihood of significant interference with military operational deployment and mission accomplishment, does not favor production of the witness. Bringing a noncombatant into a hostile combat environment (a war) will significantly interfere with the deployment and mission.
    - On balance, the Division Commander's assessment and denial should receive deference from the Court.

Brief Constitutional analysis:

By virtue of RCM 1001(e)(2), an accused does not have a Sixth Amendment right to compulsory process of a sentencing witness - the right to production of sentencing witnesses is limited. Correct application of RCM 1001(e)(2) will afford the Accused of his Fifth Amendment Due Process rights. A Military Judge's decision to deny the production of a sentencing witness is reviewed only for abuse of discretion. *United States v. Combs, 20 M.J. 441, 443 (C.M.A. 1985); United States v. Tangpuz, 5 M.J. 426, 429 (C.M.A. 1978).* The Military Judge would not abuse

her discretion by deferring to the judgment of the Division Commander and denying the Defense Motion to Compel production of a sentencing witness in a combat zone.

[redacted]
MAJ, JA
2-25 BCT TF JA

I certify that on 20 JUL 04 this Government Response to Defense Motion to Compel was delivered by e-mail to Defense Counsel, CPT [redacted]

(b)(6)-2

[redacted]
MAJ, JA
2-25 BCT TF JA

UNITED STATES	)	
	)	MOTION FOR PRODUCTION
v.	)	OF A VERBATIM ARTICLE 32(b)
	)	HEARING TRANSCRIPT
PFC Edward L. Richmond, Jr.	)	
U.S. Army	)	
Headquarters and Headquarters Co.,	)	
1st Battalion, 27th Infantry Regiment	)	
25th Infantry Division (Light)	)	9 July 2004
APO AE 09347	)	

A. RELIEF SOUGHT

COMES NOW the accused, PFC Edward L. Richmond, Jr., by and through counsel, to request production of a verbatim transcript of the Article 32(b) hearing in this case. Alternatively, the defense requests a verbatim transcript of the testimony of certain witnesses.

B. BURDEN OF PROOF & STANDARD OF PROOF

The defense bears the burden of establishing by a preponderance of the evidence that evidence to be produced is relevant and necessary under Rule for Courts-Martial (R.C.M.) 703(f)(1) and 703(f)(4).

C. FACTS

(6)(6)-7

PFC Richmond is charged with the unpremeditated murder of Mr. [redacted] on 28 February 2004. On 17 April 2004, a hearing was held pursuant to Article 32(b) of the UCMJ to investigate the charges against PFC Richmond.

Prior to that hearing, on 15 April 2004, the defense submitted a request to the Article 32(b) Investigating Officer for a verbatim transcript to be made of the testimony in that hearing in order to preserve each witness' testimony under oath. The hearing was held 49 days after the date of the alleged offense. At the time of trial on 1 August 2004, an additional 105 days will have elapsed since the date of the Article 32(b) hearing. In total, 154 days will have elapsed from the day of the alleged offense until the day the witnesses testify at trial. Several Article 32(b) witnesses are anticipated to testify at trial. A verbatim transcript of their sworn Article 32(b) testimony is necessary for purposes of cross-examination and/or impeachment by prior inconsistent statement. The only practical method for such purposes is a verbatim transcript of each witness' testimony.

The entire Article 32(b) hearing lasted only three hours. Only three witnesses testified under oath at the Article 32(b) hearing. To transcribe the sworn testimony of these three witnesses would take minimal effort on behalf of the government. The government has adequate

Appellate Exhibit II
1 of 3

resources to provide a verbatim transcript. The defense does not have the logistical resources or personnel to produce such a transcript.

On 22 April 2004, the Article 32(b) Investigating Officer indicated his intent to include a verbatim transcript with his final report. In block 21 of the DD Form 457, the Investigating Officer indicated, "Record of Verbatim Testimony is attached," however, only a summarized transcript was attached.

On 14 May 2004, the defense requested production of all statements by government witnesses in its Request for Discovery, paragraph 1m.

D. LAW

The defense relies on the following authorities in support of its motion:

a. R.C.M. 405 (j)(2)(B)
b. R.C.M. 703(f)
c. R.C.M. 914
d. The *Jencks* Act, 18 U.S.C. § 3500, et seq.
e. *United States v. Scott*, 6 M.J. 547 (A.F.C.M.R. 1978)

E. ARGUMENT

A verbatim transcript of the Article 32 hearing is relevant and necessary to the preparation of the defense in this case. The defense acknowledges that R.C.M. 405 (j)(2)(B) only mandates that the Article 32 report of investigation include the "substance of the testimony taken." However, the defense has requested, and is presently renewing that request, that outside the requirements of R.C.M. 405 a verbatim transcript be prepared to assist the defense in preparation for trial.

A verbatim transcript is necessary for several reasons. First, the defense believes that such a transcript will assist the accused in preparing a defense in his case. Soldiers testified at the Article 32(b) hearing at a date much closer in time than their testimony will be at trial. The defense must be prepared to refresh any witness' recollection with a copy of their verbatim Article 32(b) testimony. Second, during the course of the trial and motions sessions, if necessary, it will not be possible for counsel to go back and review testimony on audiotape without asking for a recess of the court. Third, the defense anticipates that during trial that it may become necessary to impeach government witnesses with their testimony at the Article 32(b) hearing. Trying to do this with tape recordings would be burdensome and potentially cause undue delay in the proceedings.

Pursuant to R.C.M. 914(a)(2) and the *Jencks* Act, 18 U.S.C. § 3500, the defense is entitled to production of all statements made by government witnesses that relate to the subject matter of their testimony. *See United States v. Scott*, 6 M.J. 547, 548 (A.F.C.M.R. 1978) (finding that the military judge erred by not requiring production of verbatim witness testimony to the defense).

Recognizing that such an entitlement does not accrue until after a witness has testified, the defense requests the verbatim transcripts prior to trial in order to preserve judicial economy, to reduce inconvenience to the panel, and to obviate the need for a delay in the trial proceedings.

PFC Richmond does not have the resources to pay for creation of a verbatim transcript that would cost thousands of dollars if done through a private contractor. The government has at its disposal a court reporter in Iraq who would be able to type a verbatim transcript within a matter of days. TDS does not have paralegal specialists to prepare such a transcript. Further, the part-time paralegal specialist in the FOB Danger TDS Branch Office is PCSing.

If the government is unwilling to produce a full verbatim transcript of the entire hearing, or the court does not order such a verbatim transcript, the defense requests a verbatim transcription of the following specific witness testimony: SGT [redacted] SPC [redacted] and SPC [redacted]

(5)(6)-2

F. CONCLUSION

The defense respectfully requests that the court compel the government to provide the defense with a verbatim transcript of the Article 32(b) hearing in this case. Alternatively, the defense requests verbatim transcribed testimony of the witnesses referenced above.

(5)(6)-2

[redacted]
CPT, JA
Trial Defense Counsel

I certify this I served this Motion for Production of a Verbatim Article 32(b) Hearing Transcript on the government trial counsel via e-mail at [redacted]@us.army.mil and on the military judge via e-mail on 9 July 2004.

(5)(6)-2

[redacted]
CPT, JA
Trial Defense Counsel

UNITED STATES v. PFC Edward L. Richmond, Jr. U.S. Army Headquarters and Headquarters Co., 1st Battalion, 27th Infantry Regiment 25th Infantry Division (Light) APO AE 09347	)	MOTION TO SUPPRESS 9 July 2004

A. Relief Sought

COMES NOW the accused, PFC Edward L. Richmond, Jr., by and through counsel, to request suppression of PFC Richmond's statement to the Criminal Investigation Command (CID), dated 29 March 2004.

B. Burden of Proof & Standard of Proof

Once raised by the defense, the burden of proof belongs to the government to prove by a preponderance of the evidence that the statement to be suppressed was not obtained in violation of the rights of the accused and is voluntary and admissible. Rule for Courts-Martial (R.C.M.) 905(c); Military Rule of Evidence (Mil. R. Evid.) 304(c).

C. Facts

On Sunday, 28 March 2004, SSG [redacted], of the S1 section, told PFC Richmond "you need to go to legal," or "you know you need to be at legal tomorrow." A second noncommissioned officer, SGT [redacted] confirmed that PFC Richmond had to be at legal at 1000. PFC Richmond did not know why he was being ordered to the legal office.

(b)(6)

PFC Richmond walked from the ALOC, unescorted, to the legal office as instructed. Upon his arrival at approximately 1000 he was met by two CID Agents whom he had never met before, SA [redacted] and SA [redacted]. The officers identified themselves as CID Special Agents. They were not wearing any rank, branch insignia or unit patches on their Desert Camouflage Uniforms (DCUs).

The agents spoke with PFC Richmond on the first floor of the building for approximately five minutes. SA [redacted] asked PFC Richmond words to the effect of, "Do you know why we're here?" PFC Richmond told them that he did not know. One of the agents then told PFC Richmond that his command ordered a polygraph exam. The agents then escorted PFC Richmond to a back corner office on the second floor of the building.

The back corner office had no overhead lighting. One long fluorescent light was mounted on the far left wall of the room and provided little light in the room. The room walls were dingy with a layer of filth and dust over faded mint green paint. The room measured approximately 12' 5" wide and 14' 2" in depth toward the back wall. The back wall contained a door to a terrace

Appellate Exhibit III
1 of 14

that was blocked by a curtain and unable to be opened. The wall had several windows that were positioned about mid-waist height to the ceiling. These windows were not open and were blocked by dark curtains to preclude visibility. The room did not have air conditioning.

Centered in the room was a conference table measuring approximately 4' wide by 6' long. Six metal folding chairs were unfolded, sitting around the table. A worn, battered couch sat against one wall. An arm chair also was placed around the table. The room also housed several floor-to-ceiling metal storage cabinets measuring several feet wide but just a few feet deep. Several large boxes of supplies and miscellaneous "junk" were piled about the room. On 29 March 2004, the room was not being used for any permanent purpose and effectively was a "junk room" for the building's tenants.

When the CID Agents escorted PFC Richmond to the room, the polygraph equipment already was set up. The set-up contained several pieces of equipment including a laptop computer with wires running every which way and a polygraph "box" that had wires running to the arm chair.

SA [redacted] advised PFC Richmond of his rights on a DA Form 3881, completed at 1005. On approximately 28 February 2004 or 1 March 2004, PFC Richmond told CID investigators that he would take a polygraph but he was never contacted until his command ordered him to "see legal" on 29 March 2004.

Several CID Forms 28-R, maintained in the original CID case file, relay the following entries:

(b)(6)-1

On 4 Mar 04 at 1015, SA [redacted] noted, "I see no need for Poly. Facts of case speak for themselves."

On 4 Mar 04 at 1700, SA [redacted] noted, "Poly is a possibility, but really not needed."

On 7 Mar 04, SA [redacted] noted, "Agreed poly on Richmond immaterial at this point."

After not hearing anything about the investigation for several weeks, on 29 March 2004, PFC Richmond did not understand why a polygraph was now needed. When he asked the CID agents, they simply told him words to the effect of, "your chain of command needs a polygraph done."

During CID's pre-polygraph explanation of the test, SA [redacted] discussed different topics with PFC Richmond. There were certain questions that PFC Richmond did not feel comfortable discussing. For example, CID asked him "Have you ever lied to a person in a position of authority?" and "Have you ever lied?" SA [redacted] told PFC Richmond that his answers to these preliminary questions would determine if he fit the profile of a murderer. PFC Richmond expressed his discomfort to SA [redacted] and said words to the effect of, "shouldn't I check with a lawyer or something." SA [redacted] ignored this concern and simply began questioning PFC Richmond about a different subject matter. As the questioning continued, SA [redacted] shifted gears and again began to redirect his questions toward the same subject matter. PFC Richmond stated unequivocally, "I can't talk about that. I want to see a lawyer if you want to talk about that."

(b)(6)-1

SA [redacted] conducted the polygraph examination. Upon completion of the question and answer part of the exam, SA [redacted] pulled out a chart of graph paper and made some markings and numbers on the paper, presumably the polygraph printout. After a cursory look at the printout, SA [redacted] summarily told PFC Richmond that he failed the polygraph.

SA [redacted] then told PFC Richmond that the military judge would know that he failed the polygraph and that the fact that he failed the polygraph examination would be used against him at his trial. SA [redacted] told PFC Richmond that he should explain why his answers came up negative on the exam. PFC Richmond asked SA [redacted] which questions he failed but SA [redacted] would not tell him. SA [redacted] again told PFC Richmond that the results could be used against him at trial. SA [redacted] told PFC Richmond that he had traveled all the way to Kirkuk from Tikrit and that he was there to "help out" PFC Richmond. SA [redacted] inferred that once he left Kirkuk, he would not be able to "help out" PFC Richmond anymore. PFC Richmond believed, "I came out of that room thinking [the polygraph result] was admissible in court."

SA [redacted] continued to interrogate PFC Richmond during this four-hour time period. SA [redacted] badgered PFC Richmond with "hypothetical" scenarios and "what-if" situations. Among the interrogation questions by SA [redacted] were "Let's say out there you knew you shot him but it was an accident," and "Or what if you tripped and started to fall and had an accidental discharge?" He continued, "Let's say you knew the Iraqi was cuffed...." and "....didn't you think anyone would see?"

PFC Richmond answered the SA [redacted] hypothetical scenarios as just that, hypothetical scenarios. It was his answers to these "what-if" type questions that were typed by SA [redacted] onto a DA Form 2823-E, "Sworn Statement." SA [redacted] printed the sworn statement. PFC Richmond was given the opportunity to read through the statement, however he barely read it because after 4 hours of questioning, PFC Richmond knew that as soon as he signed the statement he could leave. He signed the statement at 1419.

The Polygraph Examination Report, dated 30 Mar 04, pertaining to the polygraph of PFC Richmond reveals the following in the Examiner's Conclusions:

> An analysis of the polygrams collected determined insufficient criteria was present to make a conclusive decision regarding the truthfulness of RICHMOND.

D. LAW

The defense relies on the following authorities in support of its motion:

a. U.S. Const., amend V
b. R.C.M. 905(c)
c. Mil. R. Evid. 304
d. *Arizona v. Fulminante*, 499 U.S. 279 (1991)
e. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)
f. *Culombe v. Connecticut*, 367 U.S. 568 (1961)
g. *Rogers v. Richmond*, 365 U.S. 534 (1961)
h. *United States v. Bubonics*, 45 M.J. 93 (1996)
i. *United States v. Martinez*, 38 M.J. 82 (C.M.A. 1993)
j. *United States v. Hansome*, 45 C.M.R. 104 (C.M.A. 1972)
k. *United States v. Planter*, 18 U.S.C.M.A. 469 (C.M.A. 1969)
l. *United States v. Smith*, 32 C.M.R. 105 (1962)

E. WITNESSES & EVIDENCE

If the government objects to the defense's representation of the notations on the CID Forms 28-R referenced in Section C of this Motion to Suppress, the defense requests government production of such forms. On 28 April 2004, SA [redacted]s, Special Agent-in-Charge of the FOB Danger CID Field Office represented that he would not release copies of those documents without a court-order. The defense seeks to attach copies of those forms in support of this motion. (b)(6)-1

Further, the defense requests consideration of the following additional documents in support of this motion:

a. DA Form 3881-E, Rights Waiver Form, dated 29 March 2004 (Tab A)
b. DA Form 2823-E, Sworn Statement, dated 29 March 2004 (Tab B)
c. Polygraph Examination Report, dated 30 March 04 (Tab C)

F. ARGUMENT

The Fifth Amendment to the United States Constitution requires that confessions be excluded from evidence in criminal trials unless they were made voluntarily. *See Arizona v. Fulminante*, 499 U.S. 279, 281 (1991). Military Rule of Evidence 304(a) states that:

> [A]n involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule.

The Military Rules of Evidence define an involuntary statement as one that is:

(1) obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States,

(2) obtained in violation of Article 31 of the Uniform Code of Military Justice, or

(3) obtained through the use of coercion, unlawful influence, or unlawful inducement.

Mil. R. Evid. 304(c)(3). Once an appropriate motion has been made by the defense to suppress a statement under this rule, the burden is on the government to establish the admissibility of the statement. Mil. R. Evid. 304(e).

To determine whether a confession is voluntary, the United States Supreme Court has held that the necessary inquiry is:

> Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

See Culombe v. Connecticut, 367 U.S. 568, 602 (1961), *citing Rogers v. Richmond*, 365 U.S. 534 (1961). In determining whether an individual's will was overborne in particular case, the Supreme Court has held that the Court must assess: "the totality of all the surrounding

circumstances -- both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). The Court goes on to note a non-exclusive list of factors that the Court has considered in assessing the totality of the circumstances:

(1) the accused's age and education,
(2) whether the accused was properly advised of his rights,
(3) the length of the detention,
(4) the repeated and prolonged nature of the questioning, and
(5) deprivation of food or sleep.

See id. The Court notes, however, that none of these criteria are controlling, they are simply part of the assessing the totality of the circumstances of the interrogation. *See id.*

The Court of Appeals for the Armed Forces applied the standard set forth in *Schneckloth* for assessing the totality of the circumstances of an interrogation. *See United States v. Bubonics*, 45 M.J. 93, 95 (1996). The Court considered an additional factor of the accused's lack of prior involvement with the military justice system. *See id.* at 96.

Under the totality of the circumstances test, assessing both the characteristics of PFC Richmond and the details of the interrogation, the statement by PFC Richmond was involuntary and the product of unlawful inducement, coercion and unlawful influence and should be suppressed.

1. The Characteristics of PFC Richmond at the time of the Interrogation were such as to Render the Statement Involuntary

PFC Richmond joined the United States Army on 22 May 2002. He was 20-years-old at the time CID questioned him. PFC Richmond dropped out of high school and obtained a GED in order to join the Army. Throughout his military career, PFC Richmond has been conditioned to respond with discipline to figures in authority. In early March 2004, PFC Richmond's unit transferred him from forward operating base (FOB) McHenry to FOB Warrior. His entire military support system and chain-of-command remained at FOB McHenry. Despite the premise that a suspected accused is innocent until proven guilty, PFC Richmond's chain-of-command moved him away from his unit and to a different FOB specifically because of the incident for which he now stands trial. No one from his unit accompanied PFC Richmond to his CID Interrogation on 29 March 2004. Two NCOs ordered him to go to the legal office without telling him why. PFC Richmond was alone against the government.

In *Bubonics*, the Court of Appeals for the Armed Forces found the accused's conditioned response to those in a position of authority to be a significant factor in a totality of the circumstances analysis. The accused had only 2 ½ years of military experience and was "conditioned throughout that time to respond with discipline to figures of authority." *Bubonics*, 45 M.J. at 96.

Further, as the United States Court of Military Appeals in *United States v. Planter*, 18 U.S.C.M.A. 469 (C.M.A. 1969) noted, due to the rank structure in the military, coercive tactics employed by investigators are especially overpowering. The Court stated:

> Further, military personnel to whom confessions are made are, in many instances, of higher rank than the one confessing, and certainly, if only by reason of their duties, tend to have great influence under the circumstances.

Id. at 473, *citing United States v. Smith*, 32 C.M.R. 105, 120 (1962).

PFC Richmond was a soldier with less than 2 years of military experience at the time of questioning by CID. He was ordered by two noncommissioned officers to report to the legal office. When PFC Richmond arrived at the legal office, he was greeted by two CID agents who were clearly expecting his arrival. They met him at the entrance of the building in order to escort him to the interrogation room. The agents were older than PFC Richmond and were the ones that initiated the questioning. They introduced themselves with the authority of law enforcement personnel and when PFC Richmond asked why he was there, he was told that his command had ordered a polygraph examination. Each of these factors must be considered under a totality of the circumstances test when evaluating the voluntariness of PFC Richmond's post-polygraph statement.

