SUMMARIZED

# RECORD OF TRIAL

(and accompanying papers)

of

BURTON, Scott A. (b)(6) CPL/E-4

(Name Last, First, Middle Initial) (Social Security Number) (Rank)

3d Bn, 5th Mar, 1st MarDiv USMC Camp Pendleton, CA

(Unit Command Name) (Branch of Service) (Station or Ship)

By

SPECIAL COURT-MARTIAL

Convened by Commanding Officer

(Title of Convening Authority)

3d Battalion, 5th Marines
1st Marine Division

(Unit/Command of Convening Authority)

Tried at

Camp Pendleton, California, on 23 March, 2, 14-17 June 2004

(Place or Places of Trial) (Date or Dates of Trial)

ACTION OF JUDGE ADVOCATE OR GENERAL COURT-MARTIAL CONVENING AUTHARITY(SPCM)/JAG(GCM)
RCM 1111 and 1112, MCM, 1984)

| UNIT COMMAND NAME | LOCATION OF JUDGE ADVOCATE OR GENERAL COURT MARTIAL CONVENING AUTHORITY JAG | DATE RECORD RECEIVED |
|---|---|---|
| | | |

| ACTION | DATE | REMARKS |
|---|---|---|
| FINAL DISPOSITION: Findings and sentence, as approved by convening authority, correct in law and fact; to file | | |
| OR Findings and sentence, as modified or corrected (see remarks), correct in law and fact; to file | | |
| Acquittal or sentence set aside (see remarks), to file | | |
| COPIES OF CMO DISPOSED OF IN ACCORDANCE WITH DEPARTMENT REGULATIONS | | |

JUDGE ADVOCATE OR LAW SPECIALIST

| SIGNATURE | RANK | DATE SIGNED |
|---|---|---|
| | | |

Front Cover

# RECORD OF TRIAL

of

BURTON, S. A. (b)(6) CPL/E-4

3dBn, 5th Mar, 1st MarDiv USMC Camp Pendleton, CA

By

**Special Court-Martial**

Convened by Commanding Officer

3d Battalion, 5th Marines
1st Marine Division

tried at

Camp Pendleton, California, on 23 March, 2, 14-17 June

---

## COPIES OF RECORD

____ copy of record furnished the accused or defense counsel as per attached certificate or receipt.

____ copy (ies) of record forwarded herewith.

## RECEIPT FOR COPY OF RECORD

I hereby acknowledge receipt of a copy of the record of trial of United States v. Cpl S. A. Burton, delivered to me at _____ this ___ day of _____, _____.

I do / do not have matters to submit pursuant to R.C.M. 1105 and 1106 MCM, 2000.

_____
First Lieutenant C. J. Dewberry
U.S. Marine Corps

**PROCEEDINGS OF A SPECIAL COURT-MARTIAL**

The military judge called the Article 39(a) session to order at Marine Corps Base Camp Pendleton, California, in the case of the *United States* v. *Corporal S. A. Burton, U.S. Marine Corps*, at 0815, 23 March 2004, pursuant to the following order:

**[END OF PAGE]**

UNITED STATES MARINE CORPS
3RD BATTALION, 5TH MARINES
1ST MARINE DIVISION (REIN), FMF
BOX 555483
CAMP PENDLETON, CA 92055-5483

IN REPLY REFER TO:
5813
EBH
CMCO Ser:#1-04
9 Feb 2004

SPECIAL COURT-MARTIAL CONVENING ORDER 1-04

Pursuant to authority contained in paragraph 0120b(3), Judge Advocate General of the Navy Instruction 5800.7C, of 3 October 1990, a special court-martial is convened and may proceed at Marine Corps Base, Camp Pendleton California, or at any such authorized place as directed with the following members:

Captain B. P. Collins, U.S. Marine Corps;
Captain T. E. Robertson, U.S. Marine Corps;
First Lieutenant B. R. Chontosh, U. S. Marine Corps Reserve;
First Lieutenant S. Rosales, U.S. Marine Corps Reserve;
Second Lieutenant J. W. Burgess, U. S. Marine Corps Reserve and;
Second Lieutenant R. A. McIntosh, U.S. Marine Corps Reserve

P. J. MALAY
Lieutenant Colonel
United States Marine Corps
Commanding

Certified True Copy

UNITED STATES MARINE CORPS
3D BATTALION 5TH MARINES
1ST MARINE DIVISION (REIN), FMF
BOX 555401
CAMP PENDLETON, CA 92055-5401

IN REPLY REFER TO:
5813
Legal
CMCO Ser: 1a-04
04 Jun 04

SPECIAL COURTS-MARTIAL CONVENING ORDER 1a-04

Special Courts-Martial Convening Order 1-04 dated 9 Feb 2004 is modified as follows specifically for U.S. v. Corporal Scott A Burton, U.S. Marine Corps only:

**Delete**

Captain Brendan P. Collins, U. S. Marine Corps;
Captain Brian R. Chontosh, U. S. Marine Corps;
First Lieutenant Samuel Rosales, U.S. Marine Corps Reserve

**Add**

Major Hugh C. Curtright IV, U. S. Marine Corps;
Captain Thomas B. Noel, U. S. Marine Corps;
Captain David L. Kowalski, U. S. Marine Corps

**Members**

Major Hugh C. Curtright IV, U. S. Marine Corps;
Captain Thomas B. Noel, U. S. Marine Corps;
Captain David L. Kowalski, U. S. Marine Corps;
Captain Timothy E. Robertson, U.S. Marine Corps;
First Lieutenant Joshua W. Burgess, U. S. Marine Corps Reserve;
First Lieutenant Rex A. McIntosh, U.S. Marine Corps Reserve

P. J. MALAY
Lieutenant Colonel
United States Marine Corps
Commanding

ORIGINAL

UNITED STATES MARINE CORPS
3D BATTALION 5TH MARINES
1ST MARINE DIVISION (REIN), FMF
BOX 555401
CAMP PENDLETON, CA 92055-5401

IN REPLY REFER TO:
5813
Legal
CMCO Ser: 1b-04
11 Jun 04

SPECIAL COURTS-MARTIAL CONVENING ORDER 1b-04

Special Courts-Martial Convening Order 1a-04 dated 4 Jun 2004 is modified as follows specifically for U.S. v. Corporal Scott A Burton, U.S. Marine Corps only:

**Delete**

Captain David L. Kowalski, U. S. Marine Corps
First Lieutenant Joshua W. Burgess, U. S. Marine Corps Reserve

**Add**

First Lieutenant Michael V. Prato U. S. Marine Corps
First Lietuenant John F. Campbell U. S. Marine Corps Reserve

**Members**

Major Hugh C. Curtright IV, U. S. Marine Corps;
Captain Thomas B. Noel, U. S. Marine Corps;
Captain Timothy E. Robertson, U.S. Marine Corps;
First Lieutenant Rex A. McIntosh, U.S. Marine Corps Reserve
First Lieutenant Michael V. Prato U. S. Marine Corps
First Lietuenant John F. Campbell U. S. Marine Corps Reserve

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P. J. MALAY
Lieutenant Colonel
United States Marine Corps
Commanding

ORIGINAL

**PERSONS PRESENT**

**Commander C. L. Reismeier**, U.S. Navy, MILITARY JUDGE;
**Captain R. M. Manning**, U.S. Marine Corps Reserve, TRIAL COUNSEL;
**First Lieutenant A. Pettes**, U.S. Marine Corps Reserve; ASSISTANT TRIAL COUNSEL;
**First Lieutenant C. J. Dewberry**, U.S. Marine Corps Reserve, DEFENSE COUNSEL.

**PERSONS ABSENT**

**MEMBERS;**
**Mr. F. J. Spinner**, U.S. Air Force (Ret), CIVILIAN COUNSEL.

Corporal Scott Burton, U.S. Marine Corps, the accused, was present and attired in the appropriate service uniform with all decorations and awards to which he was entitled.

Sergeant K. Johnson, U.S. Marine Corps, the detailed court reporter who had been previously sworn, was present.

The trial counsel announced his legal qualifications and status as to oath; that he had been detailed by the Officer-in-Charge, Legal Services Support Team Delta, Camp Pendleton, California; and that he had acted in no disqualifying capacity.