CID questioned PFC Richmond over and over again about the killing of the Iraqi farmer. Any time he would claim that he did not know the Iraqi was flex-cuffed, he would be told that he was lying and that he did know the man was cuffed. For a soldier with no prior involvement in the military justice system, these events were overwhelming and overbore his will.

2. The Characteristics of the Interrogation were such as to Render PFC Richmond's Statement Involuntary

CID subjected PFC Richmond to repeated and prolonged questioning for over four hours which overbore his will. The United States Supreme Court has noted:

> In the police station a prisoner is surrounded by known hostile forces. He is disoriented from the world he knows and in which he finds support. He is subject to coercing impingements, undermining even if not obvious pressures of every variety. In such an atmosphere, questioning that is long continued -- even if it is only repeated at intervals, never protracted to the point of physical exhaustion -- inevitably suggests that the questioner has a right to, and expects, an answer.

Colombe v. Connecticut, 367 U.S. 568, 575 (1972).

While the questioning of PFC Richmond did not take place in a police station, the physical surroundings were analogous. The NCOs ordered PFC Richmond to go to the legal office, a location clearly linked to law enforcement activity. He was met at the entrance to the building by two CID agents. The two agents controlled the setting and the dynamics of the situation; they led PFC Richmond to a room they pre-selected for the interrogation in which the polygraph equipment already was set up.

Another factor to be considered is the issue of admonishing a person to tell the truth during the course of an interrogation. The military recognizes that, "Admonishing a person to tell the truth is not coercion, unlawful inducement or improper influence," however, "if an exhortation or adjuration to speak the truth is connected with suggestions of a threat or benefit, the confession is inadmissible." *United States v. Hansome*, 45 C.M.R. 104, 107 (C.M.A. 1972).

Whenever PFC Richmond would deny that he knew the Iraqi was flex-cuffed, SA [redacted] would tell him that he was lying or that he was not being honest with him. SA [redacted] told PFC Richmond that he was there to help him and that once he left the interrogation he would not be able to help him anymore. SA [redacted] questioned PFC Richmond over and over on the same point. Any time that PFC Richmond gave an answer that SA [redacted] did not like, he was told that he was not telling the truth. SA [redacted] told PFC Richmond that once he left Kirkuk that he

(b)(6)-1

would not be able to "help" him. He led him to believe that at that day and time of questioning, it was PFC Richmond's last opportunity to be "helped" by CID. This repeatedly and prolonged questioning combined with the other factors overbore PFC Richmond's will.

3. The 29 March 2004 Statement was the Product of an Overzealous CID Office

An important factor to consider when assessing the totality of the circumstances is the overzealousness of CID that set the stage for the coercive environment. The only reason CID went forward with the polygraph on 29 March 2004 was because they previously had arranged for SA [redacted] to travel from Balad, Iraq, to Tikrit to conduct the polygraph. The case file is replete with references that a polygraph was not needed in this case. However, ultimately, rather than reveal to SA [redacted] that his trip to Tikrit was for naught, the government continued to transport him to Kirkuk. This position is bolstered by SA [redacted] own representations to PFC Richmond that he had traveled all the way to Kirkuk just to see PFC Richmond. CID did not contact PFC Richmond to confirm a date and time for the polygraph. Rather, representing the government, CID office seized upon an opportunity to order PFC Richmond to meet with them and to subject PFC Richmond to over 4-hours of interrogation.

The facts of the present case are analogous to those of *United States v. Martinez*, 38 M.J. 82 (C.M.A. 1993). SFC Martinez consented to a polygraph exam and upon its conclusion, the CID agent told him that the test indicated deception. The CID agent conducted post-polygraph questioning of SFC Martinez. When the agent failed to get the answers that he was looking for he threatened to leave the interrogation unless SFC Martinez told the truth. After several hours of questioning, SFC Martinez made inculpatory statements. *See id.* at 83.

In the present case, SA [redacted] told PFC Richmond that he had failed the 29 March 2004 polygraph. SA [redacted] did so knowing that the test did not indicate deception but rather, that the test was inconclusive. That SA [redacted] lied to PFC Richmond is evidence of the level of coercion that CID was willing to go to get the statement that they wanted to get rather than the statement that PFC Richmond was willing to give. SA [redacted] took further steps to achieve his own ends by refusing to tell PFC Richmond what questions indicated deception. PFC Richmond was confused by what SA [redacted] was telling him because he wanted to know what questions he had failed.

Though not equaling the threat to leave the interview room, as concluded in *Martinez*, the totality of the circumstances shows that SA [redacted] coerced PFC Richmond in continuing to speak to him by telling him that he had traveled from Tikrit to Kirkuk just to meet with PFC Richmond. Important to note is that PFC Richmond knew that military personnel should not travel unnecessarily in combat-heavy Iraq. PFC Richmond knew that the special agents, like all soldiers in Iraq, put themselves in increased danger every time they leave a secured installation. This type of guilt-inducement, under the circumstances contributed to the coercive statement obtained by SA [redacted]

Additionally, the suggestive interrogation techniques of CID mirror those considered by the court in *Martinez*. In *Martinez*, "CID told him he had lied and gave him another scenario which it offered as the truth." *Id.* at 85. In the present situation, SA [redacted] interrogation was plagued with "what if" scenarios. PFC Richmond indicated that he did not want to answer these hypothetical situations. Ultimately, it was PFC Richmond's hypothetical answers and not the misleading questions that SA [redacted] typed onto a sworn statement.

A critical fact to be considered under the totality of the circumstances is that PFC Richmond commented to SA [redacted] about checking with a lawyer on two occasions during the

(b)(6)-1

interrogation. Rather than address the soldier's concerns about seeking counsel, SA [redacted] would simply change the topic of questioning. PFC Richmond's mentioning of a lawyer, while perhaps not rising to the level of invoking his right to counsel, is a significant contributing factor to determining if PFC Richmond's statement was the product of an overzealous CID agent who, after risking his life by traveling in Iraq, was going to get the statement he wanted regardless of what he was told by the soldier.

G. CONCLUSION

Under the totality of the circumstances, assessing both the characteristics of PFC Richmond and the details of the CID interrogation, the 29 March 2004 statement by PFC Richmond was involuntary and the product of unlawful inducement, influence, and coercion and should be suppressed.

RESPECTFULLY SUBMITTED:

(b)(6)-2

[redacted]
CPT, JA
Trial Defense Counsel

I certify this I served this Motion to Suppress on the government trial counsel via e-mail at [redacted]rt@us.army.mil and on the military judge via e-mail on 9 July 2004.

(b)(6)-2

[redacted]
CPT, JA
Trial Defense Counsel

017939

RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE

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

LOCATION: Kirkuk, Iraq DATE: 29 Mar 04 TIME: 1005 ER
FILE NUMBER: 0040-04-CID469-79638 (b)(6-2
NAME (Last, First MI): RICHMOND, EDWARD L. SSAN: [redacted] GRADE / STATUS: PFC
ORGANIZATION OR ADDRESS: HHC, 1/27th Infantry Battalion, FOB McHenry, APO, AE 09347 ER

RIGHTS WAIVER/NON-WAIVER CERTIFICATE

The investigator whose name appears below told me that he/she is with the United States Army Criminal Investigation Command as a Special Agent and wanted to question me about the following offense(s) of which I am suspected/~~accused~~: Murder; False Official Statements; False Swearing ER ER
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:

IR ER I-R
1. I do not have to answer questions 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.

IR
4. If I am now willing to discuss the offense(s) under investigation, with, or without a lawyer present, I have the 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:

ER
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. 1212

Witness# 1 [redacted] (b)(6)-1
Signature of Witness

[redacted] (b)(6)-1

Witness# 2
Signature of Witness

Edward Richmond
Signature of Interviewee

[redacted] (b)(6)-1
Signature of Investigator/Special Agent
SA [redacted]
22nd MP BN (CID)
APO, AE 09342

NON-WAIVER CERTIFICATE

I do not want to give up my rights: I want a lawyer: ☐ I do not want to be questioned or say anything: ☐

Signature of Interviewee: _____

DA Form 3881-E

SWORN STATEMENT

LOCATION: Kirkuk, Iraq
FILE NUMBER: 0040-04-CID469-79638
DATE: 29 Mar 04
TIME: 1419 ER
NAME: RICHMOND, EDWARD L.
SSAN: 434-57-0403
GRADE/RANK: PFC
ORGANIZATION OR ADDRESS: HHC, 1/27th Infantry Battalion, FOB McHenry, Kirkuk, Iraq, APO, AE 09347

I, Edward L. RICHMOND, want to make the following statement under oath:
I provided a sworn statement on 1 Mar 04 concerning the incident in which I shot and killed an Iraqi farmer during a raid. Looking back on the entire situation, I would like to make some corrections to that statement at this time. Prior to the raid, the rules of engagement were put out that if anyone tried to flee the villiage, we were to shoot them. After arriving to the villiage and setting up, I could hear some shotgun blasts going off in the villiage where the raid was taking place. I then noticed an Iraqi male walking his cattle away from the villiage. Since the rules of engagement were put out that we were to shoot anyone fleeing the villiage, I asked if I should shoot the farmer because he was leaving the village. I was told by SGT [redacted] to not shoot him. About an hour later, someone, maybe CPT [redacted], put out over the radio to apprehend all males leaving the villiage. At that time, we decided to apprehend the farmer. Myself and [redacted] each had a set of flexicuffs and began walking into the field where the farmer was still with his cattle. My adrenaline was already pumping because of the raid and then even more so as we approached the farmer to apprehend him. Myself and [redacted] decided tha[redacted] would place the flexicuffs on the farmer, while I stood guard. The farmer seemed to be directing our attention to something else as we approached him, and then as SGT [redacted] egan placing the flexicuffs on him, he started resisting. Already at that point I had a lot of adrenaline going through my system and [redacted] shouted at me to point my rifle at the Iraqi's head. I then pointed my rifle at his head and he stopped resisting. In my previous statement I put in that I did not realize the Iraqi was wearing flexicuffs when I shot him. Looking back now, I think it would be more accurate to say that I did not register in my mind that he was wearing flexicuffs. The adrenaline was affecting my perception of the situation. I remember seeing [redacted] putting flexicuffs on him and I saw him with his arms behind his back as I pointed my rifle at his head. I had to know he had on flexicuffs before I shot him, but it just did not register in my mind at the time. Also in my previous statement, I said that the Iraqi lunged at [redacted] Again, looking back on it now, I don't think the Iraqi actually lunged. What happened is [redacted] urned him to walk away; however, because of the adrenaline, when [redacted] moved the Iraqi out of my sight picture, I just reacted by shooting him. I would have never shot that man had I been thinking clearly. I would never shoot someone who was wearing flexicuffs if I registered in my mind that they were wearing them. It is everything combined between the pressure of the raid, the new rules of engagement, the Iraq resisting his detention, and the whole situation in general that caused me to not be react like I normally would. ER

(b)(6)-2

INITIALS OF PERSON MAKING STATEMENT ER

Sworn Statement of PFC Edward L. RICHMOND, taken at Kirkuk, Iraq, 29-Mar-04,
CONTINUED:

FRQ. SA [redacted] (b)(6)-1
A. PFC [redacted] (b)(6)-2
Q. Did you hear [redacted] tell you "he's good, let's go"?
A. No. He might have said it, but if he did, I did not hear it because of the adrenaline and the situation. It just did not register.
Q. How do you feel you were treated today?
A. Good.
Q. Were you given the opportunity to drink, eat, and use the restroom today?
A. Roger.
Q. Is there anything else you would like to add to this statement?
A. No///End of Statement/// ER

AFFIDAVIT

I, Edward L. RICHMOND, 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. ER

Witness #1:

[redacted] (b)(2)-1 (b)(6)-1

Witness #2:

Edward Richmond
(Signature of Person Making Statement)

Subscribed and sworn before me, a person authorized by law to administer oaths, this 29th day of March 2004, at Kirkuk, Iraq

[redacted] (b)(6)-1
(Signature of Person Administering Oath)
SA [redacted]
(Typed name of Person Administering Oath)
Article 136 (b) (4) UCMJ
(Authority to Administer Oath)

DEPARTMENT OF THE ARMY
United States Army Criminal Investigation Command
22nd Military Police Battalion (CIL)
Operation Iraqi Freedom
APO, AE 09342

CICR-PD (195-6) 30 Mar 04

MEMORANDUM FOR

Director, United States Army Crime Records Center, United States Army Criminal Investigation Command, 6010 6th Street, Fort Belvoir, VA 22060-5585
Special Agent In Charge, 286th Military Police Detachment (CID), Tikrit, Iraq, APO, AE 09392

SUBJECT: Polygraph Examination Report

INVESTIGATIVE CASE REFERENCE: 0040-04-CID469-79638-5H1

AUTHORIZATION NUMBER: 04-0581, 24 Mar 04

DATE(S) OF EXAMINATION: 29 Mar 04

LOCATION OF EXAMINATION(S): Kirkuk, Iraq

SUBJECT EXAMINED: RICHMOND, Edward L.; PFC; [redacted] HHC, 1/27th Infantry Battalion, FOB McHenry, APO, AE 09347; 7 Jul 83; Monroe, LA.

OFFENSE(S): Murder

PURPOSE OF EXAMINATION: Criminal Investigation

INVESTIGATIVE/OPERATIONAL SUMMARY: Investigation disclosed on 28 Feb 04, RICHMOND, along with various other members of his unit, conducted a command directed raid into the village of Taal Al Jal, Iraq. During the raid, a command directive was put out to apprehend all males in the vicinity of the village. After the directive was issued, RICHMOND and SGT Jeffrey D. [redacted], HHC, 1/27th Infantry Battalion entered a field where an Iraqi farmer, Mr. [redacted], was walking his cattle, with the intentions of apprehending him in accordance with the command directive. [redacted] became angry when [redacted] attempted to place flexicuffs on him and began resisting his apprehension. [redacted] had RICHMOND point his rifle at [redacted] at which time he stopped resisting, and allowed [redacted] to place the flexicuffs on him. As [redacted] and RICHMOND began escorting [redacted] out of the field, RICHMOND shot [redacted] in the back of the head killing him.

On 1 Mar 04, RICHMOND was interviewed and stated he was watching the back of [redacted] head and shoulders through the scope of his rifle, as they were escorting [redacted] from the field, and saw [redacted] lunge at [redacted] RICHMOND stated that he did not realize [redacted] had placed flexicuffs on [redacted] and when he saw [redacted] lunge, he felt [redacted] was being attacked, so he shot him.

FOR OFFICIAL USE ONLY

Attached as Exhibit _____ is a Polygraph Examination Report. This exhibit will be destroyed not later than three months after the date of the Report of Investigation (AR 195-6, para 2-6b). The original, to include related polygraph records, is at the US Army Crime Records Center, USACIDC, 6010 6th Street, Fort Belvoir, VA 22060-5585.
Reproduction of this exhibit or its contents is prohibited.

017943

EXHIBIT 17

On 1 Mar 04, [redacted] was interviewed and stated he had to struggle with [redacted] to put the flexicuffs on him; however [redacted] stated [redacted] never lunged at him after [redacted] was in flexicuffs, and knew of no reason why RICHMOND shot [redacted] stated RICHMOND watched him place the flexicuffs on KADIR, and after he put the flexicuffs on [redacted], he told RICHMOND, "he's good, let's go". [redacted] stated RICHMOND then brought his gun down, and they started walking with RICHMOND walking behind himself and [redacted] stated they only took a couple of steps before RICHMOND shot [redacted]

On 1 Mar 04, SPC [redacted], HHC, 1/27th Infantry Battalion, stated he heard the shot that killed [redacted] stated they had seen the farmer earlier in the morning and RICHMOND had joked about killing him. [redacted] also stated RICHMOND had allegedly asked [redacted] if he could kill the farmer. [redacted] stated RICHMOND had commented on wanting to kill some Iraqis since the orders for the mission were issued.

On 1 Mar 04, PFC [redacted] HHC, 1/27 Infantry Battalion was interviewed and stated RICHMOND had stated on numerous occasions that he wanted to kill an Iraqi. [redacted] stated he did not know if RICHMOND was joking or not, but stated "he would always see any Iraqi and ask if he could shoot them".

When interviewed, RICHMOND readily admitted to shooting [redacted] but stated he only shot [redacted] because he saw him lunge at [redacted] It was suspected that RICHMOND was predisposed to killing an Iraqi the day of the incident. It was further suspected that [redacted] never lunged at [redacted] and it was also suspected that RICHMOND knew [redacted] was in flexicuffs when he shot him. RICHMOND has denied knowing [redacted] was in flexicuffs at the time of the shooting and RICHMOND has maintained he saw [redacted] lunge at [redacted] before he shot him. RICHMOND agreed to undergo a polygraph examination to prove the veracity of his statement.

INSTRUMENTATION: This examination was conducted using an Axciton computerized polygraph instrument, SN: 4375, last calibrated on the date of the examination.

OBSERVATIONS: Unusual physiological/psychological reactions were not observed during this examination.

EXAMINER'S CONCLUSIONS: During the pre-instrument phase, RICHMOND stated he did not actually see [redacted] make a sudden lunge at [redacted] but saw him turn towards [redacted] in a manner that made him think he was lunging. RICHMOND stated he only fired at [redacted] because he thought [redacted] was in danger. RICHMOND maintained he did not know [redacted] was wearing flexicuffs before he shot him, and otherwise made no comments or statements contrary to those previously provided.

An analysis of the polygrams collected determined insufficient criteria was present to make a conclusive decision regarding the truthfulness of RICHMOND.

During the post instrument phase, RICHMOND rendered a sworn statement admitting he saw [redacted] putting flexicuffs on [redacted] before he shot him. RICHMOND stated he also saw [redacted] with his hands behind his back before he shot him. RICHMOND stated it did not register in his mind that [redacted] was wearing flexicuffs, because of the adrenaline in his system at the time. RICHMOND also stated [redacted] did not lunge at [redacted] but when [redacted] mov[redacted]

FOR OFFICIAL USE ONLY

Attached as Exhibit _____ is a Polygraph Examination Report. This exhibit will be destroyed not later than three months after the date of the Report of Investigation (AR 195-6, para 2-6b). The original, to include related polygraph records, is at the US Army Crime Records Center, USACIDC, 6010 6th Street, Fort Belvoir, VA 22060-5585.

Reproduction of this exhibit or its contents is prohibited.

out of his rifle's sight pictu[illegible] walk away, he just reacted by shooti[illegible] RICHMOND stated he shot[illegible]ue [illegible]he adrenaline in his body affecting hi[illegible]rception of what was going on. RICHMOND terminated the interview stating he had nothing further to say and declined to undergo further polygraph testing.

(5)(61-4

RELEVANT QUESTIONS USED:

Series I

Q: Did you know that man was wearing flexicuffs before he was shot?
A: No.
Q: Did you know that man was wearing flexicuffs before he was shot, that morning?
A: No.
Q: Are you lying about why that man was shot that morning?
A: No.

WITNESS, MONITOR OR INTERPRETER: SA [redacted]5593

(5)(61-7

EXAMINEE NATIVE LANGUAGE: English

LANGUAGE(S) USED DURING THE EXAMINATION: English

EXHIBITS: 4 polygrams, the polygraph consent form(s) and allied documents are on file with the original report at the US Army Crime Records Center.

///Original Signed///
[redacted] (5)(61-1
Polygraph Examiner, 221

FOR OFFICIAL USE ONLY

Attached as Exhibit _____ is a Polygraph Examination Report. This exhibit will be destroyed not later than three months after the date of the Report of Investigation (AR 195-6, para 2-6b). The original, to include related polygraph records, is at the US Army Crime Records Center, USACIDC, 6010 6th Street, Fort Belvoir, VA 22060-5585.
Reproduction of this exhibit or its contents is prohibited.

UNITED STATES v. Edward L. RICHMOND, Jr. PFC, US Army HHC, 1st Battalion, 27th Infantry 25th Infantry Division (Light) APO AE 09347-9998	)	GOVERNMENT RESPONSE TO DEFENSE MOTION TO SUPPRESS 14 July 2004

Government responds to Defense Motion to Suppress the Accused's 29 March 2004 statement to CID.

FACTS

Pertinent facts are:

- The Accused was made aware and understood his Article 31 rights, including the rights to remain silent, to discontinue questioning, and to an attorney during a previous CID interview on 1 March 2004.
- The Accused consented to a future polygraph examination on 1 March 2004.
- The Accused was ordered to go to the "Legal" building on 29 March 2004, but he was not ordered to take a polygraph examination or participate in an interview.
- The Accused consented to a polygraph examination and post-polygraph interview on 29 March 2004.
- The Accused was made aware and understood his Article 31 rights, including the rights to remain silent, to discontinue questioning, and to an attorney during the entire process on 29 March 2004.
- The Accused knew that the interviewers, SA [redacted] and SA [redacted] were CID agents. SA [redacted] wears rank and insignia on his DCU's.
- The Accused was already familiar with the "Legal" building. The interview room was not a coercive environment. The door would not even close properly and had no lock.
- The Accused was not told by CID, "your chain of command needs a polygraph done."
- The pre-polygraph, polygraph, and post-polygraph processes were conducted in accordance with applicable DoD and Army regulations.
- SA [redacted] did not mark on the polygraph charts – he used a separate sheet of paper.
- SA [redacted] told the Accused that he did not pass the exam.
- SA [redacted] cannot tell the Accused which questions he "failed" – the exam is graded overall at a later date.
- SA [redacted] told the Accused that the polygraph is admissible in court if the judge lets it in.
- SA [redacted] told the Accused that he was there to "help" the Accused tell the truth.
- The approximate four-hour period included less than two hours of interrogation. The other periods were used for administrative and polygraph tasks.
- SA [redacted] interrogation techniques were legally permissible and not coercive.
- The ultimate results of the polygraph examination were inconclusive.

Appellate Exhibit IV
1 of 917946

LAW & ARGUMENT

The Accused's 29 March 2004 statement to CID was voluntary based on the totality of the circumstances. The Accused's "will" was to make a statement. Case law cited by defense stands for the proposition that Military Judge determines voluntariness as a question of law based on the totality of the circumstances.

Government requests additional argument after the evidence on the motion is received.

WITNESSES & EVIDENCE

- Testimony of SA [redacted] ID (5)(61-1
- Rights waiver for the 29 March statement
- Rights waiver and statement from 1 March

[redacted]
MAJ, JA
2-25 BCT TF JA

I certify that on 16 JUL 04 this Government Response to Defense Motion to Suppress was delivered by e-mail to Defense Counsel, CPT [redacted] (5)(61-2

[redacted]
MAJ, JA
2-25 BCT TF JA

017947

UNITED STATES	)	
	)	
v.	)	
	)	MOTION FOR APPROPRIATE
PFC Edward L. Richmond, Jr.	)	RELIEF
U.S. Army	)	
Headquarters and Headquarters Co.,	)	
1st Battalion, 27th Infantry Regiment	)	
25th Infantry Division (Light)	)	16 July 2004
APO AE 09347	)	

COMES NOW the accused, PFC Edward L. Richmond, Jr., by and through counsel, to move for credit for violations of Article 13, Uniform Code of Military Justice (U.C.M.J.), restriction tantamount to confinement, and Rule for Courts-Martial (R.C.M.) 305.

A. Relief Sought

The defense respectfully requests that the defense Motion for Appropriate Relief be granted and that PFC Richmond be awarded credit toward any approved sentence of confinement.

B. Burden of Proof & Standard of Proof

Unlawful pretrial punishment and circumstances tantamount to confinement are evaluated according to the totality of the circumstances. *See United States v. Herrin*, 32 M.J. 983, 985 (A.C.M.R. 1991). As the proponent of the motion, the defense bears the burden of proof by a preponderance of the evidence. The standard of appellate review is for abuse of discretion. *See United States v. McCarthy*, 47 M.J. 162, 166 (C.A.A.F. 1997).

C. Facts

On 28 February 2004, Mr. [redacted] an Iraqi national, was killed near the village of Taal Al Jal. Since 28 February 2004, PFC Richmond has been the only person suspected of killing Mr. [redacted] He is the only subject of the Criminal Investigative Command investigation. (b)(6)-4

Upon arriving at the scene of Mr. [redacted] death, 1SG [redacted] C Company, took all of PFC Richmond's weapons and supervised the transportation of the soldier from Taal Al Jal to Forward Operating Base (FOB) McHenry. PFC Richmond's platoon is stationed at FOB McHenry. Upon arriving at FOB McHenry in mid-morning, CSM [redacted] separated PFC Richmond from his unit and permitted him to stay in the tent that housed the chapel. That evening PFC Richmond was allowed to return to his platoon but was told to sleep on the floor of (b)(6)-2

Appellate Exhibit V
1 of 7

his squad leader's room. The squad leader became PFC Richmond's guard until he was transported to FOB Warrior on 29 February 2004. From 29 February 2004 through the present day, PFC Richmond has been physically separated from his platoon and forced to live on a different FOB.

During the month of March, PFC Richmond lived at FOB Warrior. His unit housed him in transient billeting in Building 645. Other soldiers passed through the transient billeting, however, PFC Richmond was one of the only full-time non-transient soldiers that was forced to live in this room. The room had no electricity, no heat, and no door to the room. Other E3s of Headquarters and Headquarters Company were not required to live under these circumstances. PFC Richmond was required to check in with SGT [redacted] of Headquarters and Headquarters Company during the duty day. PFC Richmond continually asked his supervisors at FOB Warrior "what was going on" and questioned why he was being held at FOB Warrior instead of working with his platoon at FOB McHenry. He was told words to the effect of "don't worry about it" and "everything will work out." (b)(6)-2

PFC Richmond is an 11C. He has not performed as an 11C, or performed any duties commiserate with his mos since 28 February 2004. During March and continuing through April, PFC Richmond worked "extra-duty-type" details. He filled sand bags for days in a row and hours on end. He used the filled sandbags to make walkways and parking stalls. He moved the filled sandbags to different designated blocking positions. He often performed these sandbags details on his own. PFC Richmond cut the grass surrounding the company area. When the equipment was broken he was required to cut the grass with his e-tool. When he was joined in these tasks, it was by soldiers who were performing extra duty or soldiers who were pending UCMJ action. PFC Richmond picked up trash and unsightly pieces of concrete and large trees and brush. PFC Richmond filled in holes in the driving areas with bags of gravel.

PFC Richmond's company commander preferred one charge of murder against the soldier on 5 April 2004.

(b)(6)-2

In mid-April 2004, 1LT [redacted] the C Company Executive Officer, announced to approximately 15 soldiers that PFC Richmond was a "murderer" and that he "executed" someone. The incident with 1LT [redacted] occurred when he and PFC Richmond passed each other as one was exiting the ALOC and one was entering. 1LT [redacted] asked PFC Richmond if he was the soldier from mortars. When PFC Richmond responded affirmatively, 1LT [redacted] said words to the effect of, "Oh hell no. This is him. You're a fucking murderer." He continued with "I can't believe you just executed that guy! Why would you do something like that?" At least ten NCOs and junior enlisted soldiers were present in the entryway when 1LT [redacted] was making these comments in a loud accusatory voice. His comments were directed at PFC Richmond who was standing only a few feet from 1LT [redacted] and who was in clear view of the other soldiers.

b(6)-2 (b)(6)-2

After seeing PFC Richmond, 1LT [redacted] entered the ALOC. Once inside the ALOC, 1LT [redacted] began to show soldiers and officers in the ALOC the crime scene photos from the day of Mr. [redacted] death. On the day of the killing, 1LT [redacted] was the officer on the scene with a

(b)(6)-4 b(6) 2

017949

digital camera who photographed Mr[redacted] body. 1LT [redacted] retained these graphic photos on his digital camera and passed his camera around to other soldiers for them to view the photos. He made comments to the soldiers that PFC Richmond was guilty of murder. For some arbitrary reason, PFC Richmond has since been banned from the ALOC. The S4, CPT [redacted], will not allow PFC Richmond to perform duty in the ALOC despite requests by the company commander to permit him to do so.

Further, the Headquarters and Headquarters Company First Sergeant, 1SG [redacted] humiliated PFC Richmond on several different occasions in front of junior enlisted soldiers and NCOs. Specifically, on one occasion, the 1SG called PFC Richmond a criminal while a line of approximately 40 soldiers waited to receive their anthrax shots. All of the 1st Battalion, 27th Infantry soldiers housed on FOB Warrior lined up to receive their anthrax shots. For accountability purposes, the 1SG verbally checked off each of the sections. For example, he would announce, "HCS," "Supply," "S1," "Commo," to ensure that each section was present. When he concluded reviewing the sections, 1SG [redacted] looked at PFC Richmond and another soldier pending UCMJ action and said "Criminals?" The soldiers who heard this remark ranged in rank from O3 to E1. The soldiers laughed and the 1SG moved away to carry on with other company business.

By the end of April, the command directed PFC Richmond to live with SGT [redacted] There was no other PFC in the company that was forced to live with an NCO. Other housing was available but the command chose to house PFC Richmond with SGT [redacted] that SGT [redacted] could escort PFC Richmond. PFC Richmond was not allowed to go anywhere without SGT Phan. He could not go to the DFAC alone. He could not go to the PX alone. He could not go to the phone or computer lab alone. He was not allowed to go to the laundry point alone. SGT [redacted] regulated PFC Richmond's duty day and his off-duty time.

During approximately the second week in May, PFC Richmond's command allowed him to convoy from FOB Warrior to FOB Speicher in order to meet with a psychiatrist. PFC Richmond, having had his weapon confiscated on 28 February 2004, asked his chain-of-command for his weapon during the convoy. The command denied his request. PFC Richmond was forced to endure a several-hour convoy from Kirkuk to Tikrit with no weapon and no way to protect himself or his comrades if attacked. Further, the command directed PFC Richmond to ride in an unarmored truck with just one unarmed local Iraqi driver.

By the end of May, PFC Richmond's command altered his living situation. No longer required to be under the 24/7 watchful eye of SGT [redacted] the command housed PFC Richmond with two other junior enlisted soldiers: PVT [redacted] and PFC [redacted] PVT [redacted] after several instances of misconduct and an attempted suicide, was being chaptered out of the Army for patterns of misconduct. PFC [redacted] returned to his unit after a period of being absent without leave. These soldiers were the only ones required to live three-people to a room; other soldiers lived by themselves with an empty bunk in their room and space for an additional soldier.

D. Law

The defense relies on the following authorities in support of its motion:

Article 13, U.C.M.J. (10 U.S.C. § 813)
R.C.M. 305
Bell v. Wolfish, 441 U.S. 520 (1979)
United States v. McCarthy, 47 M.J. 162 (C.A.A.F. 1997)
United States. v. Stamper, 39 M.J. 1097 (A.C.M.R. 1994)
United States v. Latta, 34 M.J. 596 (A.C.M.R. 1992)
United States. v. Herrin, 32 M.J. 983 (A.C.M.R. 1991)
United States v. Sassman, 32 M.J. 687 (A.F.C.M.R. 1991)
United States v. Russell, 30 M.J. 977 (A.C.M.R. 1990)
United States v. Villamil-Perez, 32 M.J. 341 (C.M.A. 1991)
United States v. James, 28 M.J. 214 (C.M.A. 1989)
United States v. Cruz, 25 M.J. 326 (C.M.A. 1987)
United States v. Mason, 19 M.J. 274 (C.M.A. 1985)
United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983)
United States v. Carmel, 4 M.J. 744 (N.C.M.R. 1977)

E. Witnesses & Evidence

The defense requests argument on this Motion for Appropriate Relief. The defense intends to present the testimony of PFC Edward L. Richmond, Jr., for consideration of the motion only.

F. Argument

PFC Richmond suffered hostile and degrading treatment from the leadership of his company and is entitled to credit for unlawful pretrial punishment under Article 13, U.C.M.J.

Pretrial punishment is forbidden in accordance with Article 13, U.M.C.J., 10 U.S.C. § 813, which states that:

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence . . .

The Court of Military Appeals in *United States v. James*, 28 M.J. 214 (C.M.A. 1989), adopting the standard in *Bell v. Wolfish*, 441 U.S. 520 (1979), set out a two-prong test to determine if a violation of Article 13 has occurred. The Court should first decide whether the particular conditions were imposed with the intent to punish. *See id.* at 216. If the answer is yes, then the conditions are punishment and the Court should consider a sentence credit. *See id.* If the answer is no, the Court should inquire as to whether the purposes purportedly served by the

conditions are reasonably related to a legitimate governmental objective. *See id.* "[I]f a restriction or condition is not reasonably related to a legitimate goal -- if it is arbitrary or purposeless -- a court permissibly may infer that the purpose of the governmental action is punishment." *Bell*, 441 U.S. at 539.

Military appeals courts have routinely and "unequivocally" condemned conduct by those in positions of authority which result in needless military degradation, or public denunciation or humiliation of an accused." *United States v. Latta*, 34 M.J. 596, 597 (A.C.M.R. 1992), *citing United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987). Specifically, "public denunciation by the commander and subsequent military degradation before the troops prior to courts-martial constitute unlawful pretrial punishment prohibited by Article 13." *Cruz*, 25 M.J. at 330. The court further denounced the unnecessary public identification of an apprehended person as a criminal suspect. *See id.* at 331 n.3.

Accused soldiers may be entitled to credit toward an approved sentence if they are repeatedly subject to disparaging remarks by the command. *See United States. v. Stamper*, 39 M.J. 1097, 1100 (A.C.M.R. 1994) (awarding credit based on disparaging remarks by a company commander regarding a larceny the accused allegedly committed). In such instances, "these remarks chipped away at the accused's presumption of innocence." *Id.* Further, Article 13 credit can be granted for actions of the command toward the accused soldier when "some of the [restraints] bore no relation to the purposes of his restriction and were unnecessary to his presence." *United States v. Carmel*, 4 M.J. 744, 748 (N.C.M.R. 1977).

(b)(6)-2

Both 1LT [redacted] and 1SG [redacted] degraded and humiliated PFC Richmond in front of his fellow soldiers. Their comments clearly eroded the basic presumption of innocent until proven guilty. This "moral restriction" should be given significant weight by the court in a totality of the circumstances analysis. *See United States v. Russell*, 30 M.J. 977, 979 (A.C.M.R. 1990); *United States v. Carmel*, 4 M.J. 744, 748 (N.C.M.R. 1977).

Furthermore, PFC Richmond was singled out by NCOs and leaders and treated in a derogatory manner in front of other soldiers. The degrading behavior was unwarranted and prejudicial to PFC Richmond. For certain periods, PFC Richmond was under constant NCO supervision. He was not permitted to go anywhere without this NCO escort while other soldiers were free to come and go as they pleased. By placing PFC Richmond in a living and work environment with others undergoing UCMJ action, the command unjustly stigmatized PFC Richmond. *See Carmel*, 4 M.J. at 748 (considering "constant, enforced association with . . . persons undergoing nonjudicial punishment," as a factor to be considered when assessing unlawful pretrial punishment).

PFC Richmond is entitled to additional credit under Article 13, UCMJ, for unlawful pretrial punishment for the actions by his chain-of-command and for the unnecessary comments made by the unit leadership. *See Latta*, 34 M.J. at 597, *United States v. Villamil-Perez*, 32 M.J. 341, 343 (CMA 1991); *Cruz*, 25 M.J. at 330. The hostile treatment was demeaning to PFC Richmond and chipped away at his presumption of innocence. *See Stamper*, 39 M.J. at 1100.

There is no set formula for calculating credit for pretrial punishment. If the military judge finds that illegal pretrial punishment occurred, he or she determines the sentence credit to which the accused is entitled. The military judge may order more than day-for-day credit for illegal pretrial punishment. *See United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983).

Additionally, under *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985), the Court should adjudge day-for-day confinement credit for time PFC Richmond was held in conditions tantamount to confinement. Whether conditions are tantamount to confinement depends on the totality of the circumstances. Factors to consider include the limits of the restriction, access to facilities, whether the soldier is singled out by the command, and whether the soldier is permitted to continue his normal assigned duties. *See United States v. Sassman*, 32 M.J. 687, 690 (A.F.C.M.R. 1991); *United States v. Russell*, 30 M.J. 977, 979 (A.C.M.R. 1990).

The actions of the command as early as 29 February 2004 are restriction tantamount to confinement. By moving PFC Richmond to a different FOB, under the circumstances of deployment, the command effectively restricted the soldier. PFC Richmond was singled-out by being forced to move to FOB Warrior. When, in a deployed environment, a soldier is reliant on his battle-buddies and his squad, PFC Richmond was moved from that secure environment. He no longer lived, worked or socialized with his squad or platoon. He had little to no contact with his platoon during the time he was at FOB Warrior. He was moved to an unfamiliar post where he knew no one. This was done as punishment to the soldier.

Several other factors contribute to the reasonable conclusion that PFC Richmond suffered restriction tantamount to confinement. The command took PFC Richmond's weapon from him on 28 February 2004. Despite repeated requests by the soldier, the command never returned any weapon to the soldier. In the Iraq Theater of Operations a weapon is a part of each soldier's assigned uniform. The obvious absence of a weapon signals to others that the particular soldier is different. Assuming arguendo, that PFC Richmond shot Mr[redacted] the shot was a well-placed shot at a specified individual for a specified reason. PFC Richmond was not a threat to those around him. He never threatened to shoot any fellow soldiers or himself. To prohibit PFC Richmond from carrying a weapon on FOB Warrior for force protection was a decision made by the command designed to punish the soldier. (b)(6)-4

Additionally, since 29 February 2004, PFC Richmond was not permitted to continue his normally assigned duties. Instead, PFC Richmond was singled out and ordered to work extra duty type details. The factor on which the court should focus is not whether the tasks performed by PFC Richmond were those normally assigned to a PFC, but rather that the tasks were assigned to PFC Richmond because he was facing UCMJ action. Absent the pending UCMJ action, PFC Richmond would have performed the duties of an 11C and other combat arms duties. He was denied the opportunity to contribute meaningfully to his platoon and was forced to do menial tasks while pending court-martial.

G. CONCLUSION

Under the totality of the circumstances, PFC Richmond's chain of command unlawfully punished him prior to trial. The defense Motion for Appropriate Relief should be granted and PFC Richmond should be awarded an appropriate amount of credit toward any approved sentence of confinement for violations of Article 13, U.C.M.J. Additionally, PFC Richmond is entitled to 154 days credit for restriction tantamount to confinement and 154 days credit for a violation of R.C.M. 305(i), for the time period of 29 February through 31 July 2004.

RESPECTFULLY SUBMITTED:

[redacted]
CPT, JA
Trial Defense Counsel

I certify this I served this defense Motion for Appropriate Relief on the government trial counsel via e-mail at [redacted]us.army.mil and on the military judge via e-mail on 16 July 2004.

(b)(6)-2
[redacted]
CPT, JA
Trial Defense Counsel

UNITED STATES	)	
	)	GOVERNMENT MOTION
v.	)	IN LIMINE I
	)	
Edward L. RICHMOND, Jr.	)	
PFC, US Army	)	
HHC, 1st Battalion, 27th Infantry	)	
25th Infantry Division (Light)	)	16 July 2004
APO AE 09347-9998	)	

Government moves *in limine* for the Military Judge to preclude the Defense in the above case from making any references, including in voir dire, testimony, evidence, and argument, before the panel to the following:

Any reference to the 18 February 2004 incident involving an IED and engagement with civilians in 1-27 Infantry's area of operations.