The assistant trial counsel announced his legal qualifications and status as to oath; that he had been detailed by the Officer-in-Charge, Legal Services Support Team Delta, Camp Pendleton, California; and that he had acted in no disqualifying capacity.

The assistant trial counsel was duly sworn.

The detailed defense counsel announced his legal qualifications and status as to oath; that he had been detailed by the Senior Defense Counsel, Legal Service Support Team Echo, Camp Pendleton, California; that he had acted in no disqualifying capacity; and that no other defense counsel had been detailed to the case. The defense counsel went on to state that the accused had retained civilian defense counsel, but waived his presence during the arraignment.

The military judge stated that civilian counsel must file a notice of appearance with the Court before the next session.

The military judge advised the accused of his rights concerning counsel. The accused stated that he understood his rights with respect to counsel and that he chose to be defended by First Lieutenant Dewberry, his detailed defense counsel, as well as Mr. Spinner, his civilian counsel.

The military judge stated his legal qualifications and status as to oath and that he had been detailed by the Circuit Military Judge of the Sierra Judicial Circuit.

The military judge stated that he would not be a witness for either side in the case and was not aware of grounds for challenge against him.

Neither side desired to voir dire or challenge the military judge for cause.

The military judge advised the accused of his rights with respect to forum. The accused stated that he had consulted with his defense counsel and had been informed of his right to request a trial by members, including one-third enlisted persons. The military judge approved the accused's request to reserve forum selection.

The accused was arraigned on the following charge and specification:

[END OF PAGE]

# CHARGE SHEET

## I. PERSONAL DATA

| 1. NAME OF ACCUSED (Last, First, MI) | 2. SSN | 3. RANK/RATE | 4. PAY GRADE |
|---|---|---|---|
| BURTON, Scott A. | (b)(6) | Cpl | E-4 |

| 5. UNIT OR ORGANIZATION | 6. CURRENT SERVICE | |
|---|---|---|
| | a. INITIAL DATE | b. TERM |
| 3rdBn, 5thMar, 1stMarDiv, CamPen, CA 92055 | 2 Oct 00 | 4 yrs |

| 7. PAY PER MONTH | | | 8. NATURE OF RESTRAINT OF ACCUSED | 9. DATE(S) IMPOSED |
|---|---|---|---|---|
| a. BASIC | b. SEA/FOREIGN DUTY | c. TOTAL | | |
| 1726.80 ~~$1579.80~~ | 040614 None | 1726.80 ~~$1579.80~~ | 040614 None | N/A |

## II. CHARGES AND SPECIFICATIONS

10. CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 81

SPECIFICATION: In that Corporal Scott A. Burton, U.S. Marine Corps, on active duty, did, at Ad Diwaniyah, Iraq, between on or about 1 June 2003 and until on or about 6 July 2003, conspire with Corporal Jeffery E. Case, U.S. Marine Corps, to commit an offense under the Uniform Code of Military Justice, to wit: assault, and in order to effect the object of the conspiracy the said Corporal Scott A. Burton received a fire extinguisher from Corporal (b)(6) and then used that fire extinguisher to spray its contents in the face and body of an Iraqi detainee.

CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 93

SPECIFICATION 1: In that Corporal Scott A. Burton, U.S. Marine Corps, on active duty, did, at Ad Diwaniyah, Iraq, between on or about 1 June 2003 and until on or about 6 July 2003, maltreat Iraqi detainees, persons subject to his orders, by locking them in an abandoned tank.

SPECIFICATION 2: In that Corporal Scott A. Burton, U.S. Marine Corps, on active duty, did, at Ad Diwaniyah, Iraq, between on or about 1 June 2003 and until on or about 6 July 2003, maltreat an Iraqi detainee, a person subject to his orders, by spraying the detainee with a fire extinguisher.

SPECIFICATION 3: In that Corporal Scott A. Burton, U.S. Marine Corps, on active duty, did, at Ad Diwaniyah, Iraq, between on or about 1 June 2003 and until on or about 6 July 2003, maltreat Iraqi civilian detainees, persons subject to his orders, by forcing the detainees to kneel in front of fighting holes while he drew his pistol behind them and fired a round next to the head of one of the detainees.

## III. PREFERRAL

| 11a. NAME OF ACCUSER (Last, First, MI) | b. GRADE | c. ORGANIZATION OF ACCUSER |
|---|---|---|
| THOMAS, QUALIN T. | PFC | SvcCo, HqSvcBn, 1stFSSG |

| d. SIGNATURE OF ACCUSER | e. DATE |
|---|---|
| Qualin T. Thomas | 031008 |

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 7th day of October, 20 03, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

J. F. HAMILTON
*Typed Name of Officer*

HqSvcBn, 1stFSSG, MarForPac, CamPen, CA
*Organization of Officer*

First Lieutenant, USMCR
*Grade and Service*

Judge Advocate
*Official Capacity to Administer Oaths*
*(See R.C.M. 307(b)—must be commissioned officer)*

J. F. Hamilton
*Signature*

DD FORM 458 S/N 0102-LF-000-4580

ORIGINAL

DD Form 458, Charge Sheet, Supplemental Page 2
United States v. Corporal Scott A. Burton, U.S. Marine Corps

CHARGE III: VIOLATION OF THE UCMJ, ARTICLE 128

SPECIFICATION 1: In that Corporal Scott A. Burton, U.S. Marine Corps, on active duty, did, at Ad Diwaniyah, Iraq, between on or about 1 June 2003 and until on or about 6 July 2003, commit an assault upon an Iraqi detainee by firing a round next to his head with a dangerous weapon, to wit: a loaded service pistol.

SPECIFICATION 2: In that Corporal Scott A. Burton, U.S. Marine Corps, on active duty, did, at Ad Diwaniyah, Iraq, between on or about 1 June 2003 and until on or about 6 July 2003, unlawfully strike an Iraqi detainee by spraying his face and body with a fire extinguisher.

DD FORM 458 S/N 0102-LF-000-4500

ORIGINAL

The accused, through counsel, requested to reserve pleas and motions until the date contained in Appellate Exhibit I. The military judge granted the request and adopted the dates contained therein.

The military provided the accused a trial in absentia warning in accordance with R.C.M. 804.

The Article 39(a) session recessed at 0824, 23 March 2004.

[END OF PAGE]

AUTHENTICATION OF THE RECORD OF TRIAL
[pages 1-5]
in the case of

Corporal Scott A. Burton (b)(6) U.S. Marine Corps, 3d Battalion, 5th Marines, 1st Marine Division (Reinforced), Camp Pendleton, California 92055

In accordance with R.C.M. 1104(a)(2)(B), Lieutenant Commander Johnson, U.S. Navy, the military judge, was unavailable to review the record of trial due to completion of temporary additional duty and absence from the situs of the preparation of the record of trial.

The military judge called the Article 39(a) session to order at 0845, 2 June 2004.

The military judge announced that all parties present when the Court last recessed were again present with the following exceptions:

Sergeant D. Cherry, United States Marine Corps, who had been previously sworn, was the court reporter.

First Lieutenant Pettes, assistant trial counsel, had been relieved from further participation.

Lieutenant Colonel S. M. Immel, United States Marine Corps, was military judge.

The military judge stated his legal qualifications and status as to oath and that he had been detailed by the Circuit Military Judge of the Sierra Judicial Circuit.

The military judge stated that he would not be a witness for either side in the case and was not aware of grounds for challenge against him.

Neither side desired to voir dire or challenge the military judge for cause.

The military judge reminded the accused of his rights concerning counsel. The accused stated that he still wished to be represented by First Lieutenant Dewberry, his detailed defense counsel, as well as Mr. Frank Spinner. The accused waived Mr. Spinner's presence at the session of court.

The military judge reminded the accused of his rights pertaining to forum. The accused stated that he understood his rights with respect to counsel and desired to be tried by members.

The military judge granted defense counsel's request to reserve motions until 14 June 2004.

The accused, through counsel, entered the following pleas:

**To all charges and specifications thereunder:** **Not Guilty.**

The Article 39(a) session recessed at 0850, 2 June 2004.

*The Article 39(a) session was called to order at 0819, 14 June 2004.*

The military judge announced that all parties present when the Court last recessed were again present with the following exceptions:

Staff Sergeant D. D. Wyss, United States Marine Corps, who had been previously sworn, was the court reporter;
Captain Snow, U.S. Marine Corps Reserve, ASSISTANT TRIAL COUNSEL;
Mr. Frank Spinner, U.S. Air Force (Ret), CIVILIAN COUNSEL.