FACTS

Pertinent facts are:

- 18 February 2004 Incident:
  - On 18 February 2004 several members of HHC, 1-27 Infantry were engaged by an IED while traveling in a convoy through their area of operations.
  - In reaction to the IED, soldiers provided suppressive fire and then engaged civilians in nearby fields with small arms.
  - Three female civilians were shot by soldier(s) from distances between 70 and 150 meters, and one was killed.
  - An investigation indicated that SGT [redacted] fired the shots that struck the three civilians. (b)(6)-2
  - The Accused and several other potential witnesses in the instant case were involved in the incident.
  - There may have been several ROE violations from the incident.
  - Subsequent to the incident, the soldiers of 1-27 Infantry were counseled, briefed, and trained again on ROE.

- 28 February 2004 incident (the instant case):
  - During morning daylight hours on 28 February 2004, 1-27 Infantry conducted a raid inside a village within their area of operations.
  - The Accused, SGT [redacted], and other soldiers were providing perimeter/checkpoint security outside the village.
  - Upon an order from the commander to detain males outside the village, the Accused and SGT [redacted] approached a livestock herder that they had been observing for at least an hour. (b)(6)-2
  - The shepherd, [redacted], was not posing any threat.
  - The two approached [redacted], with SGT [redacted] assigning himself the duty of physically detaining [redacted] and the Accused the duty of security. (b)(6)-2
  - [redacted] cooperated until SGT [redacted] attempted to place flex cuffs on him, at which time [redacted] struggled a little with his hands.

Appellate Exhibit VI
1 of 2 017955

- The Accused, apparently at the direction of SGT [redacted] raised his weapon from 1-3 meters away to medium ready or high ready as a show of force.
- The response worked and [redacted] settled enough for SGT [redacted] to secure [redacted] arms behind his back with the flex cuffs.
- SGT [redacted] began to lead [redacted] away, slightly turning him to the left.
- After 1-2 steps the Accused shot [redacted] in the back/side of the head and killed him.

LAW & ARGUMENT

The 18 February 2004 incident is not relevant. Even if relevant its probative value would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the members; and it would be a waste of time. RCM 401-403.

[redacted]
MAJ, JA
2-25 BCT TF JA

I certify that on 16 JUL 04 this Government Motion in Limine was delivered by e-mail to Defense Counsel, CPT [redacted]

[redacted]
MAJ, JA
2-25 BCT TF JA

017956

UNITED STATES	)	
	)	
v.	)	DEFENSE RESPONSE TO
	)	GOVERNMENT MOTION
PFC Edward L. Richmond, Jr.	)	IN LIMINE I
U.S. Army	)	
Headquarters and Headquarters Co.,	)	
1st Battalion, 27th Infantry Regiment	)	
25th Infantry Division (Light)	)	20 July 2004
APO AE 09347	)	

COMES NOW the accused, PFC Edward L. Richmond, Jr., by and through counsel, to respond to the Government's Motion in Limine to preclude the defense from referencing the 18 February 2004 incident involving an IED and engagement with civilians in 1-27 Infantry's area of operations.

(b)(6)-5

A. Relief Sought

The defense respectfully requests that the government's Motion in Limine be denied. The evidence at issue meets the requirement of Military Rule of Evidence (M.R.E.) 401. The government fails to establish why introduction of such evidence is improper under M.R.E. 403.

B. Burden of Proof & Standard of Proof

As the proponent of the motion, the government bears the burden of proof by a preponderance of the evidence. Rule for Courts-Martial (R.C.M.) 905(c). On appeal, the standard of review is for an abuse of discretion. See United States v. Jenkins, 27 M.J. 209, 211 (C.M.A. 1988).

C. Facts

For the limited purpose of litigating this motion, the defense does not object to the facts as represented by the government regarding the 18 February 2004 incident. The defense objects to the government's representation of the facts regarding the 28 February 2004.

The defense supplements the government's recitation of the fact with the following important distinction: After the 18 February 2004 incident, the Rules of Engagement (ROE) that were briefed to the soldiers of 1-27th Infantry differed from the previous ROE. The ROE was not simply re-taught but also changed in between 18 February and 28 February.

D. Law

The defense relies on the following authorities in support of this responsive motion:

R.C.M. 905

Appellate Exhibit VI
1 of 4 017957

M.R.E. 401
M.R.E. 402
M.R.E. 403
United States v. Lanier, 50 M.J. 772 (A.C.C.A. 1999)
United States v. Schap, 49 M.J. 317 (C.A.A.F. 1998)
United States v. Simmons, 48 M.J. 193 (C.A.A.F. 1998)
United States v. Staley, 36 M.J. 896 (A.F.C.M.R. 1993)
United States v. Cole, 29 M.J. 873, 876 (A.F.C.M.R. 1989), aff'd, 31 M.J. 270 (C.M.A. 1990)
United States v. Jenkins, 27 M.J. 209 (C.M.A. 1988)
Department of the Army Pamphlet 27-9, para. 5-3-1, dated 1 April 2001

E. WITNESSES & EVIDENCE

The defense requests the opportunity to cross-examine any government witnesses called in support of this motion.

F. ARGUMENT

(5)(6)-5

The government asserts that the 18 February 2004 incident is not relevant. Alternatively, if relevant, the government states that the probative value would be substantially outweighed by the danger of unfair prejudice and confusion of the issues. The government believes that presentation of such evidence would mislead the members and would be a waste of time. The government fails to offer any specific argument as to why the statements should be excluded under M.R.E. 401 – 403.

For evidence to be admitted, it must be both logically and legally relevant at trial. See United States v. Simmons, 48 M.J. 193, 196 (C.A.A.F. 1998). Relevance is evaluated 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." M.R.E. 401. Generally, all relevant evidence is admissible. M.R.E. 402.

Once the threshold determination of relevancy is met, evidence may be evaluated for admissibility under M.R.E. 403. Evidence may be excluded if its prejudicial effect is "substantially outweighed" by the probative value of the evidence. The military judge is the gatekeeper for such evidence and should apply a balancing test to determine the admissibility of evidence under M.R.E. 403. See United States v. Staley, 36 M.J. 896 (A.F.C.M.R. 1993); United States v. Cole, 29 M.J. 873, 876 (A.F.C.M.R. 1989), aff'd, 31 M.J. 270 (C.M.A. 1990).

In the present case, testimony about the 18 February 2004 shooting incident is relevant as required by M.R.E. 401. The 18 February shooting incident was the catalyst for the ROE to change. The fact that the new ROE changed and was briefed in the days leading up to the 28 February 2004 killing of Mr. [redacted]s relevant to evaluating PFC Richmond's state of mind. A recognized defense to the charge of homicide is that the accused acted in defense of another or in self-defense. When evaluating such a defense, a military judge may instruct the panel: "To

(5)(6)-4

determine the accused's actual belief as to the amount of force necessary, you must view the situation through the eyes of the accused." Department of the Army Pamphlet 27-9, para. 5-3-1, dated 1 April 2001 [hereinafter "DA Pam."]; see also United States v. Lanier, 50 M.J. 772, 776 (A.C.C.A. 1999)(noting the military judge gave the proper defense of another instruction that "correctly oriented the members to view the situation through appellant's eyes"). In viewing the situation through the eyes of the accused, the trier-of-fact may consider any unlimited number of factors, to include: age, intelligence and emotional control. DA Pam. 27-9, para. 5-3-1. In the present case, PFC Richmond's knowledge of the mission ROE is relevant to evaluating the situation from the eyes of the accused.

(b)(6)-5

Additionally, testimony about the 18 February 2004 shooting incident is legally relevant as required by M.R.E. 403, as the probative value greatly outweighs any prejudicial effect. The government fails to state the prejudicial effect of the admissibility of the statement and fails to name who would be prejudiced by their admissibility. Further, the government has failed to allege how the members would be mislead or confused by the presentation of testimony regarding the 18 February shooting incident. Ultimately, any such minor confusion can be clarified or distinguished by the military judge at the instructions phase of the case. See United States v. Schap, 49 M.J. 317, 324 (C.A.A.F. 1998) (upholding the military judge's explanation in instructions to the panel).

G. Conclusion

The government has failed to meet its burden to show why evidence of the 18 February 2004 incident is inadmissible. The 18 February 2004 incident is relevant under M.R.E. 401 and admissible under M.R.E. 402 and 403. The defense respectfully request that the government Motion in Limine be denied.

RESPECTFULLY SUBMITTED:

(b)(6)-2

[redacted]
CPT, JA
Trial Defense Counsel

CERTIFICATE OF SERVICE

I certify this I served this Defense Response to Government Motion in Limine I on the government trial counsel via e-mail at [redacted]us.army.mil and on the military judge via e-mail on 20 July 2004.

(5)(6)-2

[redacted]
CPT, JA
Trial Defense Counsel

UNITED STATES	)	
	)	GOVERNMENT MOTION
v.	)	IN LIMINE II
	)	
Edward L. RICHMOND, Jr.	)	
PFC, US Army	)	
HHC, 1st Battalion, 27th Infantry	)	
25th Infantry Division (Light)	)	16 July 2004
APO AE 09347-9998	)	

Government moves *in limine* for the Military Judge to preclude the Defense in the above case from making any references, including in voir dire, testimony, evidence, and argument, before the panel to the following:

(b)(6)-2

Any reference to the **alleged** order by company commander CPT [redacted] to shoot all males fleeing a village during the 28 February 2004 raid operation in 1-27 Infantry's area of operations.

FACTS

Pertinent facts are:

(b)(6)-2

- In preparation for a raid inside a village in the 1-27 Infantry area of operations, on 27 February 2004 Alpha Company Commander CPT [redacted] briefed the operation to participating leaders, including SGT [redacted], an HHC Squad Leader.
- SGT [redacted] understood CPT [redacted] to have briefed the normal ROE for the operation, except SGT [redacted] believed that CPT [redacted] added that soldiers were to shoot all males fleeing the village during the raid (or words to that effect).
- In turn, SGT [redacted] briefed the soldiers assigned to him for the operation, including the Accused. SGT [redacted] told the soldiers about his understanding that they were to shoot males fleeing the village during the raid. However, SGT [redacted] told his soldiers, including the Accused, that he (SGT [redacted]) would decide if any of them were to shoot fleeing males.
- During the morning hours on 28 February 2004, 1-27 Infantry conducted the raid inside the village.

(b)(6)-2

- The Accused, SGT [redacted], and other soldiers were providing perimeter/checkpoint security outside the village.
- At some point when the sun rose, an unarmed civilian shepherd walked out of the village with his group of cows. SGT [redacted] and his soldiers observed the man, who obviously was not in the process of fleeing.

(b)(6)-2

- The Accused asked SGT [redacted] if he could shoot the shepherd. SGT [redacted] told the Accused no.
- The shepherd watched the cows as the soldiers continued to observe him for at least an hour, when an order from the commander to detain males outside the village came over the radio.

(b)(6)-2

- The Accused and SGT [redacted] approached the civilian shepherd, who had not run, fled, or posed any threat at all. The shepherd's name was later learned to be [redacted]

(b)(6)-4

Appellate Exhibit VII
1 & 2

- The two approached [redacted] with SGT [redacted] assigning himself the duty of physically detaining [redacted] and the Accused the duty of security.
- [redacted] cooperated until SGT [redacted] attempted to place flex cuffs on him, at which time [redacted] struggled a little with his hands.
- The Accused, apparently at the direction of SGT [redacted], raised his weapon from 1-3 meters away to medium ready or high ready as a show of force.
- The response worked and [redacted] settled enough for SGT [redacted] to secure [redacted] arms behind his back with the flex cuffs.
- SGT [redacted] began to lead [redacted] away, slightly turning him to the left.
- After 1-2 steps the Accused shot [redacted] in the back/side of the head and killed him.
- [redacted] never exhibited any intention or act to flee the village or the custody of the soldiers.

LAW & ARGUMENT

The alleged order from CPT [redacted] is not relevant. Even if relevant its probative value would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the members; and it would be a waste of time. RCM 401-403.

[redacted]
MAJ, JA
2-25 BCT TF JA

I certify that on 16 JUL 04 this Government Motion in Limine was delivered by e-mail to Defense Counsel, CPT [redacted]

[redacted]
MAJ, JA
2-25 BCT TF JA

017962

UNITED STATES	)	
	)	
v.	)	DEFENSE RESPONSE TO
	)	GOVERNMENT MOTION
PFC Edward L. Richmond, Jr.	)	IN LIMINE II
U.S. Army	)	
Headquarters and Headquarters Co.,	)	
1st Battalion, 27th Infantry Regiment	)	
25th Infantry Division (Light)	)	19 July 2004
APO AE 09347	)	

COMES NOW the accused, PFC Edward L. Richmond, Jr., by and through counsel, to respond to the Government's Motion in Limine to preclude the defense from referencing an alleged order by CPT [redacted] to "shoot all males fleeing the village."

(5)(61-2

A. Relief Sought

The defense respectfully requests that the government's Motion in Limine be denied. The evidence at issue meets the requirement of Military Rule of Evidence (M.R.E.) 401. The government fails to establish why introduction of such evidence is improper under M.R.E. 403.

B. Burden of Proof & Standard of Proof

As the proponent of the motion, the government bears the burden of proof by a preponderance of the evidence. Rule for Courts-Martial (R.C.M.) 905(c). On appeal, the standard of review is for an abuse of discretion. See United States v. Jenkins, 27 M.J. 209, 211 (C.M.A. 1988).

C. Facts

(5)(61-2

On 27 February 2004, Headquarters and Headquarters Company, 1-27 Infantry, tasked SGT [redacted] Mortars Platoon, to join a mission lead by A Company, 1-27 Infantry. Late in the evening of 27 February 2004, SGT [redacted] attended a pre-mission briefing. At the briefing, the A Company Commander, CPT [redacted], told the soldiers words to the effect of, "if there are any males fleeing the village, shoot them," or "put them down."

After the briefing, SGT [redacted] returned to his platoon area to brief the 4 or 5 soldiers that would be joining him on the mission. These soldiers did not attend the briefing by CPT [redacted] SGT [redacted] briefed these soldiers that CPT [redacted] had announced that if anyone was fleeing the village or running across the field that the soldiers were to shoot that person. PFC Edward L. Richmond, Jr., attending this briefing and heard SGT [redacted] instructions. Other soldiers, including SPC [redacted] also attended the briefing and heard SGT [redacted] instructions.

(5)(61-2

Appellate Exhibit IX
1 of 4

D. LAW

The defense relies on the following authorities in support of this responsive motion:

R.C.M. 905
M.R.E. 401
M.R.E. 402
M.R.E. 403
United States v. Lanier, 50 M.J. 772 (A.C.C.A. 1999)
United States v. Schap, 49 M.J. 317 (C.A.A.F. 1998)
United States v. Simmons, 48 M.J. 193 (C.A.A.F. 1998)
United States v. Staley, 36 M.J. 896 (A.F.C.M.R. 1993)
United States v. Cole, 29 M.J. 873, 876 (A.F.C.M.R. 1989), aff'd, 31 M.J. 270 (C.M.A. 1990)
United States v. Jenkins, 27 M.J. 209 (C.M.A. 1988)
Department of the Army Pamphlet 27-9, para. 5-3-1, dated 1 April 2001

E. WITNESSES & EVIDENCE

The defense requests the opportunity to cross-examine any government witnesses called in support of this motion.

F. ARGUMENT

(b)(6)-2

The government asserts that the statements by CPT [redacted] are not relevant. Alternatively, if relevant, the government states that the probative value would be substantially outweighed by the danger of unfair prejudice and confusion of the issues. The government believes that presentation of such evidence would mislead the members and would be a waste of time. The government fails to offer any specific argument as to why the statements should be excluded under M.R.E. 401 – 403.

For evidence to be admitted, it must be both logically and legally relevant at trial. See United States v. Simmons, 48 M.J. 193, 196 (C.A.A.F. 1998). Relevance is evaluated 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." M.R.E. 401. Generally, all relevant evidence is admissible. M.R.E. 402.

Once the threshold determination of relevancy is met, evidence may be evaluated for admissibility under M.R.E. 403. Evidence may be excluded if its prejudicial effect is "substantially outweighed" by the probative value of the evidence. The military judge is the gatekeeper for such evidence and should apply a balancing test to determine the admissibility of evidence under M.R.E. 403. See United States v. Staley, 36 M.J. 896 (A.F.C.M.R. 1993); United States v. Cole, 29 M.J. 873, 876 (A.F.C.M.R. 1989), aff'd, 31 M.J. 270 (C.M.A. 1990).

(5)(6)-2

In the present case, the statements made by CPT [redacted] are relevant as required by M.R.E. 401 because they are logically related to the charged offenses. Evidence that CPT [redacted] briefed soldiers to "shoot all males fleeing the village," and to "put them down" is relevant to the charge of murder. A recognized defense to the charge of homicide is that the accused acted in defense of another or in self-defense. When evaluating such a defense, a military judge may instruct the panel: "To determine the accused's actual belief as to the amount of force necessary, you must view the situation through the eyes of the accused." Department of the Army Pamphlet 27-9, para. 5-3-1, dated 1 April 2001 [hereinafter "DA Pam."]; see also United States v. Lanier, 50 M.J. 772, 776 (A.C.C.A. 1999)(noting the military judge gave the proper defense of another instruction that "correctly oriented the members to view the situation through appellant's eyes"). In viewing the situation through the eyes of the accused, the trier-of-fact may consider any unlimited number of factors, to include: age, intelligence and emotional control. DA Pam. 27-9, para. 5-3-1. In the present case, the accused's knowledge of the mission objective and Rules of Engagement (ROE) for the mission are all relevant to evaluating the situation from the eyes of the accused.

(5)(6)-2

Additionally, CPT [redacted] statements are legally relevant as required by M.R.E. 403, as their probative value greatly outweighs any prejudicial effect. The government fails to state the prejudicial effect of the admissibility of the statement and fails to name who would be prejudiced by their admissibility. Further, the government has failed to allege how the members would be mislead or confused by the presentation of testimony regarding CPT [redacted] (5)(6)-2 statement. Ultimately, any such minor confusion can be clarified, delimited or expounded upon by the military judge at the instructions phase of the cases. See United States v. Schap, 49 M.J. 317, 324 (C.A.A.F. 1998) (upholding the military judge's explanation in instructions to the panel).

G. CONCLUSION

The government has failed to meet its burden to show why CPT [redacted] statements are inadmissible. The statements are both relevant under M.R.E. 401 and admissible under M.R.E. 402 and 403. The defense respectfully request that the government Motion in Limine be denied.

RESPECTFULLY SUBMITTED:

(5)(6)-2

[redacted]
CPT, JA
Trial Defense Counsel

CERTIFICATE OF SERVICE

I certify this I served this Defense Response to Government Motion in Limine II on the government trial counsel via e-mail at [redacted]@us.army.mil and on the military judge via e-mail on 19 July 2004.

(b)(6)-2

[redacted]
CPT, JA
Trial Defense Counsel

UNITED STATES	)	
	)	
v.	)	FINDINGS OF THE COURT
	)	
RICHMOND, Edward L., Jr. PFC, U.S. Army HHC, 1/27th IN APO AE 09347	)	DEFENSE MOTION TO SUPPRESS

3 August 2004

The Defense Motion to Suppress is denied.

I make the following findings:

1. The accused is a 20-year old infantry mortarman, who completed 10 years of education and holds a General Education Diploma from high school. He had been in trouble with the law several times before coming on active duty. He had been read his rights 2 or 3 times in the past by law enforcement officials, but does not recall whether he invoked his rights or talked to investigators in the past. As a child, the accused was diagnosed with Attention Deficit Hyperactive Disorder, which he describes as causing him to make quick decisions without thinking.

2. On 28 February 2004, the accused was involved in an incident at Taal Al Jal. During a raid on the town, the accused, while pulling perimeter security, shot and killed an Iraqi farmer. The accused subsequently came under investigation for murder.

3. On 1 March 2004, the accused was advised of his rights under Article 31, UCMJ, using a DA Form 3881 Rights Warning Procedure/Waiver Certificate. The accused waived his rights to remain silent or obtain a lawyer and gave a sworn written statement to CID investigators. At that time, the accused indicated that he would be willing to take a polygraph examination.

4. The accused did not hear back from CID or any other law enforcement personnel until 28 March 2004. On 28 March 2004, the accused was told by his supervisors to go to "legal" tomorrow. He was not told why to report to "legal."

5. The next day, 29 March 2004, when the accused arrived at "legal," he was introduced to Special [redacted], a polygrapher who has traveled from Tikrit to Kirkuk (FOB Warrior) to conduct a polygraph examination of the accused. The accused knew that SA [redacted] was a law enforcement official in a position of authority and that he outranked the accused. SA [redacted] was friendly with the accused. SA [redacted] advised the accused of his rights again using a DA Form 3881 Rights Warning Procedure/Waiver Certificate. The accused waived his rights and stated that he was willing to talk to SA [redacted] The accused understood his rights and specifically understood that he could have (a) stopped the interview at any time and (b) asked for a lawyer at any time. The accused understood that he did not have to stay. The accused wanted to take and pass the polygraph.

017967

Appellate Exhibit X
1 of 4

6. SA [redacted] then explained to the accused the polygraph examination procedures, and obtained the accused's consent to take part in a polygraph examination. SA [redacted] then took biographical medical information from the accused to make sure he was not on any medication, that he felt all right – to satisfy the agent that there were no medical reasons not to conduct the examination. (5)(61-1)

7. SA [redacted] then talked briefly with the accused about the case, went over the list of questions to be used during the examination, and took a break before administering the polygraph. After the break, SA [redacted] did a practice test to calibrate the machine, then conducted the examination, going over the relevant questions three times.

8. At the conclusion of the examination, SA [redacted] reviewed the results and determined that the accused's test results were either inconclusive or failed. He then informed the accused "you did not pass the test." From that, the accused concluded that he must have failed the test. The accused asked which questions he failed. SA [redacted] explained that he could not tell which particular questions the accused failed, but that overall, the accused did not pass the test. (5)(61-1)

9. The accused then talked to SA [redacted] about the events of 28 February 2004. The accused did not change his statement about the events right away, but eventually did so. He and [redacted] also re-enacted the events of the shooting – role-playing where the accused was and where the farmer was at the time of the shooting. At 1419, the accused signed a sworn written statement regarding the events of 28 February 2004. This statement differed in several respects from the initial statement made by the accused on 1 March 2004. Some of the key differences included the following:

a. The accused stated that the farmer turned away and left his sights, explaining that the farmer might not have lunged at SGT [redacted] (5)(6-2)

b. The accused stated that, thinking back on it, he must have known the farmer had flexicuffs on but that it didn't "register" in his mind;

c. The accused stated that the adrenaline was flowing and that because of that he may not have perceived everything clearly.

10. At some point, SA [redacted] told the accused that he was there to help him tell the truth. SA [redacted] also told the accused that the results of the polygraph would be admissible against him in court if the judge allowed it. SA [redacted] explained to the accused that he should explain himself. (5)(61-1)

11. The room in which the interview took place was a room with a conference table, several folding chairs, an easy chair, an entryway with a door that would not remain shut, a balcony at the far end, windows, with drapes, some boxes, a wall locker, and a fan. The room was not very clean and was most likely normally used as a day room or "hang-out" room. The temperature was comfortable – not too hot, but not too cold. On the conference table was SA [redacted] laptop computer, the polygraph box and cables leading off of the box. The accused sat on a folding (5)(61-1)

chair, as did SA [redacted] except during the taking of the test, at which time the accused was seated on the easy chair.

12. The entire process, start to finish, was observed by SA [redacted]

13. The accused had a friendly, professional, calm, and confident demeanor throughout the time he was with SA [redacted] and S [redacted] In testimony before the court on this motion, the accused exhibited a similar demeanor. The accused is a strong-willed person who speaks his mind.

14. During the pre-test interview, SA [redacted] asked the accused if he had ever been charged with anything in the past. The accused replied that he had and that it related to drugs. The accused told SA [redacted] hat if he wanted to ask the accused about that, the accused wanted to talk to a lawyer first. SA [redacted] then stopped talking to the accused about the prior misconduct and focused on the events of 28 February 2004. I conclude that the accused did not ask to talk to a lawyer before answering questions or talking to a law enforcement investigator about the events of 28 February 2004. SA Huston did not violate the accused's right to talk to a lawyer about these events by continuing his interview/interrogation after the accused's statement. It was clear to the accused and the investigator that the accused's desire to talk to a lawyer related only to the prior drug offenses, which were not the subject of this interview and interrogation.[1] In the accused's words, he "wanted to be as forthcoming as he could to help with the investigation, but didn't want to talk about the drugs subject."

(b)(6)-1

15. During the post-polygraph interview, SA [redacted] suggested several theories of what might have happened on 28 February 2004 and asked the accused if any of them were true. The accused, fairly forcefully, corrected SA [redacted], explaining several times that "that's not the way I remember it." For example, the accused told SA [redacted] that it was not an accident, as SA [redacted] suggested. The accused wanted to make the post-polygraph statement to help explain why he might have failed the polygraph examination. The accused thought it was in his best interest to cooperate.

16. During the four hours that the accused was with SA [redacted], he was permitted to take several breaks – cigarette breaks, and restroom breaks. He was also provided water and an MRE to eat.

17. Neither SA [redacted], nor SA [redacted] made any promises to the accused to get him to confess. Nor did either agent make any threats or in any way touch or coerce the accused to make a statement.

18. The accused read his typewritten statement after it was printed out, initialed the places he was told to initial, then swore to the statement, and signed it. At the end, the accused shook hands with SA [redacted] and left on a cordial note.

---

[1] I note that the defense, in written pleadings and oral arguments, concedes that the accused did not make a request to talk to a lawyer regarding the charge of murder under investigation. The defense does not make an allegation of a violation of the accused's right to counsel, nor do I find one under the facts of this case. Rather, I find that the government has proven by a preponderance of the evidence that the accused did not invoke his right to counsel as to the charge of murder then under investigation.

Analysis and conclusions:

I conclude, based on the totality of the circumstances, that the government has met its burden of proving by a preponderance of the evidence that the accused's typewritten sworn statement to SA [redacted] given on 29 March 2004 was voluntary and is admissible against him. The accused knowingly, intelligently, and consciously waived his right to remain silent and right to obtain an attorney before talking to law enforcement investigators on 29 March 2004 about the shooting which occurred on 28 February 2004.

I specifically find that the accused's decision to talk to SA [redacted] after the polygraph examination, and to render the second sworn written statement to CID was made by him because he wanted to tell the truth, tell what he knew, and assist in the investigation. I find the accused to be an intelligent, articulate soldier. He has a greater knowledge of and experience with the process of rights advisement than most soldiers his age. He is not a newcomer to the system. I further find that the accused is a strong enough person to have told investigators that he did not want to talk to them or to have demanded to talk to a lawyer about these allegations first before talking to investigators if that was what he wanted to do. Indeed, the accused shut down SA [redacted] when SA [redacted] wanted to ask about the prior drug offenses. Further, the accused corrected SA [redacted] when SA [redacted] was suggesting possible scenarios for the shooting. This accused is a savvy soldier who made his statement because it was something he wanted to do.

(5)(6)-1

The statement was not the product of coercion by law enforcement investigators. I do not find that SA [redacted] over-stepped his bounds in this case. SA [redacted] did not lie to the accused when he told him, "you did not pass the test." SA [redacted] did, however, let the accused assume that he thus failed the test. I do not find this to be an abhorrent police interrogation technique. Nor to I find SA [redacted] promise to help the accused tell the truth to be a technique which was either designed to overbear the accused's free will, nor did it, in fact, do so. Throughout the process, SA [redacted] maintained a cordial, friendly relationship with the accused, did not pressure the accused in any way, and let the accused give his version of the events of 28 February 2004 in his own way. Certainly, I find no actions by SA [redacted] or SA [redacted] which offend my sense of due process in this case.

Here, the statement made by the accused on 29 March 2004 was the product of an essentially free and unconstrained choice by him. The accused wanted to help investigators, wanted to tell the truth, and wanted to assist in the investigation, in his words. The accused's will was not overborne and his capacity for self-determination was not critically impaired.

The government may introduce Prosecution Exhibits 3 and 4 against the accused at this court-martial. The defense is free to raise the issue of voluntariness of the statement with the members if it chooses to do so.

(5)(6)-2

[redacted]
LTC, JA
Circuit Judge

UNITED STATES	)	
	)	
v.	)	FINDINGS OF THE COURT
	)	
RICHMOND, Edward L., Jr. PFC, U.S. Army HHC, 1/27th IN APO AE 09347	))))	DEFENSE MOTION FOR APPROPRIATE RELIEF

3 August 2004

The Defense Motion for Appropriate Relief to grant credit for a violation of Article 13, UCMJ, for restriction tantamount to confinement, and for a violation of R.C.M. 305 is granted in part and denied in part.

I make the following findings and conclusions: (b)(6)-4

1. On 28 February 2004, the accused shot Mr. [redacted], an Iraqi national. That afternoon, he was confined to a tent and guarded by an NCO. That night, he slept on the floor of his squad leader's container. The next day, he was moved from Forward Operating Base (FOB) McHenry to FOB Warrior. I conclude that the accused was effectively confined on 28 and 29 February and that he is entitled to 2 days credit for such confinement.

2. From 29 February to the present, the accused has been living at FOB Warrior. He is not performing MOS duties (11C – mortarman). Indeed, all members of his platoon remain at FOB McHenry. I find that the defense has failed to meet their burden of proving by a preponderance of the evidence that the accused was moved to FOB Warrior as a form of punishment for the crime of which he is accused. Indeed, there are many more plausible reasons for why the Battalion Commander ordered the accused to be transferred to FOB Warrior. I find it likely that the commander wanted to (a) prevent any acts against the accused by soldiers who were likely upset over the events of 28 February 2004[1], (b) segregate the accused from other witnesses to prevent changing of testimony, (c) transfer the accused to the rear support elements who had better ability to maintain supervision and control over him, or (d) better ensure the accused's safety, given his decision to remove the accused's weapon. Any or all of those reasons for the transfer would serve legitimate government interests and not be illegal punishment under Article 13, UCMJ.

3. Since 29 February, the accused has performed details as assigned daily by his chain of command. Those details involve such things as filling sandbags and placing them, police call, PMCS, area beautification, and mail call. I find no evidence to suggest that the duties performed by the accused are punishment. Rather, I find that the duties he has performed are commensurate with his rank and are, in fact, the norm for many soldiers in the accused's situation. I believe the company commander when he says the duties performed by the accused were legitimate duties

(b)(6)-2

[1] For example, 1LT [redacted] who was also living at FOB McHenry, testified that he was very upset by the events of 28 February 2004. If the accused had been on FOB McHenry, the likelihood of an encounter such as that which occurred on FOB Warrior on 8 April 2004 was great.

017971

Appellate Exhibit XI
1 of 4

and that he did not intend "to smoke" the accused. The duties given were not intended to punish the accused. Many days, the accused was not fully employed during the day and was able to use the Internet cafe or do as he pleased. Finally, the accused was permitted specially to have a private space every day from 1100 to 1200 in order to work on his case and assist in his defense. The accused was, arguably, treated better than other infantry soldiers assigned to 1/27 Infantry. Again, the defense has failed to prove by a preponderance of the evidence that the accused's details were either intended to be, or were, illegal punishment under Article 13, UCMJ.

4. FOB Warrior is a better place to be than FOB McHenry. FOB McHenry is a tiny FOB. It is frequently subject to attack by mortars. The Dining Facility (DFAC) is in a tent. There is no PX, no medical unit, and limited MWR. FOB Warrior is a large FOB. There is a PX, hard shell DFAC, medical and triage units, an Internet Cafe, an Education Center, an MWR facility, a gymnasium, telephone facilities, and a laundry point. FOB Warrior is not attacked as often as FOB McHenry.

5. After the shooting, on 28 February 2004, the accused's assigned weapon, an M4 with M68 scope, was taken from him. I find this action to be a reasonable response on the part of the chain of command. The accused had just fired that same weapon in an alleged criminal act. It would have been irresponsible to put a weapon with ammunition back into his hands. The defense has not proven by a preponderance of the evidence that the decision to remove the accused's weapon from him was either intended to be, or was, illegal punishment under Article 13, UCMJ. I further find that it was not necessary for the accused to have a weapon while on FOB Warrior. Many other people stationed on FOB Warrior did not carry weapons – [redacted] contractors, interpreters, and other civilians did not carry weapons. Neither the accused, nor those people, were inherently in danger because they did not have a weapon. Indeed, the accused did not have to defend himself while on FOB Warrior.

6. Initially on FOB Warrior, the accused lived in the ALOC. He had his own room. Several other soldiers lived in the ALOC; the accused was treated well by living there. Later, the accused was moved into a container unit with SGT [redacted] He lived with SGT [redacted] for approximately 30 days. Upon the accused's request, joined in by his defense counsel, the commander moved the accused out of SGT [redacted] container unit and into a container unit occupied by PVT [redacted] and PVT [redacted] Private [redacted] was then pending UCMJ action for AWOL. Private [redacted] was then pending a chapter discharge from the Army due to a pattern of misconduct. The accused was then pending court-martial charges. I find the command's decision to put the three together to maintain supervision and control over them to be a reasonable decision. I do not find that the living arrangements made for the accused in any way rise to a level of illegal punishment under Article 13, UCMJ.

7. For one 30 day period, the accused was directly supervised by and lived with SGT [redacted] The company commander's stated purpose for making those arrangements was to (a) have SGT [redacted] an NCO, take charge of and supervise the accused, along with PVT [redacted] and PVT [redacted] and (b) ensure that if anyone gave the accused any trouble, they would have to answer to SGT [redacted] During that 30 day period, SGT [redacted] dictated where the accused could go and when. The accused shadowed SGT [redacted] everywhere. Although the Brigade had a policy that wherever soldiers go on the FOB, they had to have a buddy, that policy was not always enforced. Further,

(b)(6)-2

only the accused was required to have an NCO as his buddy rather than a peer. The effect of SGT [redacted] being the accused's "buddy" for purposes of the policy was to have 24 hour supervision by an NCO who restricted the accused's freedom of movement. I find that for that 30 day period, the limitations on the accused's liberty rose to the level of restriction tantamount to confinement and differed significantly from the everyday level of restraint imposed upon other soldiers assigned at FOB Warrior. The accused is entitled to 30 days credit for that restriction tantamount to confinement.

8. Given the Brigade policy, however, and given that all soldiers are restricted to the FOB, I find it unreasonable to require that the command recognize that the level of restriction for that 30 day period rose to the level of *de facto* confinement. The command was thus not required to hold a magistrate's hearing either pursuant to United States v. Rexroat or pursuant to R.C.M. 305 to review the legality of such restriction.

9. The accused was permitted to use the telephone whenever he wanted, to use the Internet Cafe often, and to consult with his defense counsel upon request.

10. On one occasion, the accused left FOB Warrior (Kirkuk) by convoy to FOB Danger (Tikrit). He asked to have a weapon for the trip, but was denied. I find the command's decision to not issue the accused a weapon for that trip to be reasonable. Again, the accused was charged with a crime involving misuse of his weapon; it would not have been responsible to put a weapon and ammunition back into his hands while pending this charge. I further find that the accused was not in undue risk while on the convoy. The accused was situated similarly to others who do not carry weapons – contractors, civilian drivers, and Iraqi interpreters. The convoy had gun trucks providing security. Most of the soldiers accompanying the convoy were armed with ammunition. The accused rode in an up-armor HMMWV. The accused was as safe as everyone else on the convoy. He is not entitled to credit against his term of confinement for that trip.

11. On one occasion, the accused was required to hand-pull weeds with his E-tool after the weedeater he was using broke. Several days earlier, NCOs in his company had hand-pulled weeds in the front of the same building. I do not find that the requirement for the accused to pull weeds with his E-tool was punishment under Article 13, UCMJ.

12. On or about 8 April 2004, 1LT [redacted] saw the accused in the ALOC on FOB Warrior. 1LT [redacted] called the accused a "murderer" in a tone of voice loud enough for the 10-15 soldiers in the area to hear. 1LT [redacted] then, on his own initiative, showed photographs he had taken of the dead victim in this case to the soldiers in the ALOC. The accused is presumed innocent until proven guilty. He is not to be called a "murderer" until and unless he is found guilty of the charge of murder. Although 1LT [redacted] not in the accused's chain of command, he is a commissioned officer with authority over the accused and the other enlisted soldiers in the area. I find that 1LT [redacted] actions were degrading and improper. The accused will be credited with 10 days credit for this violation of Article 13, UCMJ.

(b)(6)-2

13. In late June or early July, members of HHC, 1/27 IN, were standing outside the medical facility on FOB Warrior waiting for their anthrax shots. First Sergeant [redacted] started listing off the sections to ensure everyone's presence. He stated, "Commo?" "Support?" "S-1?" "S-4?"

017973

(b)(6)-2

At the end 1SG [redacted] turned to the accused and PVT [redacted] and said, "Criminals?" The government concedes that 1SG [redacted] actions were improper and recommends that the accused be credited with 5 days credit against his term of confinement for a violation of Article 13, UCMJ. I agree.

To summarize, the accused is entitled to the following:

Time frame	Reason	Days Credit
28-29 Feb 04	RTTC[2]	2
April 04	RTTC	30
8 Apr 04	Art. 13	10
late June, early Jul 04	Art. 13	5
Total credit:		47 days

(b)(6)-2

[redacted]
LTC, JA
Circuit Judge

[2] Restriction Tantamount to Confinement

017974

UNITED STATES	)	
	)	
v.	)	FINDINGS OF THE COURT
	)	
RICHMOND, Edward L., Jr. PFC, U.S. Army HHC, 1/27th IN APO AE 09347	))))	GOVERNMENT MOTION IN LIMINE I (18 Feb 04 IED Incident)

3 August 2004

The Government Motion in Limine I to preclude reference to an 18 February 2004 incident involving an IED and engagement with civilians in 1/27 IN's area of operations is denied.

I make the following findings:

(b)(6)-5

1. On 18 February 2004, several members of HHC, 1/27 IN were engaged by an IED while traveling in a convoy through their area of operations (AO). In reaction, soldiers provided (b)(6)-2 suppressive fire and then engaged with small arms civilians in a nearby field. Sergeant [redacted] fired shots that apparently hit three female civilians, killing one. The accused was part of the convoy. Sergeant [redacted] was subsequently investigated for his actions. No action has been taken against SGT [redacted] date.

(b)(6)-2

2. After the 18 February 2004 incident, the Battalion counseled, briefed, and trained all 1/27 IN soldiers again on the Rules of Engagement (ROE).

3. On 27 February 2004, SGT [redacted] briefed the accused and several other soldiers from the mortar platoon regarding their role the next day to provide security for a raid being conducted by A Company, 1/27 IN in a village in their AO.

4. On 28 February 2004, the accused, SGT [redacted] and others provided perimeter security for A Company's raid. Upon an order from the Commander to detain males outside the village, the accused and SGT [redacted] approached a livestock herder that they had been observing for at least an hour. The herder, Mr. [redacted], cooperated until SGT [redacted] went to put flex cuffs on him. When Mr. [redacted] struggled, the accused raised his weapon as a show of force. Mr. [redacted] stopped resisting and SGT [redacted] put the flex cuffs on Mr. [redacted]. Shortly thereafter, the accused shot Mr. [redacted] killing him.