The assistant trial counsel announced his legal qualifications and status as to oath and that he had acted in no disqualifying capacity.

The assistant trial counsel was duly sworn.

The civilian counsel announced his legal qualifications and status as to oath and that his office was located in Colorado Springs, Colorado.

The civilian counsel was duly sworn.

The defense made a motion to grant appropriate relief to dismiss on grounds of multiplicity and failure to state an offense.

Absent objection, the defense counsel requested that the military judge consider *U.S. v. Curry*. The military judge granted the request.

Absent objection, the trial counsel requested that the military judge consider Appellate Exhibit IV. The military judge granted the request.

The following witnesses for the prosecution were sworn and testified in substance as follows:

(b)(6)
Captain, 5th Marine Regiment, 1st Marine Division

DIRECT EXAMINATION

I have been with my current unit for almost two years. Prior to this assignment, I was assigned to recruiting duty in Pennsylvania. I also served with 3/5 from 14 August 2002 through 6 February 2004. I was a company commander within 3/5. I commanded both Company L and Weapons Company. I commanded Weapons

Company from 1 June until 6 February 2003.

In June of 2003 Weapons Company was assigned to the city of Ad Diwania, Iraq, along a river. Shortly thereafter, we moved to Camp Got Some in the southern part of the city. Our mission was to conduct security and sustainment operations within the city. We established a permissive environment for coalition forces and a non-permissive environment for the enemy. This was also known as Phase IV operations. Phase IV operations began on Easter Sunday 2003.

I organized the company so that the 81 Millimeter Mortar Platoon would provide local base security. The platoon also patrolled the city. The Combined Anti-Armor Platoon supported combat patrols and operations outside the city. At this time, the city was relatively friendly to coalition forces.

The local security patrols within our area were a force protection issue. We wanted to ensure no one conducted pre-operational security on our camp or planned attacks. During this time there was a problem with looting in the city.

While on security patrols, the Marines were to continue to use the five S's. They were to still follow the guidance from the commanding general. As we would detain looters, we would determine if they were a threat to our forces or merely looting. If we decided that they were a threat, then we would secure them and speed them along to military police or intelligence for questioning.

The five S's stand for securing, silencing, separating, safeguarding, and speeding them to the appropriate authorities. The decision to take detained Iraqis to the MP's was made by patrol leaders. Patrols were authorized to detain Iraqis. If an Iraqi was detained by a Marine patrol, they were not free to leave until being released. If an Iraqi was detained, arrangements were made to transport them to an appropriate authority.

As the company commander, I informed my Marines that detainees were to receive the same Geneva Convention rights as EPW's. I am familiar with the Geneva Convention.

We understood that it was in our best interest to treat prisoners with dignity and respect because we were living alongside them. We wanted to ensure the population understood we were on their side and were not occupiers but liberators.

Iraqis detained on patrol were restricted in their freedom until they were released.

CROSS-EXAMINATION

In every case a determination had to be made whether an Iraqi was a looter or a threat. They may be militarily characterized as possibly trespassers. Whatever their characterization, if they were in an area we were to safeguard, it was appropriate for them to be stopped in order to ascertain what they were doing.

The Marines did not have the authority to have an Iraqi carry their gear or make them general laborers.

If it was determined that an Iraqi was not an immediate threat, the Marines were to instruct them to leave the area. More often than not, Iraqis were just asked to leave the area rather than taken into custody. We encountered many of the same people over and over again.

If an Iraqi was instructed to go away and they disobeyed, there was not a lot we could do. Many times they would leave because they understood that we were the martial law. They did have a responsibility to obey us. Many times we just convinced them that for their own safety it was important for them to leave. We appealed to their commonsense. We did not encounter many who defied us.

We would arrest and detain an Iraqi if we observed one Iraqi harming or attempting to harm another. If an Iraqi said someone stole their property, they would come to us and ask for an arrest. Most of the time we turn those matters over to the MP's.

REDIRECT EXAMINATION

If an Iraqi was taken into custody and placed into the back of a HMMWV and transported to another location, I would consider that Iraqi subject to those Marine's orders.

RECROSS-EXAMINATION

I think the word "detainee" is a general term. It was never specifically defined to me.

EXAMINATION BY THE COURT

If an Iraqi were detained, then an NCO would be responsible for supervising them. "Detained" was a general term used for a person

who was apprehended. A person was detained until we determined what we were going to do with them. An apprehension occurred when we stopped someone's movement. The majority of those apprehended were released; the minority were detained.

Generally an apprehension was turned into an detention when a person was deemed to be a repeat offender. Those that we could not make a determination on or those we suspected of something more were also detained.

When an apprehension became a detention there was no one act that occurred that signified the transition. When an apprehension would occur a suspect may be flex cuffed and have their identification taken to make a positive ID. The flex cuffs were used to protect the Marines until they could determine what was going on. Once a determination was made that a person was not a threat, then the Marines would cut the cuffs, return his identification, and ask them to be on their way. I would consider this a short detention.

For long-term detention the person apprehended would be taken to another location. These detentions could last from an hour to a few days, depending on the situation. For example, if a person was held for more than six hours, they would be held in our camp area. We did not have a makeshift brig. If we were going to hold them we would find a shaded area, give them water, and post a guard.

RECROSS-EXAMINATION

If an Iraqi had property they were not supposed to have, the property would be seized. Translators were used to assist our communications. Through the translators we would instruct the Iraqis not to do things. We had the power to tell Iraqis to stop doing things. If they did not listen to our commands, what we could do ~~what~~ was limited. We did not have the resources to apprehend every looter and take them to a holding area to ascertain whether they were thieves or to prosecute them. We were an expeditionary-type police force and unit. I relied upon the Marines to make on-the-spot judgements to determine what to do in regard to detaining or releasing Iraqis.

REDIRECT EXAMINATION

If an Iraqi was caught looting, they could be detained and brought back to the compound if it was deemed necessary. The Marines did have some power over the Iraqis.

The witness was warned, excused, and withdrew from the courtroom.

(b)(6) Lance Corporal, 3d Battalion, 5th Marines, 1st Marine Division

I have been at my present unit for a little over a year. I checked in to Weapons Company about 3 June 2003, while deployed to Ad Diwania, Iraq. Our first compound was located in a police station inside the city. We later moved to Camp Got Some outside the city. The move took place during the first part of July.

My squad leader was Sergeant Taylor and my fire team leader was Corporal (b)(6)

I know the accused in this case. He was another fire team leader within the squad.

While we were deployed to Ad Diwania we had various missions. We ran patrols within the city at times. Two or three fire teams would go out on patrol at a given time. I understood that we were patrolling the area to stop looters. There was also a UXO or unexploded ordnance area that we had to safeguard.

When the patrol would encounter looters we would chase them off. If we got ahold of them, we would take them for a short time and usually release them. The looters would usually run when they saw us coming. We would usually attempt to chase them down. After we caught them we would detain them and bring them back to the HMMWV's. We would sometimes release them to the Army MP's at a different location.

If a looter was caught we could detain them, put them into custody, and take them to the Army MP's and turn them over. We could also detain them for a short time and just release them. Manpower was a factor taken into consideration when making these decisions.

When our patrol would detain an Iraqi, the patrol leader would typically assign guards to the detainee to ensure they did not escape and for safety reasons. When we apprehended an Iraqi for looting and guards were placed on him, he was not free leave. The squad leaders determine when to release the detainees.

I recall an incident taking place with a fire extinguisher. We had caught looters with desks and chairs. After we caught the looters, we brought back one of the detainees to where the HMMWV was. My fire team did not bring the detainee back to the HMMWV. The HMMWV's were located at another location from where the Iraqi

was caught. I recall seeing the detainee in the location with the vehicles. There were two or three HMMWV's at this location.

When I first arrived back at the HMMWV's the detainee was on his knees on the ground with his hands behind his back. The detainee was being guarded.

I remember another incident involving a detainee where a round was discharged from a pistol. The Iraqis in this situation were looters as well. We drove up on them, jumped out of the HMMWV, and apprehended them. After the looters were apprehended, they were brought back to the HMMWV's and placed them in our custody. I do not remember transporting these detainees to another location.