(b)(6)-4 (b)(6)-2 (b)(6)-4 (b)(6)-2 (b)(6)-7

Analysis and Conclusions:

The government argues that the events of 18 February 2004 are not relevant to the charge pending against the accused. I disagree. I find that the events of 18 February 2004 are relevant to several issues in this case.

First, because the accused was present during the 18 February 2004 shooting, that event is relevant to the accused's state of mind only 10 days later when again engaging a civilian in a

017975

Appellate Exhibit XII
1 of 2

nearby village. The accused's state of mind is directly in issue in deciding any issue of either self-defense, or defense of others, which I expect to be raised by the evidence in this case.

Second, the events of 18 February 2004 apparently led to additional training on the ROE, which the accused received before he went on the raid of 28 February 2004. The accused's understanding of the rules of engagement is relevant to whether his actions on 28 February 2004 were criminal or not.

Third, the events of 18 February 2004 are relevant to explain the actions of SGT [redacted] on 28 February 2004. Sergeant [redacted] is the primary witness against the accused in this case. The defense is entitled to cast doubt upon SGT [redacted] credibility by suggesting that he is biased against the accused and in favor of the government because it was in his best interest to assist the government so that nothing bad would happen to him (SGT [redacted] from the 18 February 2004 incident. (5)(6)-2

I am concerned that this court-martial not turn into a trial of SGT [redacted] or any allegations of wrongdoing from the events of 18 February 2004. That will not happen. I am convinced, however, that the relevance of the 18 February events is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members. Further, presentation of this evidence will not delay the case, waste the court's time or present cumulative evidence.

To ensure that this court-martial not be bogged down by substantial evidence on a tangential issue, however, the defense is on notice that the limited inquiry they requested in their proffer is the extent to which I will permit questioning about this incident. The defense is then free to argue to the members how that incident should color the members view of either (a) SGT [redacted] testimony, or (b) the accused's perception of his actions on 28 February 2004.
(5)(6)-2

As a reminder, the defense proferred that its line of questioning to SGT [redacted] would be to the effect of the following: (5)(6)-2

1. Isn't it true that, on 28 February 2004, you were under investigation for shooting three civilians after the convoy you were on was struck by an IED 10 days earlier?
2. In fact, one of those civilians was killed, wasn't she?
3. On 28 February 2004, that investigation was not yet complete, was it?
4. You were the only subject of that investigation, weren't you?

If either party believes further inquiry or details must be elicited in the interest of justice, beyond that line of questioning above, you are instructed to request an Article 39(a) session to obtain a ruling from me before asking such additional questions.

[redacted] (5)(6)-2
LTC, JA
Circuit Judge

UNITED STATES	)	
	)	
v.	)	FINDINGS OF THE COURT
	)	
RICHMOND, Edward L., Jr. PFC, U.S. Army HHC, 1/27th IN APO AE 09347	))))	GOVERNMENT MOTION IN LIMINE II (Alleged order by A Co Commander to shoot males fleeing village)

3 August 2004

The Government Motion in Limine II to preclude reference to an alleged order by the A Company Commander to shoot all males fleeing a village during the raid of 28 February 2004 is denied.

I make the following findings:

1. On 27 February 2004, the A Company Commander, CPT, briefed the mission the company had for the next day which was to conduct a raid on a village in the 1/27 area of operations (AO). SGT was at that briefing.

2. SGT understood CPT to have briefed the then-existing rules of engagement (ROE), but also believed that CPT had briefed that all males fleeing the village during the raid would be shot, or "put down," or words to that effect.

3. SGT in turn, briefed the soldiers assigned to him for the raid, including the accused. SGT told his soldiers that they were authorized to shoot any males fleeing the village, but stated that he (SGT would decide if any of them were to shoot anyone.

4. On 28 February 2004, the accused, SGT and others provided perimeter security for A Company's raid. After sunrise, the accused and SGT watched an Iraqi man walk out of the village with his cows. The accused asked SGT if he could shoot the man. SGT told the accused, "No." The accused and SGT observed the man for at least an hour.

5. Shortly thereafter, the Commander ordered his soldiers to detain males outside the village. The accused and SGT approached the cow herder. The herder, Mr cooperated until SGT went to put flex cuffs on him. When Mr struggled, the accused raised his weapon as a show of force. Mr. stopped resisting and SGT put the flex cuffs on Mr. Shortly thereafter, the accused shot Mr killing him.

Analysis and Conclusions:

The government argues that alleged order by CPT to shoot all males fleeing the village is not relevant to the charge pending against the accused. I disagree. I find that it is relevant to several issues in this case.

Appellate Exhibit XIII

First, the order is part of the *res gestae* of this case. It is evidence inextricably part of the events of 28 February 2004 and would be relevant on that ground alone.

Second, to the extent that the accused was aware of the Commander's authorization to shoot all males fleeing the village, or believed that authorization to have been given, it is relevant to the accused's state of mind at the time that he shot Mr. [redacted] For the defense of self-defense or the defense of others, the accused's state of mind is directly relevant. I anticipate those defenses may be raised in this case. (b)(6)-1

The government argues that if evidence of this alleged order or authorization is brought before the members, they will jump to the conclusion that the Company Commander authorized a violation of the ROE. The government further argues that the members will thereby be misled and confuse the issues. I disagree. The members are smart enough not to automatically jump to that conclusion. In addition, I can clarify in instructions that the members are not to speculate on whether (a) the order or authorization was actually given, or (b) whether such order was or is a violation of the ROE. I can instruct the members to make certain they use that information for proper purposes. Toward that end, counsel are encouraged to suggest appropriate instruction on this issue depending upon how the evidence shapes up at trial.

[redacted] (b)(6)-2
LTC, JA
Circuit Judge

017973

UNITED STATES	)	
	)	FLYER
v.	)	
	)	
Edward L. RICHMOND, Jr.	)	
PFC, US Army	)	
HHC, 1st Battalion, 27th Infantry	)	
25th Infantry Division (Light)	)	
APO AE 09347-9998	)	

THE CHARGE

SPECIFICATION: In that Private First Class (E3) Edward L. Richmond, Jr., U.S. Army, did, at or near Taal Al Jal, Iraq, on or about 28 February 2004, murder [redacted] by means of shooting him in the head with a rifle.

(5)(6)-7

Appellate Exhibit XIV

DEFENSE VOIR DIRE QUESTIONS
U.S. v. Richmond

Charge I: Violation of the UCMJ, Article 118

THE SPECIFICATION: In that Private First Class Edward L. Richmond, Jr., U.S. Army, did, at or near Taal Al Jal, Iraq, on or about 28 February 2004, murder [redacted] by means of shooting him in the head with a rifle.

(5)(4-7

1. **Do you know the accused in this case, PFC Richmond? Yes ( ) No ( )**
   a. **If yes, how?**

2. **Do you have any prior knowledge of the facts or events in this case?**
   Yes ( ) No ( )

   b. **If so, what is your knowledge? (I.e., Sig Acts, Serious Incident Reports, etc.)**

3. **Have you or any member of your family ever been charged with or investigated for an offense similar to that charged in this case? (By "similar," I mean a crime of violence.) Yes ( ) No ( )**

4. **If so, will that experience influence the performance of your duties as a court member in this case in any way? Yes ( ) No ( ) Explain.**

5. **Have you, or any member of your family, or anyone close to you personally, ever been the victim of an offense similar to that charged in this case?**
   Yes ( ) No ( )
   a. **If so, please explain.**

   b. **If so, will that experience influence the performance of your duties as a court member in this case in any way? Yes ( ) No ( ) Explain.**

6. **Are you serving as a court member for the first time in a trial by court-martial?**
   Yes ( ) No ( )

7. **I am sure you are basically familiar with the military justice system, and you know that the accused has been charged, his charge has been forwarded to the convening authority and referred to trial.** ***None of this warrants any inference of guilt.*** **Can you follow this instruction and not infer that the accused is guilty of anything more than what he has pled guilty to merely because the charge has been referred to trial? Yes ( ) No ( )**

Appellate Exhibit XV
1 of 6

8. Do you understand that the burden of proof to establish the accused's guilt of the greater offense of murder rests *solely* upon the prosecution and the burden *never* shifts to the defense to establish the accused's innocence?

Yes ( ) No ( )

9. By law, the defense has no obligation to present any evidence or to disprove the elements of the offense of murder.

a. Do you agree with this rule?

b. If you do not agree, will you be able to set your personal opinion aside and follow the law in this matter?

10. Do you believe that the prosecution should not be held to such a high standard?
Yes ( ) No ( )

11. Do you believe that the defendant should have to prove his innocence?
Yes ( ) No ( )

12. Have you ever applied for a specialized law enforcement position?

13. The jury for this case will probably be made up of court members of different rank. Will you feel free to voice your opinion in deliberations, and then vote according to your own opinion, even if someone higher in rank disagrees with you?

Will you allow anyone subordinate to you to do the same?

14. Have you had any dealings with any of the parties to the trial, to include the military judge, LTC [redacted] and counsel (MAJ [redacted] CPT [redacted] CPT [redacted] which might affect your performance of duty as a court member in any way? If you have any connection, please raise your hand:

a. LTC [redacted] military judge:

b. MAJ [redacted] (b)(6)-2

c. CPT [redacted]

d. CPT [redacted] (5)(6)-2

15. Do you know of anything of either a personal or professional nature that would cause you to be unable to give your full attention to these proceedings throughout the trial from 4-5 August? Yes ( ) No ( )

e. If so, please explain:

16. Do you, having read the charge and specification, believe that you would be compelled to vote for any particular punishment, if the accused is found guilty, solely because of the nature of the charge? Yes ( ) No ( )

17. Are you aware of any matter that might raise a question concerning your participation in this trial as a court member?
Yes ( ) No ( )

18. Do you believe that because the soldier has been charged that he is probably guilty? Yes ( ) No ( )

19. If you came to the conclusion that the prosecution had not proven the guilt of PFC Richmond beyond a reasonable doubt, and you found that a majority of the panel believed that he was guilty, would you change your verdict because you were in the minority Yes ( ) No ( )

20. Have you sat on a panel previously? Yes ( ) No ( )
If so, what was your trial about?

21. Do you regularly view the community MP Blotters and Serious Incident Reports? Yes ( ) No ( )

22. Do you recall seeing anything about this case on those reports?
Yes ( ) No ( ) If so, please explain.

23. Has this case been discussed in command meetings or briefings?
Yes ( ) No ( )

24. You are aware that courts-martial are governed by certain rules, which are designed not only to assist you in reaching the truth, but also to ensure fairness to both sides. Can you accept this proposition? Yes ( ) No ( )

25. Would you agree that each side is entitled to have those rules enforced so that only proper matters are brought before you for consideration?
Yes ( ) No ( )

26. Does you agree that the defense or prosecution may properly object to evidence that the other side is trying to offer because the evidence does not comply with the rules governing courts-martial? Yes ( ) No ( )

27. Would you hold it against either side in your deliberations for attempting to prevent improper evidence from coming before you? Yes ( ) No ( )

28. Would you agree that a statement under stress could be unreliable or untrue?
Yes ( ) No ( )

29. Have you ever thought you signed a document, then later discovered that you had been mistaken or signed something other than what you thought you were signing? Yes ( ) No ( )

(only if statement is not suppressed)

30. Do people sometimes sign documents without reading them carefully?
Yes ( ) No ( )

31.Do you agree that many words in the English language can have different meanings?

32. Do you agree that a word may mean one thing to one person and another thing to a different person?

33. Do you agree that there may be circumstances surrounding an interrogation of an individual that could make that person get confused?

34. Would you agree that a person's age, experience, and education might be relevant to how well they would understand an interrogator's questions?

35. Would you agree that these factors would also affect how well they could handle the pressure of being interrogated?

36. This case involves the death of an individual who was shot in the head. You are likely to see photographs of the body. Do you agree that it is natural to have an emotional reaction to these types of photographs?

37. Do you agree that an emotional reaction can have an impact on your ability to rationally and objectively evaluate the facts of the case?

38. Do you agree to minimize, as extensively as possible, your emotional reactions to the photographs you may see in order to give PFC Richmond a fair and impartial trial?

39. Do you agree that seeing pictures of a dead body do not necessarily prove anything about the circumstances of the death?

40. The defense in this case is defense of another. PFC Richmond was defending SSG [redacted] The military judge will instruct you that if there is evidence of defense of another person, then it is lawful to use as much force as that person would be entitled to use in self-defense. When there is evidence of self-defense, the government must prove beyond a reasonable doubt that the person did not act in self-defense. Would you have difficulty returning a verdict of not guilty if the government fails to prove beyond a reasonable doubt that PFC Richmond was not acting in defense of SSG [redacted]

41. There will be no question in this case that [redacted] was shot by PFC Richmond. Do you agree that a person has a right to shoot an attacker if he believes that another person is in actual danger of being seriously hurt by that attacker?

42. Should the military judge instruct you that if PFC Richmond had a reasonable belief that he could use whatever force he believed necessary to stop the attack upon SSG [redacted], to include shooting, and not be guilty of murder, could you follow that instruction?

43. Knowing that the charge in this case is murder, could you give PFC Richmond the same fair trial that you would give him if he were charged with a less serious crime?

44. This case may involve evidence about the Rule of Engagement given to PFC Richmond before the shooting. Do you agree that soldiers are not always clear on the ROE?

45. Do you agree that changes in the ROE might confuse a young soldier?

46. Do you agree that soldiers must make life or death decisions on the battlefield?

47. Do you agree that they must often make these decisions immediately, with no time for reflection?

48. Do you agree that they must often make these decisions based on incomplete information?

49. Do you agree that a snap decision based on incomplete information may turn out to be wrong, in hindsight?

50. But do you agree that the decision should be judged based on what the soldier knew at the time?

51. You will hear from many witnesses throughout the case. Can you evaluate their testimony based on the factors the judge will instruct you on and not in reference to "what side they are on" or other such extraneous factors?
Yes ( ) No ( )

52. Are you willing to consider a full range of punishments if PFC Richmond is found guilty? Yes ( ) No ( )

53. Do you feel that the convening authority expects a particular verdict or sentence because he selected you to sit on this court martial? Yes ( ) No ( )

54. Do you agree that even an honest person can have an imperfect memory?
Yes ( ) No ( )

55. In general, do you think that witnesses called by the prosecution have more credibility than defense witnesses? Do you think that defense witnesses have more credibility than prosecution witnesses?

56. Do you agree that you will be fulfilling you sworn duty if you find PFC Richmond not guilty because the trial counsel failed to prove him guilty beyond a reasonable doubt? Yes ( ) No ( )

57. Having read the charge and specification, do you feel that you cannot give the accused a fair trial for any reason? Yes ( ) No ( )
a. If yes, what is your concern?

58. The presumption of innocence law requires you to find the defendant not guilty unless you are convinced beyond a reasonable doubt that the accused is guilty.

a. Do you disagree with this law?

b. Can you apply this rule and follow it in this trial?

59. Is there anything I have omitted which the Court needs to know?

Ma'am - I apolo..ze for the handwritten submission.
Defense is okay with these, except "innocent" in #3.

V/R MAJ [redacted]
(5)(6)-2

GOVT VOIR DIRE

- Does anyone have ill feelings against Iraqis in general?
- Can a Iraqi be a murder victim?
- Is the death of an innocent Iraqi any different than the death of ~~any~~ an innocent person of a different race or ethnicity
- If the Government proves it, will you find an American soldier guilty of murdering an Iraqi

Appellate Exhibit XVI

Members of the panel, the defense has introduced evidence that the accused took a polygraph examination before making his second statement, dated 28 March 2004. You are advised that you may not consider that polygraph evidence or its results for the purpose of determining whether the accused told the truth or not when he made either of his statements. The accused's credibility, like the credibility of all other witnesses, is a matter for you to determine, not a box or machine.

You may consider that evidence for the limited purpose, if any, of its tendency to support the defense theory that the second statement made by the accused was not voluntary because the special agent who interviewed the accused may have lied to him about the results or may have promised to help the accused. You must determine the weight or significance, if any, such statement deserves under all the circumstances. In deciding what wiehgt or significance, if any, to give to the accused's statements, you should consider the specific evidence offered on the matter, your own common sense and knowledge of human nature, and the nature of any corroborating evidence as well as the other evidence in this trial.

Appellate Exhibit XVII

017988

rope-type organization."

The eventual size of the NATO peacekeeping e[illegible]ere, however, and its relationship [illegible]e U.S.-led fighting force hunting te[illegible]s, is still undetermined.

"We'll see what NATO's appetite is," Jones said.

The United States already runs several of the teams, or PRTs. They build infra- [illegible] visit allowed us to gain a firsthand impression of the current situation and the challenges that lie ahead," said Minuto Rizzo, NATO's deputy secretary general, in a statement. "But it was also a demonstration of NATO's commitment to Afghanistan."

The PRTs face obvious challenges in their quest to turn ancient, rugged land- [illegible]ing both the NATO and American missions in Afghanistan, Jones doesn't see the alliance taking up the same saber as the [illegible]led Operation Enduring Freedom anytime soon.

I think that NATO's interest for the foreseeable future is to do those things that relate to security, stability and reconstruction," he said. "There is no mandate for training of peacekeepers for Africa may prove too much.

"If you look at the requirements to perform all these missions simultan[illegible]," Nassauer said, "this could easi[illegible]stretch NATO's capability, as well [illegible]ose of the U.S. and those of the EU."

E-mail reporter Ward Sanderson at:
sandersonw@mail.estripes.osd.mil

Batiste weighs fate of soldier accused in death of Iraqi civilian

BY STEVE LIEWER
Stars and Stripes

At the request of defense attorneys, the 1st Infantry Division commander has delayed a decision on whether a soldier accused of wrongly killing an Iraqi civilian will face a court-martial, a 1st ID spokesman said Friday.

Maj. Gen. John R.S. Batiste has been studying an Article 32 investigation and had been expected to decide this week whether the soldier — Pfc. Edward L. Richmond, 20, of the Hawaii-based 1st Battalion, 27th Infantry Regiment — will be charged with murder, said Capt. William Coppernoll.

The unit is part of the 25th Infantry Division's 2nd Brigade Combat Team, which is based in the north-central Iraqi city of Kirkuk under 1st ID command. In January, it took over military control in the Kirkuk area from the Italy-based 173rd Airborne Brigade.

Richmond is accused of shooting the man Feb. 28 while members of his platoon attempted to arrest him during a roundup of suspected terrorists in al-Hawijah, a city southwest of Kirkuk that has been a center of insurgency since the U.S. invasion last spring.

Coppernoll said a single charge of unpremeditated murder was preferred against Richmond on April 5.

That prompted an Article 32 investigation — similar to a grand jury hearing in civilian court — to advise Batiste whether the charge should be referred to a court-martial.

E-mail Steve Liewer at:
liewers@mail.estripes.osd.mil

Messages of Support

★ Spc. BJ Carr: How are you doing? I hope okay. I have not heard anything from you since you left. If and when you get this message could you please try to let me know that you are okay. We are all praying for you. We love you and miss you very much. Your loving wife and kids, Lyndi, Tori, Brody Carr

★ SGT Guy Smith! I love you-baby! Be safe! –Jen

Stars and Stripes

Messages of Support

★ This message is for PFC Frank Sosebee. I just wanted to let you know that I haven't forgotten about you! It's been a long time since we've talked. Hope you are in the best of spirits, because we both are defending our country. If this reaches you, when you get home, you know where and how to find me! Nikia Harris

★ GOD BLESS AMERICA AND ALL OUR TROOPS. THANK YOU ALL, ESPECIALLY THE 173rd.
MR. PELLERITO'S FIFTH GRADE CLASS

★ CW2 Crownover, We all miss you, and hope for your return soon. Stay safe, and always know that we are VERY PROUD of you and what your doing. Keep your head up high, and remember we're here waiting for you. Love, Shellie and Family

★ Jeffrey, We are all thinking about you, and miss you. Be very careful and come home soon! We send our love. Mom, Dad, Grandparents & Susan!!