When the three or four detainees were brought back to the HMMWV's they were placed on their knees with their hands behind their backs. These detainees were probably guarded, but I do not recall. These detainees were not free to leave. If they would have ran, we would have chased them down and apprehended them.

CROSS-EXAMINATION

The detainees in both circumstances were eventually released.

The witness was warned, excused, and withdrew from the courtroom.

The defense counsel made an argument on the motion.

The trial counsel presented argument on the motion.

The defense counsel made an argument in rebuttal.

The Article 39(a) session closed at 0920, 14 June 2004.

The Article 39(a) session opened at 0943, 14 June 2004.

The military judge and all parties present were again present.

The military judge denied the defense motion to dismiss for failure to state an offense and provided the following findings of fact: One, in June 2003, the accused was a member of Weapons Company, 3d Battalion, 5th Marines, 1st Marine Division; two, during June 2003, the accused was involved in Phase IV operations at Ad Diwania, Iraq; three, Phase IV operations involved transitional security of both military members and Iraqi nationals; four, the accused accompanied patrols in support of Phase IV operations; five, during Phase IV operations the accused

would be involved in actions where Iraqi civilians were detained; six, these detentions varied in duration from a few minutes to much longer periods; seven, while detained, the Iraqis had a duty to obey the Marines detaining them; eight, when an Iraqi was detained by coalition forces, the coalition forces had a duty, absent ~~a~~ of other duty or order, not to maltreat Iraqi civilians; nine, the duty of an Iraqi to follow the direction of a Marine that detained them was not transitional, but continued through the detention and upon their release. For example, if an Iraqi was told by a Marine not to enter a certain place, that order would apply even upon the Iraqi's release.

The military judge stated that the Court may supplement findings at or before the authentication of trial.

The military judge asked the defense to clarify their second motion, a motion for appropriate relief based on grounds of multiplicity. The military judge stated that the motion appeared to be a motion for relief based on unreasonable multiplication of charges. The defense counsel concurred.

The defense counsel made an argument on the motion.

The trial counsel presented argument on the motion.

The defense counsel made an argument in rebuttal.

The Article 39(a) session closed at 1003, 14 June 2004.

The Article 39(a) session opened at 1017, 14 June 2004.

The military judge and all parties present were again present.

The military judge granted the defense's motion in part. The military judge stated that the accused may not be found guilty of both Specification 2 of Charge II and Specification 2 of Charge III, but that the accused may be found guilty of either offense. The military judge went on to state that the members would be instructed that they may only find the accused guilty of Specification 2 of Charge II or Specification 2 of Charge III. The members would further be instructed that Specification 2 of Charge III is the greater offense; that the accused may not be found guilty of both Specification 3 of Charge II and Specification 1 of Charge III; that they may only find the accused guilty of Specification 3 of Charge II or Specification 1 of Charge III; that Specification 1 of Charge III is a greater offense.

The military judge stated that the Court may supplement findings at or before the authentication of trial.

The military judge reminded the accused of his rights pertaining to forum. The accused stated that he understood his rights with respect to counsel and still desired to be tried by members.

The accused, through counsel, entered the following pleas:

**To all charges and specifications thereunder:** **Not Guilty.**

The defense counsel stated that he did not anticipate filing additional motions.

The trial counsel offered Prosecution Exhibits 3, 4, and 6 for identification. Absent objection, Prosecution Exhibits 3, 4, and 6 were admitted into evidence.

The Article 39(a) session recessed at 1035, 14 June 2004.

**[END OF PAGE]**

The Article 39(a) session was called to order at 0910, 15 June 2004.

The military judge and all parties present were again present.

The defense counsel stated that they had seen the cleansed charge sheet, Appellate Exhibit XI, and had no objection. The defense counsel further stated that they had seen the member's folders and had no objection.

The military judge and counsel discussed proposed voir dire.

The Article 39(a) session recessed at 0916, 15 June 2004.

The Article 39(a) session was called to order at 1232, 15 June 2004.

The military judge and all parties present were again present.

The following members entered the courtroom:

**Major Hugh C. Curtright IV, U.S. Marine Corps;**
**Captain Thomas B. Noel, U.S. Marine Corps;**
**Captain Timothy E. Robertson, U.S. Marine Corps;**
**First Lieutenant Rex A. McIntosh, U.S. Marine Corps Reserve;**
**First Lieutenant Michael V. Prato, U.S. Marine Corps;**
**First Lieutenant John F. Campbell, U.S. Marine Corps Reserve.**

The military judge administered preliminary instructions to the members of the court-martial.

The members of the court-martial were duly sworn in accordance with R.C.M. 807.

The court-martial was assembled.

The trial counsel stated the general nature of the charges and specifications in the case. That the charge was preferred by Lance Corporal Q. Thomas, United States Marine Corps, and was properly referred to trial by the Commanding Officer of 3d Battalion, 5th Marine Regiment.

The military judge, trial, and defense counsel conducted voir dire of the members collectively and individually.

The trial counsel had no challenge for cause.

The defense counsel had no challenge for cause.

The military judge expressed his concern with First Lieutenant McIntosh sitting as a member on the grounds that he was ill. Absent objection, the military judge excused First Lieutenant McIntosh from further participation in the court-martial. The military judge ascertained whether the excusal of First Lieutenant McIntosh would in any way prejudice the defense. The defense counsel stated that it would not.

First Lieutenant McIntosh entered the courtroom and was excused from further participation in the court-martial.

The trial counsel had no peremptory challenge.

The defense counsel exercised their peremptory challenge upon Captain Noel.

The members entered the courtroom.

The member challenged was excused from further participation in the court-martial and withdrew from the courtroom.

The military judge administered further preliminary instructions to the members of the court-martial.

The court-martial recessed at 1337, 15 June 2004.

The court-martial was called to order at 1349, 15 June 2004.

The military judge and all parties present were again present.

The trial counsel made an opening statement.

The defense counsel made an opening statement.

The following witnesses for the prosecution were sworn and testified in substance as follows:

(b)(6) Lance Corporal, 3d Battalion, 5th Marines, 1st Marine Division

DIRECT EXAMINATION

I am presently assigned to Weapons Company. I am a member of Headquarters Platoon. My MOS is 0341. I joined my present unit in June of 2002. I deployed to Iraq with my current unit. I cannot recall when my company arrived in Kuwait, but it was in the beginning of the year.

In June and July of 2003, Weapons Company was located in Ad Diwania, Iraq, which is two-hours south of Baghdad. The Weapons Company compound was located in an abandoned Iraqi military base known as Camp Got Some.

I recognize Prosecution Exhibit 3 as part of Camp Got Some. There are some HMMWV's depicted in the exhibit next to the buildings.

I cannot recall the name of my squad leader or fire team leader.

My platoon was performing patrols within Ad Diwania. We would arrest or apprehend Iraqis that were stealing or loitering. We would encounter these Iraqis stealing while on security patrols north of our camp and around the tank factory. The most security patrols I have done in a week was three or four.

Two HMMWV's with a squad of five in each would go out on one-hour patrols.

I recognize Prosecution Exhibit 4 as the tank factory near Camp Got Some. Camp Got Some is in the lower, center portion of the diagram. The tank factory is in the upper, center portion.

Looking at the diagram, we would start our patrols on the main road heading toward one o'clock. We would then make a left and proceed toward ten o'clock. While we were patrolling through these buildings we would check for Iraqis. The Iraqis would take metal from the tank factory and proceed toward ten o'clock. The Iraqis would travel on the back roads. Some of our patrol route is not depicted on the diagram. Our patrols would conclude back at Camp Got Some.

I know the accused in this case. He stayed in the room across from me in Camp Got Some. He stayed in the room next to me in San Mateo. The accused was part of my squad.

I cannot accurately recall an incident involving a fire extinguisher, but I made a statement that would refresh my memory. The incident would have taken place in the morning. I did not really keep track of time, but I know it was in the summer months. On this occasion we were patrolling behind the tank factory.

Before the incident with the fire extinguisher we were on a normal patrol with two vehicles. Sergeant Taylor was the patrol leader on this occasion. I cannot recall whose vehicle I was in.

Our patrol led us into the tank factory and we looked around. We then went out behind the factory and saw two Iraqis with a donkey cart full of metal objects. They were going to the main road that is depicted on the exhibit.