Appellate Exhibit XVIII

d Afghanistan.

ir investigation, troops re- not knowing where to turn for help and expressed fear of reprisal or that their identities wouldn't be kept confidential if they come forward, while commanders aren't even sure what might constitute sexual assault, Embrey said.

The task force, named "Care pard Air Force Base.

"I'm not sure there was a breakdown here," said David Chu, undersecretary of defense for personnel and readiness. "I think what you see is a department that is continually focused on doing better against these standards. In fact, although comparisons are very difficult, as I read the evidence, it's not clear we're all that different in terms of incidents cases."

The ta made nine recommenda or change, from creating a single office to write policy to making it easier for victims to report incidents and better methods of prosecuting offenders.

The full report can be found at: www.defenselink.mil/news/May2004/d20040513SATFReport.pdf
E-mail Sandra Jontz at: jontzs@stripes.osd.mil

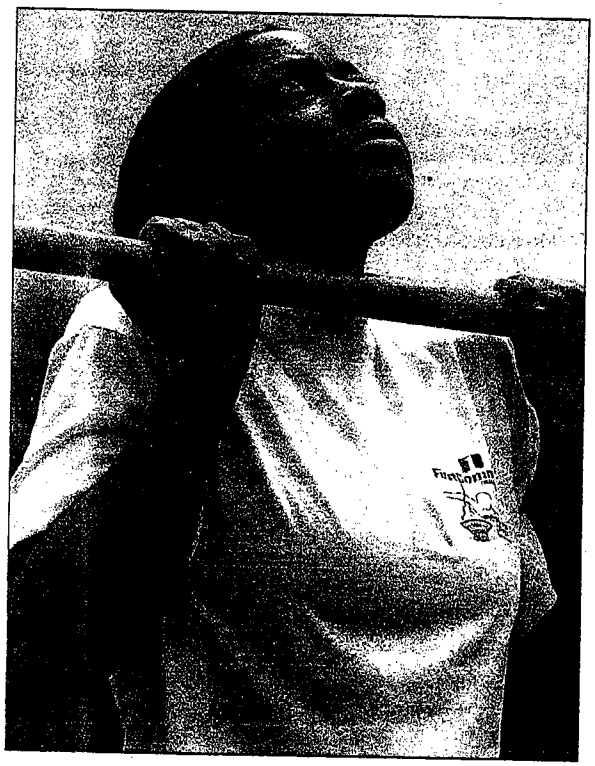
widow's tax next year. The cost of more than $2 billion over five years would be covered by money previously earmarked for the Air Force to lease tanker aircraft.

With no dissent heard, the committee approved Miller's amendment to raise SBP benefits, starting with 270,000 beneficiaries age 62 and older. As of Oct. 1, 2005, their SBP would climb to 40 percent of covered

new nine-membe RAC commission with a l cilities to close or realign. issioners will review, amend and send a revised list through the president to Congress.

That process would be pushed back two years under the House committee provision.

Comments are welcomed. Write to Military Update, P.O. Box 231111, Centreville, VA 20120-1111, e-mail milupdate@aol.com or visit: www.militaryupdate.com



Armed Forces Olympics

NAPLES, Italy — Participants in the Armed Forces Olympics made a run for it on Friday — and not just for the races.

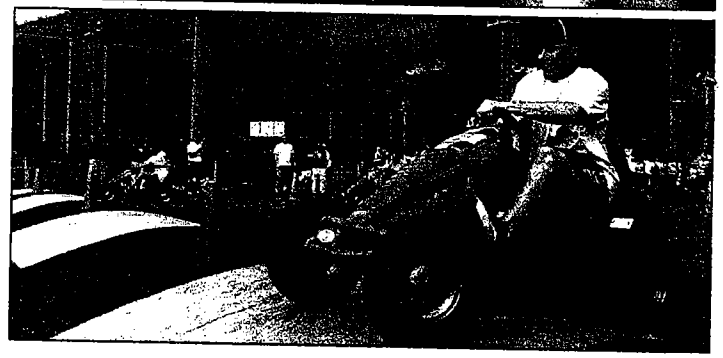
A torrential downpour and hail forced the 400 participants — like Petty Officer 2nd Class Monique Mannix and her 4-month-old pug, Dagoberto, top right — to run for cover.

Though the weather halted the games two hours early, participants got in three hours of friendly competition.

Fourteen commands in the Naples area participated in the 10th annual event at Carney Park. The events included a 10-kilometer relay, home run contest, basketball, arm wrestling, jousting, climbing, push-ups and chin-ups. With the fields a muddy mess, officials canceled the event, and no winner was declare.

Seaman Steven Ashmore, bottom right, 21, a patrolman for the Security Department, took part in the Chariots of Fire Championship, while Air Force Maj. Patricia Burrows, left, 37, competed in a chin-up competition for the Army Air Corps team.

PHOTOS BY KENDRA HELMER
Stars and Stripes



Question by Court-Martial Member

Panel Member's Rank & Name: COL [redacted] (5)(6)-2
(Please Print)

Name of Witness: SGT [redacted]

Question(s):

SAY AGAIN WHAT PVT RICHMOND DID WITH HIS WPN WHEN YOU LOOKED AT HIM + SAID "HE'S GOOD, LETS GO."

Objection(s) by Trial Counsel (Yes) (No)
Grounds:

Signature:

Objection(s) by Defense Counsel (Yes) (No)
Grounds:

(5)(6)-2

Signature: [redacted]

Appellate Exhibit XIX

Question by Court-Martial Member

Panel Member's Rank & Name: COL [redacted] (b)(6)-2
(Please Print)

Name of Witness: [redacted]

Question(s):

PLEASE EXPLAIN WHAT SPECIFICALLY CHANGED IN THE ROE BETWEEN 18 + 28 FEB.

Objection(s) by Trial Counsel (Yes) (No)
Grounds:
Please limit to the changes, not the impetus for the change.

Signature:

Objection(s) by Defense Counsel (Yes) (No)
Grounds:

(b)(6)-2

Signature: [redacted]

Appellate Exhibit XX

Question by Court-Martial Member

Panel Member's Rank & Name: COL [redacted] (b)(6)-2
(Please Print)

Name of Witness: PFC [redacted]

Question(s): ASK IN ORDER PLEASE

- CAN'T YOU SEE AROUND THIS WEAPON SIGHT WHEN USED ON A M4? YOUR EYE SHOULD BE 6-8" AWAY FROM IT, AND I THOUGHT YOU'RE SUPPOSED TO SEE AROUND IT.

- IF YOU CAN'T SEE AROUND THE SIGHT, HOW DID YOU KEEP A BEAD ON HIM IF HE LUNGED ENOUGH TO CONSIDER IT A THREAT? - YOU SAID YOU COULD ONLY SEE HEAD + SHOULDERS IN THE SCOPE.

- IF YOU CAN SEE AROUND THE SIGHT, HOW WAS IT YOU COULD NOT SEE HIS HANDS RESTRAINED AS HIS BACK WAS TOWARDS YOU AS HE WAS LED AWAY?

- WHAT EXACTLY WAS IT YOU THOUGHT MR KNAIR WAS DOING TO SGT [redacted] (b)(6)-2

Objection(s) by Trial Counsel (Yes) (No)
Grounds:

Signature:

Objection(s) by Defense Counsel (Yes) (No)
Grounds:

(b)(6)-2

Signature [redacted]

Appellate Exhibit XXI

Question by Court-Martial Member

Panel Member's Rank & Name: COL [redacted] (b)(6)-2
(Please Print)

Name of Witness: CPT [redacted]

Question(s):

How would you classify PFC Richmond's character in terms of the Army Values.

Objection(s) by Trial Counsel (Yes) (No)
Grounds:

Signature:

Objection(s) by Defense Counsel (Yes) (No)
Grounds:

(b)(6)-2

Signature: [redacted]

Appellate Exhibit XXII

Question by Court-Martial Member

Panel Member's Rank & Name: COL [redacted] (b)(6)-2
(Please Print)

Name of Witness: SGT [redacted]

Question(s):

DID YOU SAY TO RICHMOND TO "SHOOT HIM IF HE FUCKING MOVES" WHILE YOU WERE FLEX CUFFING MR [redacted] (b)(6)-4 ? OR WORDS TO THAT EFFECT?

DID YOU EVER INSTRUCT RICHMOND TO AIM AT [redacted] HEAD?

Objection(s) by Trial Counsel (Yes) (No)
Grounds:

Signature:

Objection(s) by Defense Counsel (Yes) (No)
Grounds:

(b)(6)-2

Signature: [redacted]

Appellate Exhibit XXIII

Question by Court-Martial Member

Panel Member's Rank & Name: (Please Print) COL [redacted] (5)(6)-2

Name of Witness: [redacted]

Question(s):

WHICH IS IT - YOU SAID THAT (5)(6)-2 SGT [redacted] SAID THAT "WE CAN USE ALL MEANS NECESSARY", THEN YOU SAID HE SAID "IF THEY RESIST YOU CAN SHOOT". DID HE ACTUALLY USE THE WORDS "YOU CAN SHOOT"? THAT IS NOT CLEAR TO ME.

Objection(s) by Trial Counsel (Yes) (No)
Grounds:

Signature:

Objection(s) by Defense Counsel (Yes) (No)
Grounds:

(5)(6)-2

Signature: [redacted]

Appellate Exhibit XXIV

Question by Court-Martial Member

Panel Member's Rank & Name: Col [redacted] (b)(6)-2
(Please Print)

Name of Witness: SGT [redacted]

Question(s):

1) Are you aware that members of your platoon question your truthfulness?

2) Why do you think the members of your platoon question your truthfulness?

3) Why have you been reassigned to the medic platoon?

Objection(s) by Trial Counsel (Yes) (No)
Grounds:

Signature:

Objection(s) by Defense Counsel (Yes) (No)
Grounds:
no objection to #3
#1 & 2 are not relevant: 401/403

Signature [redacted] (b)(6)-2

Appellate Exhibit XXV

Question by Court-Martial Member

Panel Member's Rank & Name: COL [redacted] (b)(6)-2
(Please Print)

Name of Witness: [redacted]

Question(s):

DID YOU ASK PFC RICHMOND SOMETHING ABOUT THE FLEXCUFFS RIGHT AFTER HE SHOT MR [redacted] (b)(6)-1 WHAT DID YOU SAY?

ALSO - EXPLAIN IN MORE DETAIL WHO WAS FACING WHO DURING THE WALKED UP TO [redacted] (b)(6)-1 PAT DOWN, ZIP STRIP, LEAD AWAY & SHOT FIRED. A DEMONSTRATION WOULD BE USEFUL

Objection(s) by Trial Counsel (Yes) (No)
Grounds:

Signature:

Objection(s) by Defense Counsel (Yes) (No)
Grounds:

(b)(6)-2

Signature [redacted]

Appellate Exhibit XXVI

UNITED STATES	)	
	)	FINDINGS WORKSHEET
v.	)	
	)	
Edward L. RICHMOND, Jr.	)	
PFC, US Army	)	
HHC, 1st Battalion, 27th Infantry	)	
25th Infantry Division (Light)	)	
APO AE 09347-9998	)	

Private First Class Edward L. Richmond, Jr., this court-martial finds you:

Of the Charge and its Specification:

~~[a] Not Guilty~~

~~or~~

~~[b] Guilty~~

~~or~~

~~[c]~~ Not guilty, but guilty of voluntary manslaughter in violation of Article 119

~~or~~

~~[d] Not guilty, but guilty of negligent homicide in violation of Article 134~~

(b)(6)-2

[redacted]

(Signature of President)

COL, USA

Appellate Exhibit XXVII

017998 (27)

United States v. Richmond

Findings Instructions

Members of the court, when you close to deliberate and vote on the findings, each of you must resolve the ultimate question of whether the accused is guilty or not guilty based upon the evidence presented here in court and upon the instructions which I will give you. My duty is to instruct you on the law. Your duty is to determine the facts, apply the law to the facts, and determine the guilt or innocence of the accused. The law presumes the accused to be innocent of the charge against him.

You will hear an exposition of the facts by counsel for both sides as they view them. Bear in mind that the arguments of counsel are not evidence. Argument is made by counsel to assist you in understanding and evaluating the evidence, but you must base the determination of the issues in the case on the evidence as you remember it and apply the law as I instruct you.

During the trial some of you took notes. You may take your notes with you into the deliberation room. However, your notes are not a substitute for the record of trial.

I will advise you of the elements of each offense alleged.

Unpremeditated Murder

In the specification of the charge, the accused is charged with the offense of murder, in violation of Article 118, UCMJ. To find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

(1) That [redacted] is dead;

(2) That his death resulted from the act of the accused in that the accused shot him in the head with a rifle at or near Taal Al Jal, Iraq, on or about 28 February 2004;

(3) That the killing of [redacted] by the accused was unlawful; and

(4) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon [redacted]

The killing of a human being is unlawful when done without legal justification or excuse.

The intent to kill or inflict great bodily harm may be proved by circumstantial evidence, that is, by facts or circumstances from which you may reasonably infer the existence of such an intent. Thus, it may be inferred that a person intends the natural and probable results of an act he purposely does. Therefore, if a person does an intentional act which is likely to result in death or great bodily harm, it may be inferred that he intended to inflict death or great bodily harm. The drawing of this inference is not required.

Appellate Exhibit XXVIII (28)
1 of 8 017999

"Great bodily harm" means serious bodily injury. "Great bodily harm" does not mean minor injuries, such as a black eye or bloody nose, but does mean fractured or dislocated bones, deep cuts, torn parts of the body, serious damage to internal organs, and other serious bodily injuries.

Voluntary Manslaughter

The lesser offense of voluntary manslaughter is included in the crime of unpremeditated murder. Voluntary manslaughter is the unlawful killing of a human being, with an intent to kill or inflict great bodily harm, done in the heat of sudden passion caused by adequate provocation. Acts of the accused which might otherwise amount to murder constitute only the lesser offense of voluntary manslaughter if those acts were done in the heat of sudden passion caused by adequate provocation. Passion means a degree of anger, rage, pain, or fear which prevents cool reflection. The law recognizes that a person may be provoked to such an extent that in the heat of sudden passion caused by adequate provocation, he strikes a fatal blow before he has had time to control himself. A person who kills because of passion caused by adequate provocation is not guilty of murder. Provocation is adequate if it would cause uncontrollable passion in the mind of a reasonable person. The provocation must not be sought or induced as an excuse for killing or doing harm.

If you are not satisfied beyond a reasonable doubt that the accused is guilty of murder but you are satisfied beyond a reasonable doubt that the killing, although done in the heat of sudden passion caused by adequate provocation, was done with the intent to kill or inflict great bodily harm, you may still find him guilty of voluntary manslaughter.

The intent to kill or inflict great bodily harm does not have to exist for any measurable or particular time before the act which causes the death. All that is required is that it exist at the time of the act which caused the death.

Negligent Homicide

You are further advised that another lesser included offense of the charged offense is Negligent Homicide in violation of Article 134, UCMJ. If you find the accused not guilty of unpremeditated murder, and not guilty of voluntary manslaughter, you should then consider whether the accused is guilty of negligent homicide. In order to find the accused guilty of this lesser-included offense, you must find the following elements beyond a reasonable doubt:

(1) That [redacted] is dead; (b)(6)-4

(2) That his death resulted from the act of the accused, that is that at or near Taal Al Jal, Iraq,, on or about 28 February 2004, the accused sho[redacted]n the head with a rifle;

(3) That the killing by the accused was unlawful;

(4) That the act of the accused which caused the death amounted to simple negligence; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Conduct prejudicial to good order and discipline is conduct which causes a reasonably direct and obvious injury to good order and discipline. Service discrediting conduct is conduct which tends to harm the reputation of the service or lower it in public esteem.

Killing of a human being is unlawful when done without legal justification or excuse.

Simple negligence is the absence of due care, that is, an act by a person who is under a duty to use due care which demonstrates a lack of care for the safety of others which a reasonably careful person would have used under the same or similar circumstances.

The offense of negligent homicide differs from unpremeditated murder and voluntary manslaughter primarily in that it does not require that you find beyond a reasonable doubt that the accused had the intent to kill or inflict great bodily harm. It also does not require that you find beyond a reasonable doubt that the accused was acting in a sudden heat of passion caused by adequate provocation.

Defense of Another

The evidence has raised the issue of defense of another in relation to the offenses of either unpremeditated murder, or voluntary manslaughter, or negligent homicide. There has been some evidence that the accused may have shot Mr. [redacted] after Mr [redacted] lunged or took some aggressive act toward SGT [redacted] A person may use force in defense of another only if that other person could have lawfully used such force in defense of himself under the same circumstances. Therefore, if SGT [redacted] ould lawfully have used force in defense of himself, the accused could also have defended SGT [redacted] n the same manner.

For defense of another to exist, the accused must have had a reasonable belief that death or grievous bodily harm was about to be inflicted on SGT [redacted], the accused must have actually believed that the force he used was necessary to protect SGT [redacted] In other words, defense of another has two parts. First, the accused must have had a reasonable belief that death or grievous bodily harm was about to be inflicted on SGT [redacted] he test here is whether, under the same facts and circumstances, a reasonably prudent person, faced with the same situation, would have believed that death or grievous bodily harm was about to be inflicted. Second, the accused must have actually believed that the amount of force he used was necessary to protect against death or grievous bodily harm. To determine the accused's actual belief as to the amount of force necessary, you must view the situation through the eyes of the accused. In addition to what was known to the accused at the time, the accused's age, intelligence, and emotional control are all important factors to consider in determining his actual belief as to the amount of force necessary to protect SGT [redacted] As long as the accused actually believed that the amount of force he used was necessary to protect against death or grievous bodily harm, the fact that the accused may have used such force or a different type of force than that used by the attacker does not matter.

The accused, under the pressure of a fast moving situation or immediate attack, is not required to pause at his or SGT [redacted] peril to evaluate the degree of danger or the amount of force necessary to protect SGT [redacted] deciding the issue of defense of another, you must give careful consideration to the violence and rapidity, if any, involved in the incident. The rapidity

of the situation impacts both upon the accused's actual belief as to the amount of force necessary and as to whether a reasonably prudent person, faced with the same situation, would have believed that death or grievous bodily harm was about to be inflicted upon SGT [redacted] (5)(6)-2

The burden is on the prosecution to establish the guilt of the accused. Unless you are satisfied beyond a reasonable doubt that the accused did not act in defense of another, you must acquit the accused of the offenses of either unpremeditated murder, or voluntary manslaughter, or negligent homicide. If you are convinced beyond a reasonable doubt that the accused did not act in defense of another under the law, you may find him guilty of unpremeditated murder or another lesser included offense.

Mistake of Fact Defense

(5)(6)-4 (5)(6)-2

The evidence has raised the issue of mistake on the part of the accused concerning whether Mr. [redacted] was about to inflict death or great bodily harm on SGT [redacted] in relation to the offenses of unpremeditated murder, voluntary manslaughter, and negligent homicide. You should consider that evidence in determining whether the government has proven beyond a reasonable doubt that the accused's acts were unlawful.

The accused is not guilty of these offenses if:

(1) he mistakenly believed that Mr [redacted] was about to inflict death or great bodily harm on SGT [redacted] and (5)(6)-4

(2) if such belief on his part was reasonable.

To be reasonable the belief must have been based on information, or lack of it, which would indicate to a reasonable person that Mr [redacted] was about to inflict death or great bodily harm on SGT [redacted] Additionally, the mistake cannot be based on a negligent failure to discover the true facts. (5)(6)-2 (5)(6)-4

Negligence, again, is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances.

The burden is on the prosecution to establish the accused's guilt. If you are convinced beyond a reasonable doubt that, at the time of the charged offense or its lesser included offenses, the accused was not under the mistaken belief that Mr [redacted] was about to inflict death or great bodily harm on SGT [redacted] the defense of mistake does not exist. Even if you conclude that the accused was under the mistaken belief that Mr [redacted] was about to inflict death or great bodily harm on SGT [redacted] if you are convinced beyond a reasonable doubt that, at the time of the charged offense or its lesser included offenses, the accused's mistake was unreasonable, the defense of mistake does not exist. (5)(6)-2 (5)(6)-4

Circumstantial Evidence

Evidence may be direct or circumstantial. Direct evidence is evidence which tends directly to prove or disprove a fact in issue. If a fact in issue was whether it rained during the evening, testimony by a witness that he or she saw it rain would be direct evidence that it rained.

On the other hand, circumstantial evidence is evidence which tends to prove some other fact from which, either alone or together with some other facts or circumstances, you may reasonably infer the existence or nonexistence of a fact in issue. If there was evidence the street was wet in the morning, that would be circumstantial evidence from which you might reasonably infer it rained during the night.

There is no general rule for determining or comparing the weight to be given to direct or circumstantial evidence. You should give all the evidence the weight and value you believe it deserves.

I have instructed you that either for unpremeditated murder or voluntary manslaughter, the accused's specific intent to kill or inflict great bodily harm must be proved beyond a reasonable doubt. Direct evidence of intent is often unavailable. The accused's intent, however, may be proved by circumstantial evidence.

Stipulations of Fact

(b)(6)-1

The parties to this trial have stipulated or agreed that the name of the Iraqi man who was shot and killed in this case was [redacted]. They have also stipulated that the two vehicles in the left horizon background of the picture which is 5 of 10, in Prosecution Exhibit 7, are where the TCP was during the mission of 28 February 2004. When counsel for both sides, with the consent of the accused, stipulate and agree to a fact, the parties are bound by the stipulation and the stipulated matters are facts in evidence to be considered by you along with all the other evidence in the case.

Credibility of Witnesses

You have the duty to determine the believability of the witnesses. In performing this duty you must consider each witness' intelligence, ability to observe and accurately remember, sincerity and conduct in court, and character for truthfulness. Consider also the extent to which each witness is either supported or contradicted by other evidence; the relationship each witness may have with either side; and how each witness might be affected by the verdict.

In weighing a discrepancy between witnesses, you should consider whether it resulted from an innocent mistake or a deliberate lie. Taking all these matters into account, you should then consider the probability of each witness' testimony and the inclination of the witness to tell the truth. The believability of each witness' testimony should be your guide in evaluating testimony and not the number of witnesses called. These rules apply equally to the testimony given by the accused.

Prior Inconsistent Statements

(b)(6)-2

You have heard evidence that SGT [redacted] and the accused made statements prior to trial that may be inconsistent with their testimony at this trial. If you believe that an inconsistent statement was made, you may consider the inconsistency in evaluating the believability of the testimony of either the accused or SGT [redacted] or both. You may not, however, consider the prior statement as evidence of the truth of the matters contained in that prior statement.

018003

Character Evidence

To show the probability of his innocence, the defense has produced evidence of the accused's character for good duty performance. Evidence of the accused's good character may be sufficient to cause a reasonable doubt as to his guilt.

On the other hand, evidence of the accused's good character may be outweighed by other evidence tending to show the accused's guilt.

(5)(6)-2

Evidence has been received as to SGT [redacted]'s bad character for truthfulness. You may consider this evidence in determining SGT [redacted] elievability.

Uncharged Misconduct

You may consider evidence that the accused may have failed a PT test or gotten into a fight at a club in Hawaii for the limited purpose of its tendency, if any, to test the basis of the opinion of the witnesses who testified to the accused's character for being a good soldier. Those questions and answers may enable you to assess the weight you accord to that testimony.

You may not consider this evidence for any other purpose, and you may not conclude from this evidence that the accused is a bad person or has general criminal tendencies and that he, therefore committed the offense charged.

Closing Substantive Instructions On Findings

You are further advised:

First, that the accused is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt;

Second, if there is reasonable doubt as to the guilt of the accused, that doubt must be resolved in favor of the accused, and he must be acquitted;

Third, if there is a reasonable doubt as to the degree of guilt, that doubt must be resolved in favor of the lower degree of guilt as to which there is no reasonable doubt; and

Lastly, the burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government. The burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of the offense.

By "reasonable doubt" is intended not a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt. The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution, which does not amount to an element, need not be established beyond a reasonable

doubt. However, if, on the whole evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty.

Bear in mind that only matters properly before the court as a whole should be considered. In weighing and evaluating the evidence you are expected to use your own common sense, and your knowledge of human nature and the ways of the world. In light of all the circumstances in the case, you should consider the inherent probability or improbability of the evidence. Bear in mind you may properly believe one witness and disbelieve several other witnesses whose testimony conflicts with the one. The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you.

You must disregard any comment or statement or expression made by me during the course of the trial that might seem to indicate any opinion on my part as to whether the accused is guilty or not guilty since you alone have the responsibility to make that determination. Each of you must impartially decide whether the accused is guilty or not guilty according to the law I have given you, the evidence admitted in court, and your own conscience.

Findings Argument

At this time you will hear argument by counsel. As the government has the burden of proof, trial counsel may open and close. Trial counsel, you may proceed.

Counsel have referred to instructions that I gave you, if there is any inconsistency between what counsel have said about the instructions and the instructions which I gave you, you must accept my statement as being correct.

Procedural Instructions On Findings

The following procedural rules will apply to your deliberations and must be observed: The influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment. Your deliberation should include a full and free discussion of all the evidence that has been presented. After you have completed your discussion, then voting on your findings must be accomplished by secret, written ballot, and all members of the court are required to vote.

If you find the accused guilty of the specification of the charge, the finding as to that charge must be guilty. The junior member will collect and count the votes. The count will then be checked by the president, who will immediately announce the result of the ballot to the members.

The concurrence of at least two-thirds of the members present when the vote is taken is required for any finding of guilty. Since we have 10 members, that means 7 members must concur in any finding of guilty.

If you have at least 7 votes of guilty of any offense then that will result in a finding of guilty for that offense. If fewer than 7 members vote for a finding of guilty, then your ballot resulted in a finding of not guilty bearing in mind the instructions I just gave you about voting on the lesser included offenses of voluntary manslaughter, and negligent homicide.

You may reconsider any finding prior to its being announced in open court. However, after you vote, if any member expresses a desire to reconsider any finding, open the court and the president should announce only that reconsideration of a finding has been proposed. Do not state:

(1) whether the finding proposed to be reconsidered is a finding of guilty or not guilty, or

(2) whether a finding as to unpremeditated murder, or as to voluntary manslaughter, or as to negligent homicide is involved. I will then give you specific further instructions on the procedure for reconsideration.

As soon as the court has reached its findings, and I have examined the Findings Worksheet, the findings will be announced by the president in the presence of all parties. As an aid in putting your findings in proper form and making a proper announcement of the findings, you may use Appellate Exhibit ___, the Findings Worksheet.

(b)(6)-2

COL [redacted] he findings worksheet follows along the lines of my instructions and gives you the options available in this case. Once you have finished filling in what is applicable, please line out or cross out everything that is not applicable so that when I check your findings I can ensure that they are in proper form. Any questions about the findings worksheet?

If, during your deliberations, you have any questions, open the court, and I will assist you. The Uniform Code of Military Justice prohibits me and everyone else from entering your closed session deliberations. As I mentioned at the beginning of the trial, you must all remain together in the deliberation room during deliberations. While in your closed-session deliberations, you may not make communications to or receive communications from anyone outside the deliberation room, by telephone or otherwise. If you have need of a recess, if you have a question, or when you have reached findings, you may notify the Bailiff, who will then notify me that you desire to return to open court to make your desires or findings known. Further, during your deliberations, you may not consult the *Manual for Courts-Martial* or any other legal publication unless it has been admitted into evidence.

Do counsel object to the instructions given or request additional instructions?

Does any member of the court have any questions concerning these instructions?

If it is necessary and I mention this because there is no latrine immediately adjacent to your deliberation room, your deliberations may be interrupted by a recess. However, before you may leave your closed session deliberations, you must notify us, we must come into the courtroom, formally convene and then recess the court; and after the recess, we must reconvene the court, and formally close again for your deliberations. So, with that in mind, COL [redacted] do you desire to take a brief recess before you begin your deliberations, or would you like to begin immediately?

(b)(6)-2

(b)(6)-2

COL [redacted] please do not mark on any of the exhibits, except the Findings Worksheet and please bring all the exhibits with you when you return to announce your findings.

The court is closed

UNITED STATES)
)
v.)
)
Edward L. RICHMOND, Jr.)
PFC, US Army)
HHC, 1st Battalion, 27th Infantry)
25th Infantry Division (Light))
APO AE 09347-9998)

SENTENCE WORKSHEET

Private First Class Edward L. Richmond, Jr., this court-martial sentences you:

~~1. To no punishment.~~

~~**REPRIMAND**~~

~~2. To be reprimanded.~~

~~**REDUCTION.**~~

X 3. To be reduced to the grade of E1.

~~**FORFEITURES**~~

~~4. To forfeit $_____ pay per month for _____ month(s).~~

X ~~5.~~ To forfeit all pay and allowances.

~~**RESTRAINT AND HARD LABOR**~~

~~6. To be restricted for _____ (days) (months) to the limits of:~~

_____.

~~7. To perform hard labor without confinement for _____ (days) (months).~~

X ~~8.~~ To be confined for [redacted] (~~days) (months~~) (years).

~~**PUNITIVE DISCHARGE**~~

~~9. To be discharged from the service with a Bad Conduct Discharge.~~

X ~~10.~~ To be dishonorably discharged from the service.

(b)(6)-2

[redacted]
(Signature of President)

018007

Appellate Exhibit XXIX

United States v. Richmond

Sentencing Instructions

Members of the court, you are about to deliberate and vote on the sentence in this case. It is the duty of each member to vote for a proper sentence for the offense of which the accused has been found guilty. Your determination of the kind and amount of punishment, if any, is a grave responsibility requiring the exercise of wise discretion. Although you must give due consideration to all matters in mitigation and extenuation, as well as to those in aggravation, you must bear in mind that the accused is to be sentenced only for the offense of which he has been found guilty.

You must not adjudge an excessive sentence in reliance upon possible mitigating action by the convening or higher authority.

Maximum Punishment

The maximum punishment that may be adjudged in this case is:

a. Reduction to the grade of E-1;

b. Forfeiture of all pay and allowances;

c. Confinement for 15 years; and

d. A dishonorable discharge.

The maximum punishment is a ceiling on your discretion. You are at liberty to arrive at any lesser legal sentence.

In adjudging a sentence, you are restricted to the kinds of punishment which I will now describe or you may adjudge no punishment. There are several matters which you should consider in determining an appropriate sentence. You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his crime and his sentence from committing the same or a similar offense. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.

Types Of Punishment.

(REPRIMAND:) This court may adjudge a reprimand, being in the nature of a censure. The court shall not specify the terms or wording of any adjudged reprimand.

(REDUCTION:) This court may adjudge reduction to the lowest or any intermediate enlisted grade, either alone or in connection with any other kind of punishment within the maximum limitation. A reduction carries both the loss of military status and the incidents thereof and

018008

Appellate Exhibit XXX
1 of 5

results in a corresponding reduction of military pay. You should designate only the pay grade to which the accused is to be reduced, for example, E-2.

(EFFECT OF ARTICLE 58a—U.S. ARMY:) I also advise you that any sentence of an enlisted soldier in a pay grade above E-1 which includes either of the following two punishments will automatically reduce that soldier to the lowest enlisted pay grade E-1 by operation of law. The two punishments are: One, a punitive discharge meaning in this case, a bad conduct discharge or a dishonorable discharge; or two, confinement in excess of six months, if the sentence is adjudged in months, or 180 days, if the sentence is adjudged in days. Accordingly, if your sentence includes either a punitive discharge or confinement in excess of six months or 180 days, the accused will automatically be reduced to E-1. However, notwithstanding these automatic provisions if you wish to sentence the accused to a reduction, you should explicitly state the reduction as a separate element of the sentence.

(RESTRICTION:) This court may adjudge restriction to limits for a maximum period not exceeding two months. For such a penalty, it is necessary for the court to specify the limits of the restriction and the period it is to run. Restriction to limits will not exempt an accused from any assigned military duty.

(HARD LABOR WITHOUT CONFINEMENT:) This court may sentence the accused to hard labor without confinement for a maximum period not exceeding three months. Such hard labor would be performed in addition to other military duties which would normally be assigned. In the usual course of business, the immediate commanding officer assigns the amount and character of the hard labor to be performed.

(CONFINEMENT:) As I have already indicated, this court may sentence the accused to confinement for a maximum of 15 years. A sentence to confinement should be adjudged in either full days or full months or full years; fractions such as one-half or one-third should not be employed. So, for example, if you do adjudge confinement, confinement for a month and a half should instead be expressed as confinement for 45 days. This example should not be taken as a suggestion, only an illustration of how to properly announce your sentence.

In determining an appropriate sentence in this case, you should consider that I have previously ruled that the accused will be credited with 47 days credit against any punishment which includes a term of confinement. If you adjudge confinement as part of your sentence, those days will be credited against any sentence to confinement you may adjudge. This credit will be given by the authorities at the correctional facility where the accused is sent to serve his confinement, and will be given on a day for day basis.

(FORFEITURES—ALL PAY AND ALLOWANCES:) This court may sentence the accused to forfeit all pay and allowances. A forfeiture is a financial penalty which deprives an accused of military pay as it accrues. In determining the amount of forfeiture, if any, the court should consider the implications to the accused of such a loss of income. Unless a total forfeiture is adjudged, a sentence to a forfeiture should include an express statement of a whole dollar amount to be forfeited each month and the number of months the forfeiture is to continue. The accused is in pay grade E-3 with over 2 years of service, the total basic pay being $ 1,495.50 per month.

If reduced to the grade of E-2, the accused's total basic pay would be $ 1,337.70.

If reduced to the grade of E-1, the accused's total basic pay would be $ 1,193.40.

This court may adjudge any forfeiture up to and including forfeiture of all pay and allowances.

(EFFECT OF ARTICLE 58b IN GCM) Any sentence which includes either (1) confinement for more than six months or (2) confinement for six months or less *and* a punitive discharge will require the accused, by operation of law, to forfeit all pay and allowances during the period of confinement. However, if the court wishes to adjudge any forfeitures of pay and/or pay and allowances, the court should explicitly state the forfeiture as a separate element of the sentence.

(PUNITIVE DISCHARGE:) The stigma of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities and will deny the accused other advantages which are enjoyed by one whose discharge characterization indicates that he has served honorably. A punitive discharge will affect an accused's future with regard to his legal rights, economic opportunities, and social acceptability.

(DISHONORABLE DISCHARGE ALLOWED:) This court may adjudge no discharge or this court may adjudge either a dishonorable discharge or a bad conduct discharge. Such a discharge deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Army establishment. A dishonorable discharge should be reserved for those who, in the opinion of the court, should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment. A bad conduct discharge is a severe punishment, although less severe than a dishonorable discharge, and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct.

(NO PUNISHMENT:) Finally, if you wish, this court may sentence the accused to no punishment.

General Instructions

In selecting a sentence, you should consider all matters in extenuation and mitigation as well as those in aggravation, whether introduced before or after your findings. Thus, all the evidence you have heard in this case is relevant on the subject of sentencing.

You should consider evidence admitted as to the nature of the offense of which the accused stands convicted, plus:

1. The accused's age – he is 21.

2. The accused's good military character as testified to by several witnesses.

3. The accused's good duty performance since the events of 28 February 2004.

4. The duration of the accused's pretrial restriction.

5. The accused's GT score of 126.

6. The accused's education which includes a general education diploma and a home school high school diploma.

7. That the accused is a graduate of the following service schools: Basic Training and AIT.

8. That the accused is entitled to wear the medals and awards listed on Prosecution Exhibit 15, his enlisted record brief, and

9. The lack of previous convictions or Art. 15 punishment.

(ACCUSED'S NOT TESTIFYING UNDER OATH:) The court will not draw any adverse inference from the fact that the accused has elected to make a statement which is not under oath. An unsworn statement is an authorized means for an accused to bring information to the attention of the court, and must be given appropriate consideration. The accused cannot be cross-examined by the prosecution or interrogated by court members or me upon an unsworn statement, but the prosecution may offer evidence to rebut statements of fact contained in it. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider that the statement is not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and your knowledge of human nature and the ways of the world.

(ARGUMENT FOR A SPECIFIC SENTENCE:) During argument, counsel recommended that you consider a specific sentence in this case. You are advised that the arguments of counsel and their recommendations are only their individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel.

Concluding Sentencing Instructions

When you close to deliberate and vote, only the members will be present. I remind you that you all must remain together in the deliberation room during deliberations. I also remind you that you may not allow any unauthorized intrusion into your deliberations. You may not make communications to or receive communications from anyone outside the deliberations room, by telephone or otherwise. Should you need to take a recess or have a question, or when you have reached a decision, you may notify the Bailiff, who will then notify me of your desire to return to open court to make your desires or decision known.

Your deliberations should begin with a full and free discussion on the subject of sentencing. The influence of superiority in rank shall not be employed in any manner to control the independence of members in the exercise of their judgment. When you have completed your discussion, then any member who desires to do so may propose a sentence. You do that by writing out on a slip of paper a complete sentence. The junior member collects the proposed sentences and submits them to the president, who will arrange them in order of their severity.

You then vote on the proposed sentences by secret written ballot. All must vote; you may not abstain. Vote on each proposed sentence in its entirety, beginning with the lightest, until you

018011

arrive at the required concurrence, which is two-thirds or 7 members. A sentence which includes confinement in excess of ten years requires the concurrence of three-fourths or 8 members. The junior member will collect and count the votes. The count is then checked by the president who shall announce the result of the ballot to the members. If you vote on all of the proposed sentences without arriving at the required concurrence, you may then repeat the process of discussion, proposal of sentences and voting. But once a proposal has been agreed to by the required concurrence, then that is your sentence.

You may reconsider your sentence at any time prior to its being announced in open court. If after you determine your sentence, any member suggests you reconsider the sentence, open the court and the president should announce that reconsideration has been proposed without reference to whether the proposed reballot concerns increasing or decreasing the sentence. I will give you specific instructions on the procedure for reconsideration.

As an aid in putting the sentence in proper form, the court may use the Sentence Worksheet marked Appellate Exhibit 29.

Extreme care should be exercised in using this worksheet and in selecting the sentence form which properly reflects the sentence of the court. If you have any questions concerning sentencing matters, you should request further instructions in open court in the presence of all parties to the trial. In this connection, you are again reminded that you may not consult the Manual for Courts-Martial or any other publication or writing not properly admitted or received during this trial. These instructions must not be interpreted as indicating an opinion as to the sentence which should be adjudged, for you alone are responsible for determining an appropriate sentence in this case. In arriving at your determination, you should select the sentence which will best serve the ends of good order and discipline, the needs of the accused, and the welfare of society. When the court has determined a sentence, the inapplicable portions of the Sentence Worksheet should be lined through. When the court returns, I will examine the Sentence Worksheet. The president will then announce the sentence.

Do counsel object to the instructions as given or request other instructions?

Does any member of the court have any questions?

COL [redacted] (5)(6)-2 if you desire a recess during your deliberations, we must first formally reconvene the court and then recess. Knowing this, do you desire to take a brief recess before you begin deliberations or would you like to begin immediately?

COL [redacted] (5)(6)-2 please do not mark on any of the exhibits, except the Sentence Worksheet and please bring all the exhibits with you when you return to announce the sentence.

The court is closed.

APPELLATE EXHIBIT XXXI

THE POST TRIAL AND APPELLATE RIGHTS

ARE LOCATED IN THE FRONT OF THE ROT IN THE

APPROPRIATE PLACE