I do not recall whose HMMWV caught the Iraqis that were stealing; I was off chasing the donkey cart that belonged to the Iraqis we were pursuing. After I caught the donkey cart, Corporal (b)(6) came up in the HMMWV and picked me up and brought me back to where Sergeant Taylor's vehicle was. I recall that Sergeant Taylor. Corporals (b)(6) and Burton, (b)(6) and Doc (b)(6) were present around the HMMWV.

After we caught the donkey cart, we examined what they took and determined that it was not really anything that would bring us harm. There were metal pipes and sheets of metal inside the donkey cart.

The Iraqis and the donkey cart were hard to miss. When the Iraqis saw us coming for them they ran. When we saw them run we took off after them.

When I arrived back to where the vehicles were, I saw one Iraqi sitting Indian style on the ground with his hands on his knees. The Marines were surrounding him. There were two Iraqis total. I cannot recall what happened to the other but I think he may have ducked underneath some bushes and hid.

I recognize Prosecution Exhibit 1 as a depiction of how the vehicles were positioned. I was located in what has been marked as Sergeant Taylor's HMMWV. I think all of Prosecution Exhibit 1 is incorrect. Sergeant Taylor's vehicle was up next to Corporal Case's vehicle. The Iraqi is depicted in the correct position on the diagram. I remember there being Marines surrounding the Iraqi in a half-circle.

When we pulled up in the HMMWV I got out and went to Sergeant Taylor's HMMWV and started eating an MRE. Corporal (b)(6) was sitting next to me. Corporal Burton was in the middle of the half-circle. I draw a blank from this point.

I saw an Iraqi get sprayed with a fire extinguisher by Corporal Burton. Corporal Burton got the fire extinguisher from Case's HMMWV. Corporal Burton asked if there was an extinguisher in Sergeant Taylor's truck. He did not ask me directly. I picked one up and it was full, but I told him it was empty. I knew what he was going to do because Marines have done it in the past. I did not have any conversations with Corporal Burton prior to him

spraying the Iraqi.

When the fire extinguisher was sprayed powder came out. The powder from the extinguisher hit the Iraqi in the midsection.

When the Iraqi was hit with the powder he was sitting Indian style with his hands on his knees. Corporal Burton took out the fire extinguisher hose and sprayed the Iraqi in the midsection. There were a few Marines standing around watching this take place.

When Corporal Burton sprayed the detained Iraqi he was standing directly in front of him, about five to eight feet away. The Iraqi was facing the same way the vehicles were. I was ten to fifteen feet away from Corporal Burton. When the Iraqi was sprayed, I did not see him acting in a threatening manner. I do not know if the Iraqi possessed a weapon.

After the Iraqi was sprayed with the extinguisher he was coughing and gagging. The Iraqi appeared scared.

Every HMMWV has a fire extinguisher.

Corporal Burton thought spraying the Iraqi with the extinguisher was funny because he was laughing.

I recall an incident involving a pistol and the discharge of a round. I do not recall when this incident occurred. It was after the incident with the fire extinguisher.

I remember moving in to Camp Got Some. We were located at the previous mayor's house.

During the incident with the pistol we were out on a normal patrol. I believe we caught four Iraqis, two were teenagers and two were just kids. There ages were 18 to 19 and 10 to 11. We had two vehicles on this patrol. (b)(6) was in my HMMWV along with (b)(6) . I cannot recall who the driver was.

The four Iraqis were caught were looting tile. None of them had weapons. Once we caught the Iraqis we took them into custody and placed them in the back of the HMMWV. There were Marines guarding them in the back of the vehicle.

These Iraqis also had donkey carts. We dumped the donkey cart over and let the donkeys go.

Once these four Iraqis saw our patrol they tried to run like every other Iraqi. We saw the goods on the cart so we went off

after them.

We took the detained Iraqis to an area where there was a three- to four-foot high wall behind them and two, one-man trenches. These trenches were about a foot deep. There were blown-up buildings around us.

The Iraqis were not cuffed in the back of the vehicle. They had there hands in front of them where we could see them.

When we got to the location, the Iraqis were taken out of the HMMWV's and were placed in front of the first trench. They were then lined up on their knees with their hands behind their backs. They were in execution style. Corporal Burton, (b)(6) , and Sergeant Taylor went to the front of Sergeant Taylor's HMMWV and were talking. Doc (b)(6) was sitting in the HMMWV. (b)(6) was next to me and (b)(6) was across from me. (b)(6) were in the other HMMWV watching the Iraqis. I did not see it, but it was obvious.

The defense counsel objected to the witness' response stating that the witness did not see the event. The military judge sustained the objection.

I recognize Prosecution Exhibit 2 for identification as the setup for the pistol incident. The third HMMWV at the top of the diagram was not there. There was not a third HMMWV. The two HMMWV's at the bottom of the diagram are not accurately depicted. The second HMMWV in the center of the diagram was forward more because I could not see the Marines in discussion. There were four Iraqis rather than three.

The military judge stated that he would not allow the witness to use either diagram.

After the meeting I could not see, the next thing I saw was Sergeant Taylor in front of his HMMWV. Corporal Burton and Case began walking toward the Iraqis. Case stayed at the end of Sergeant Taylor's HMMWV and Corporal Burton continued walking to what would be the first Iraqi if you were looking directly at it. This took about ten seconds. This Iraqi appeared to be the oldest. Corporal Burton stepped to the side of him, diagonally, and started saying some stuff to him with his pistol in hand. After he got done talking, he walked around behind the Iraqi and placed his wrists on the right shoulder of the Iraqi with the pistol inches away from his ear and head. Corporal Burton pointed the weapon at a 45-degree angle pointing up and fired a round.

Corporal Burton and Case placed the Iraqis on their knees in front of the fighting hole with their hands behind their back. He was holding their wrists and his hand was on their shoulder and put them down. He was guiding them to their knees.

I recall hearing the pistol being charged. I did not think he actually had chambered a round. Corporal Burton was at the front of the HMMWV when this happened, about 23 to 27 feet from the Iraqis.

I did not see the Iraqis make any threatening movements before the round was discharged. It did not appear Corporal Burton was acting in self-defense. I did not see the Iraqis give their consent for this to happen.

I was approximately 10 to 15 feet from where this occurred. There was nothing obstructing my view.

I recognize Prosecution Exhibit 5 as an accurate replica of a 9-millimeter Beretta. I have seen one before. This exhibit would help me explain this incident to the members. This is the type of weapon I recall Corporal Burton used.

The witness reenacted the incident in the well using the assistant trial counsel.

When Corporal Burton fired the shot next to the Iraqi, the other three Iraqis were crying. Corporal Burton told them to get out of here, to go, in Arabic. They ran and took off.

The Iraqi who had the round discharged next to his head showed no emotion. He was a pacifist. He was petrified.

Right after the incident took place Corporal Burton showed no emotion. After two to three minutes he sort of laughed about it. After the incident Corporal Burton walked back to the area where Sergeant Taylor and (b)(6) were.

CROSS-EXAMINATION

Corporal Burton was an NCO, superior to me, and in a position to supervise me. On occasion he had to discipline me on minor infractions.

The trial counsel objected to the question. The military judge overruled the objection.

I felt like Corporal Burton picked on me.

It is not possible that just two Iraqis were placed on their knees. It is not possible that the younger Iraqis were standing away and removed from the trench I described.

All of my observations were made while I was sitting in the back of one of the HMMWV's. There were benches in the back. I was sitting next to (b)(6) on the bench. I never got out of the HMMWV.

I got sleep but (b)(6) did not the night before. This incident occurred fairly early in the morning and Donald was sleeping in the HMMWV during the incident. We were in the HMMWV that was closest to the Iraqis on their knees. Kline and Doc (b)(6) were also in the HMMWV. Doc (b)(6) was in the passenger seat or the vehicle. The vehicle was diagonal to the Iraqis that were kneeling. (b)(6) was not a doctor; he was an HN3. was a lance corporal and was sitting across from me and (b)(6) in the HMMWV.

Sergeant Taylor remained in front of him HMMWV when Corporal Burton walked over to the Iraqis. Corporal Burton placed the Iraqis on their knees before he began talking with Sergeant Taylor.

PFC (b)(6) . PFC (b)(6) and PFC (b)(6) were inside's Sergeant Taylor's HMMWV. There were no other Marines present at the scene. Corporal (b)(6) was the only Marine standing within ten feet of Corporal Burton when he fired the weapon. I think he may have been a little bit more than ten feet and everyone else was in the HMMWV's.

I have testified previously during proceedings involving this case where I was placed under oath. I testified to the best of my memory about these events. At that time I could not recall Ohare being present. Doc (b)(6) reminded me that he was there and that is the reason I put him there now.

(b)(6) was not on the floor of the HMMWV, he was on the bench leaned against the hood of the HMMWV.

Corporal Burton fired the pistol 10 to 15 feet away from my HMMWV. It was exactly 10 feet from my HMMWV to the first Iraqi that was kneeling. There was five feet from where the weapon was fired to the fourth Iraqi.

At no time were the Iraqi's hand tied behind their backs.

Oftentimes when we would stop and detain Iraqis we would have them sit down so they could not run away. If they are on their knees it is easier for them to run. If other Marines testified that they placed Iraqis on their knees they did not do what they were told.

When Corporal Burton pulled the trigger of the pistol I was watching him. I do not recall being under oath and testifying that I was not watching Corporal Burton when he pulled the trigger. I also do not recall testifying under oath that his hands were on the Iraqi's shoulder for about five seconds. If you produced a tape that showed I said that I would say that my testimony today was more accurate.

There was not an older Iraqi that was allowed to depart.

In each of the two incidents I described, the Iraqis were not otherwise apprehended and taken back to the camp. They were all allowed to leave. I do not recall if any of these Iraqis had been previously stopped or detained by patrols.

REDIRECT EXAMINATION

Lance Corporal (b)(6) was sleeping when the shooting took place with his head cocked back, leaning on the HMMWV with his eyes shut. My attention was not focussed on (b)(6) when the pistol was fired, but prior to the shot, Lance Corporal (b)(6) was asleep. He was tired because he did patrols the night before.

EXAMINATION BY THE COURT

Our weapons were supposed to be in Condition 1 while we were on patrols. Usually we do not chamber a round because the round could go off. With an M16 you could chamber a round because you would know it would not go off. I would leave the pistol in Condition 3.

The HMMWV's we were in were high backs on both occasions.

The witness was warned, excused, and withdrew from the courtroom.

(b)(6) Lance Corporal, 3d Battalion, 5th Marines, 1st Marine Division

I am currently FAP'd to Division. I have been there for about three months.

I was with 81's Platoon, Weapons Company during the war. My MOS is 0341. I have been with 3/5 for over three years. I deployed with 3/5 in support of Operation Iraqi Freedom. Weapons Company arrived in Kuwait in early February.

In June and July of 2003, Weapons Company was located in Camp Got Some, Ad Diwania, Iraq. My squad leader at the time was Sergeant Taylor. I was a fire team leader. My fire team consisted of (b)(6) and perhaps another member.

I am testifying today under a grant of immunity from the base commanding general. I was offered a pretrial agreement and immunity in exchange for my testimony today. The grant of immunity that I was given specified that I must testify truthfully.

When I was in Iraq in June of 2003, our missions included escorting fuel trucks, running money, and patrolling our camp's perimeter. We also received other small tasks.

We would take at least two HMMWV's on patrol.

I know the accused in this case. I went to SOI with him and we were in the same company in boot camp. I went through the ranks with him. He was part of my squad.

I recall an incident involving a fire extinguisher. I remember this incident occurred in June or July of 2003. I believe it took place in early afternoon. My squad was on patrol at the time.

I believe we came upon three Iraqis. They got scared for some reason and ran. We pursued them. A few Marines were chasing a donkey cart and the rest of the Marines caught the Iraqis. We brought the Iraqis back to a center location in the back of the HMMWV. I was part of the HMMWV that actually apprehended the Iraqis. There were either one or two other HMMWV's located in this center location.

We threw the Iraqis in the back of the HMMWV because I did not want them to ride up front with me. We were taking the Iraqi into custody. We were chasing them because they ran. I was unsure why they were running but it could have been a number of things. I do not remember specifically what he did but I am sure he was doing something.

There were several Marines guarding the Iraqi in the back of the vehicle.

I recognize Prosecution Exhibit 1 for identification because I drew it. This is how I recall the vehicles being positioned. I believe we apprehended one or two Iraqis. I think one was let go and we had the one left. We kept the one Iraqi in custody because he ran.

The vehicle I was riding in is labeled as Case on the exhibit. Zamora, Kline, and possibly another Marine were in my vehicle. I do not recall what vehicle the accused was in.

When we arrived at the location the Iraqi was removed from the truck. He was placed between the two HMMWV's as indicated on the exhibit. There were several Marines guarding him at this time. He may have been standing or on his knees. I do not remember. I remember the Iraqi was scared because of his body language.

I would guess there were six to ten Marines at the location at this time. Most of the Marines were eating chow and some were guarding the Iraqi.

Before the incident took place I had a conversation with the accused. The subject came up of spraying the Iraqi in the face with the fire extinguisher. I wanted to do it but it did not work out that way because Corporal Burton wanted to do it. He did not tell me why he wanted to spray the Iraqi. Corporal Burton sprayed the Iraqi in the face with the fire extinguisher.

Corporal Burton got the fire extinguisher from my HMMWV. I gave it to him.

This conversation with the accused took five seconds or less.

I do not recall how the topic came up of spraying the Iraqi in the face. I think it was just us becoming frustrated from chasing the Iraqis. I believe it was Corporal Burton's idea to spray the Iraqi with the extinguisher.

When Corporal Burton sprayed the fire extinguisher I saw a white mist on the Iraqi. I cannot say for sure whether the Iraqi was standing or sitting at the time. The contents of the extinguisher hit the Iraqi in the upper-body, face area. After the Iraqi had been sprayed he looked like someone who had been sprayed with a fire extinguisher, powdery substance on his face and clothes. It looked like he had kitchen flour dumped on him.

The fire extinguisher lasted for about a second.

I was maybe ten feet from Corporal Burton when this took place. There was nothing blocking my view.

I did not see the Iraqi acting in any threatening manner towards the accused. To my knowledge, the Iraqi did not have a weapon when he was apprehended.

After the Iraqi was sprayed with the fire extinguisher he was unhappy and a little upset. I think he was crying. I think the Marines there thought it was funny because we were laughing. I believe pictures were taken during this event. I think I took them. I did not recognize the Iraqi as anyone we had detained in the past.

I recall an incident involving a pistol. I do not recall if this took place before or after the extinguisher incident. I know it took place in June or July. It did not occur on the same patrol.

I am sure the Iraqis in this incident were stealing something. They may have been running. The decision was made to stop and deal with them.

I think (b)(6) were in my vehicle during this incident.

When the Iraqis ran we chased and caught them. I was not there when the Iraqis were apprehended. We pulled up after they were apprehended. ~~I do not remember~~. I remember three vehicles on this patrol and we caught six Iraqis. After they were caught I recall seeing Marines guarding them. They were guarded for our safety. SM 2

The Iraqis we caught on both this patrol and the fire extinguisher incident were in our control. These Iraqis were not free to leave.

When I first encountered the Iraqis they were out of the vehicles, off to the side by the fighting holes. I do not recall where the fighting holes were in relation to where the Iraqis were apprehended.

I recognize Prosecution Exhibit 2 for identification because I drew it. While not to scale, this accurately depicts my recollection of how the vehicles and detainees were placed. I was on one of the vehicles on the bottom of the diagram, either the lead or trail vehicle.

I have no idea whose idea it was to conduct the mock execution.

The defense counsel objected to the trial counsel's use of the term "mock execution." The military judge sustained the objection.

The holes could not have been deeper than ankle deep but they may have been. They are drawn to scale on the exhibit. It was a sort of skirmish trench.

When my vehicle drove up I saw Marines and Iraqis. The Marines were hanging out around the top HMMWV where it says detained Iraqis and hole on the exhibit. I saw the Iraqis standing outside the fighting hole. I do not recall if they were on their knees or standing. They were facing the fighting hole. When I drove up Corporal Burton was close to the first vehicle on the top of the diagram at 12 o'clock.

I was not at the location long before the incident occurred. I remember three to six Iraqis. Sergeant Taylor, Corporal Burton, and a couple of other members of the squad got together close to the 12 o'clock HMMWV on the diagram. I do not recall what was discussed. While this conversation was taking place, I believe the Iraqis were at the 12 o'clock hole but I do not recall. I did not see who positioned the Iraqis at the hole.

After this conversation or greeting at the HMMWV a shot was fired. After the conversation I came back to the HMMWV I was driving, one of the bottom two on the diagram. Sergeant Taylor and Corporal Burton were still at the 12 o'clock HMMWV with a couple of Marines in the back. I believe (b)(6) was with me when I heard a shot. I did not actually see the shot fired, but I heard it. There was a 9-millimeter pistol being held by the accused. Where "shooter" is depicted on the exhibit is where the accused was standing when I saw him with the pistol in hand. He was behind the top Iraqi.

I had some idea why the Iraqis were positioned in front of the fighting hole.

The defense counsel objected to the line of questioning on the grounds of speculation. The military judge sustained the objection.

After the conversation at the HMMWV, Corporal Burton was where it says shooter on the diagram. Corporal Burton got his weapon from his holster that he carried on patrol. We had extra pistols from people leaving who had them. From time to time we all carried dual arms.

I never saw the Iraqis make any threatening advances toward Corporal Burton. I could not see Corporal Burton acting in self-defense.

After the shots were fired and I saw Corporal Burton, he was a foot to two feet behind the Iraqi. I was facing a 9 o'clock position when the shots were fired. After the shots were fired I faced the 1 o'clock position. I am sure that Corporal Burton had the pistol in his right hand. I think he is right handed.

I do not recall hearing a pistol being charged. I doubt that I did because we carry our weapons in Condition 1. Before firing the round Corporal Burton placed the weapon six inches to a foot to the right of the Iraqi's head. He was holding the weapon at a 45-degree angle upward.

The defense counsel objected on the grounds the question had been asked and answered. The military judge overruled the objection.

The lead Iraqi appeared to be 30 years old. The other two Iraqis appeared to be in their upper teens or 20's.

After the shot was fired and I turned around I do not recall what I saw. The Iraqis were still there. When the shot was fired the Iraqi did not look very startled to me. The other two Iraqis did not appear startled either.

The Iraqis were eventually released from right there. They ran away once they were released.

There was nothing blocking my view once I heard the shot fired and turned around.

I was not facing Corporal Burton when the shot was fired because when I saw the weapon positioned I knew what was going to happen and did not want a part of it. I could sense what was going to happen.

The defense counsel objected on the grounds of speculation. The military judge overruled the objected but instructed the trial counsel to rephrase the question.

I got that sense because I saw a pistol upholstered close to a person's head.

After the incident when we got back to the camp Corporal Burton said he felt bad for doing it. I do not remember his reaction right after the incident.

I do not recall taking these Iraqis into custody before.

CROSS-EXAMINATION

(b)(6)

We were frustrated while chasing the Iraqis because we were told we could not do anything. It was passed through the chain of command that no one was to be brought back to the compound. I felt as if the Iraqis were not respecting us. I could not think of a way to get the Iraqis to stop looting. We would either dump or burn the property that we confiscated. We would either cut the donkey's loose or take them back to the compound for our fun. To my knowledge the people who were caught stealing were not taken to justice in any way. All of the Marines were frustrated.

We could not tell a potential terrorist from a looter based on the way they looked. We treated all Iraqis the same.

Every time we caught someone they would always say "no alibaba." I am sure that the individuals described in the incidents said this at some point. We were unable to speak to the Iraqi's effectively. On neither occasion did we have a translator with us. Attempting to communicate led to more frustration.

During the incidents described I am unsure whether anyone was able to communicate with the Iraqis.

I do not remember an Iraqis being placed on their knees. I remember three at each hole. The diagram is not a completely accurate depiction of what I saw. When the weapon was fired the Iraqis could have been on their knees or they could have been standing. I remember the placement of the weapon. The weapon was not to the Iraqi's ear it was to the side. The Iraqis ran away seconds after the weapon was fired. I doubt that it was a minute. I never saw Corporal Burton hold the weapon with two hands. I did not see the accused place his hands on any of the Iraqis.

When we would stop Iraqis and we did not want them to leave we would usually put them on their knees.

It is possible that I walked with Corporal Burton from the first HMMWV to one of the holes on the diagram. I do not know ~~of~~ if I did that or not.

The trial counsel objected that the question had been asked and answered. The military judge overruled the objection.

I do not recall if the Iraqis had donkey carts on the occasion illustrated in the diagram; they may or may not have.

It is hard to remember these events because they happened close to a year ago.

If Corporal Burton were to have walked around from the back to the front of the Iraqi he would not have been in the hole. I guess the diagram is not an accurate one. I remember the trench in length was wide enough for three people.

I did not see anyone give the accused the pistol. The accused was wearing a holster.

I did not see Corporal Burton actually threaten the Iraqi.

REDIRECT EXAMINATION

The Iraqi in the fire extinguisher incident did not have a weapon when he was in front of us. I felt threatened from him when he ran but not when he was in front of us before being shot with the extinguisher.

I did not feel threatened by the Iraqis that were placed in front of the fighting holes.

The things we would catch the Iraqis looting would range from unexploded ordnance, to American utilities and bricks and wood. The Iraqis we would catch with unexploded ordnance would be taken to 977.

When Iraqis would be placed on their knees their hands would be either on their head, behind their backs, or in front. We placed their hands there so we could see them.

Even thought the three Iraqis are missing from the south hole on the diagram, it accurately depicts what I recall.

We were told that Weapons Company Compound was not going to take detainees any longer. No one gave us authority, however, to spray an Iraqi with a fire extinguisher or discharge a weapon in that manner.

RECROSS-EXAMINATION

It is hard to change rules of engagement. You cannot go from shooting anyone who looks like he has a weapon to having to wait for them to positively point a weapon at you. We were told we could have a heavy hand with the Iraqis

REDIRECT EXAMINATION

The Iraqis during both incidents were in our custody. With Marines guarding them. They posed no threat.

EXAMINATION BY THE COURT

I have never seen a detainee sprayed with a fire extinguisher other than this incident. I saw a Marine NCO sprayed with one before.

Since 977 would not do their job anymore, we were told to ensure that these people would not get too close to our compound. I consider getting physical to be using a heavy hand. I cannot say specifically who passed this word. It came from the command, meaning anyone from our platoon commander to the platoon sergeant. We were given this word by the platoon commander in the sergeant's berthing area. We were told that 977 was not doing their job. I personally took American utilities and the detainee caught with them and I was told by 977 that it was not enough evidence to prosecute. I reported the incident to Lieutenant (b)(6) and he brought us together in the berthing area. He told us "do what you've got to do." No one else in the chain of command elaborated on what heavy hands meant. In my mind it would include possibly spraying someone with a fire extinguisher. I do not know if it would include discharging a pistol next to someone's head. At best I think that would be borderline.

The witness was excused, warned, and withdrew from the courtroom.

The court-martial recessed at 1634, 15 June 2004.

[END OF PAGE]

The court-martial was called to order at 0820, 16 June 2004.

The military judge and all parties previously present were again present. The members were present.

(b)(6) Lance Corporal, Weapons Company, 3d Battalion, 5th Marines

DIRECT EXAMINATION

I have been with 3/5 for about a year. I joined the 81's Platoon of 3/5 early June of 2003. When I joined the platoon, they were located at a police station inside the city of Ad Diwania. At the beginning of July, we moved to Camp Got Some. My squad leader was Sergeant Taylor, and Corporal (b)(6) was my fire team leader. The other members included Lance Corporal (b)(6), and Private First Class (b)(6)

Our duties included performing patrols, conducting security missions, and guarding the camp. The patrols were mostly in a vehicle. We would usually take two to three vehicles on the patrols. I know Corporal Burton because he is a fire team leader in my squad.

I recall an incident that took place around the beginning of July while we were on patrol that involved a fire extinguisher. I believe the incident took place in the morning hours. We were patrolling the tank factory ensuring that unexploded ordnance was secure from the looters. We did see looters out there. When we saw them, we attempted to chase them down and catch them. We caught one of them and brought him back to the HMMWV's. I was not present when this looter was caught. We had caught looters in the past while on patrol. Generally to catch looters we would grab them and they would pretty much know that they were caught at that time, and we would take them back to the HMMWV's. I do recall that this looter that my squad caught that day was stealing various items, like desks or chairs. I did not see the looter taken into custody, but I saw him in custody when he was brought back to the HMMWV.

The fire extinguisher incident happened where the HMMWV's were. I saw the looter sitting near the HMMWV's, but I wasn't paying much attention because I was getting chow. I believe there were two or three HMMWV's there, and probably about five to ten Marines there. The looter was sitting down with his hands behind his back. I don't recall if he was sitting Indian style or if he was on his knees. I know he was on the ground.

I did see about one or two Marines around the looter. I believe they were guarding the looter.

The military judge sustained an objection by the defense as to leading.

As I was getting chow behind one of the HMMWV's, I peeked up around it and Corporal Burton had a fire extinguisher in his hand and the looter had been sprayed and was leaving the area. When I saw the looter at this time, he was standing. The looter had a white powdery substance on him. I couldn't really tell what the looter's demeanor was. I was probably about 10 to 20 meters away from him. I do not recall what Corporal Burton's demeanor was. I do not know where Corporal Burton got the fire extinguisher. I don't recall if he was riding in my vehicle or not.

I recall an incident involving a pistol. It took place right around the same time period as the fire extinguisher incident. I do not recall if it was the same patrol or not. While on patrol, we found about three or four looters and we took them back to the HMMWV's. The were sitting on the ground, and I was in the back of one of the HMMWV's posting security in the opposite direction. Corporal Burton was one of the fire team leaders. He was out walking with some other Marines. I heard a shot, and by the time I turned around, the Iraqis were up and running. At this time, Corporal Burton was out in front of the Iraqis and then he was behind them afterwards. I saw him pull out a pistol.

There were about two vehicles on this patrol. Lance Corporal (b)(6) , Private First Class (b)(6) and Lance Corporal (b)(6) were in the HMMWV with me. I cannot remember what these Iraqis were caught looting. I don't recall if they had weapons on them. I'm not sure where the Iraqis were apprehended.

I was sitting on the right side of the HMMWV facing outboard in the opposite direction from the incident. It was a high-back HMMWV. I was probably about 20 to 30 meters away from the incident. I saw three or four Iraqis that ranged between the ages of 8 and 18 with Corporal Burton.

The area where this incident took place was a run-down area. It was where the Iraqis were not allowed to be. The buildings were old and run-down. I saw Corporal Burton behind the Iraqis before the shots were fired. The Iraqis were on their knees with their hands behind their backs. I'm not sure what Corporal Burton was doing before the shots were fired. The Iraqis were lined up side by side in front of a foxhole. I believe the foxhole was about 8 feet long and 2 feet wide. I was posted as security at

this time. Corporal Burton had a 9-millimeter in his hand. I don't remember if there were other Marines near Corporal Burton at this time. I don't remember seeing any of the Iraqis threatening Corporal Burton.

Corporal Burton was probably three or four feet behind the Iraqis before I heard the shot. After I heard the shot, I turned around and the Iraqis were running and Corporal Burton was walking away. I don't know the age of the Iraqi who was closest to Corporal Burton. There wasn't anything obstructing my view of the incident. I couldn't see the Iraqis' demeanor as they were running away. I don't know what Corporal Burton's demeanor was either.

CROSS-EXAMINATION

I did not serve in combat with Corporal Burton. When the looter was sprayed with the fire extinguisher, he was standing. I only saw the residue on him; I didn't see the actual spraying. I believe I stated in another statement that the looter was sprayed from his shoulders to his knees. The spraying was very brief. At the time of the spraying, Corporal Burton was about six feet away from the looter.

I could have said in a previous statement that the Iraqi who was closest to Corporal Burton was about 20 years of age. I don't have any reason to dispute that that was my testimony at the Article 32 investigation.

I recall seeing about four Iraqis involved in the 9-millimeter incident. I don't remember exactly how many of the Iraqis were placed in front of the foxhole. It was not unusual to put Iraqis on their knees. We did that to ensure that we had control, and it was standard operating procedure. We were given very little guidance on how to deal with looters prior to this situation.

I believe I testified prior that the ages of the Iraqis were 10 to 14. I testified at the Article 32 that the oldest Iraqi was 20, and today I said that the youngest one was about 8 years old. I was just estimating their ages. I really don't know how old they were.

I can't remember exactly how many HMMWV's there were at the 9-millimeter incident. I was in the back of one HMMWV facing a different direction. I would turn around and look periodically. I'm not sure if Lance Corporal (b)(6) or Private First Class (b)(6) was there. I can't recall if was there or not. I don't

remember where Lance Corporal (b)(6) was during this incident. I don't really remember how many Marines were outside of the HMMWV's.

The HMMWV that I was in was about a little more than 15 or 20 meters away from Corporal Burton. There was another HMMWV that was closer to Corporal Burton. I don't know who was in that HMMWV. I am saying that I would have been in the same HMMWV with Lance Corporal (b)(6) and Private First Class (b)(6) I don't know if there were any Marines withing 10 feet of Corporal Burton. The closest I can place Corporal Burton to the Iraqis was 3 or 4 feet.

REDIRECT EXAMINATION

I saw Corporal Burton briefly spray the fire extinguisher. I saw the fire extinguisher in his hands and the last half of the downward spray and the Iraqi covered in the powder. I can't really explain the guidance we received on the looters. We were just told they were looters in the area and that we were supposed to keep them out of the area. I am familiar with five S's and a T. It means search, safeguard, segregate, tact. And I can't remember the others. This acronym applies to EPW's. I learned it at SOI. It is fair to say that I had some guidance. I joined 3/5 in June of 2003 after the war.

The witness was excused and withdrew from the courtroom.

(b)(6) Private First Class Weapons Company, 3d Battalion, 5th Marines

DIRECT EXAMINATION

I've been with Weapons Company, 81's Platoon for about three and a half years. I deployed in support of Operation Iraqi Freedom. My platoon landed in Kuwait at the end of February. I was part of 81's Platoon during the war. Weapons Company was located in Ad Diwania, Iraq, at Camp Got Some. My squad leader was Sergeant Taylor or Sergeant (b)(6) . My fire team leader was Corporal (b)(6)

During this time, my squad was conducting patrols around the city and perimeter. We were basically a police force in the city. About 8 to 10 Marines would go out on these patrols. We conducted foot and vehicle patrols. Usually two HMMWV's would go out on patrol. I do know Corporal Burton. He was in the 81's Platoon when I was there. I would sometimes go out on patrol with him.

I recall an incident involving a fire extinguisher. I don't know when this incident occurred. We were on patrol, and we picked up some kids at the tank factory. I believe there were two vehicles present at this incident along with about 8 to 10 Marines. Sergeant Taylor was the highest ranking Marine. There were about 4 NCO's on that particular patrol. We chased the kids, one of the vehicles stopped at one of the kids. Everybody was gathered around. I wasn't really paying attention because I was in one of the HMMWV's, but I saw a fire extinguisher go off. I don't know who did it. I didn't actually see the spraying, but I did see the kid doused in the powder. I was minding my business in the back of one of the HMMWV's. I didn't want to have anything to do with what they were doing.

I don't recall the Iraqi's demeanor after this incident. I can't tell you where Corporal Burton was prior to the incident. I know the Marines were circling the Iraqi. The Iraqi was standing. The Iraqi was sprayed in his upper torso area with the powder. I was about ten feet away from the incident.

I was on a patrol with two HMMWV's. We were doing a perimeter patrol. Right before we left, Corporal Burton got in the HMMWV. When we arrived at the tank factory, we drove to the one of the tanks and Corporal Burton got out of the HMMWV and looked in the tank. He jumped back into the HMMWV, and we went back to camp to drop Corporal Burton off, then we went to resume our patrol. I don't know why Corporal Burton was checking the tank. He was not in my vehicle during this patrol.

I do recall an incident involving a 9-millimeter pistol. I believe it happened around May. During this patrol, we pulled up to an area that had foxholes in the ground. We pulled up, and there was already a HMMWV there, and the Iraqis were standing near the foxholes. In my HMMWV it was Sergeant Taylor, Lance Corporal Case, and a few other Marines that I can't remember. I remember some kids around the foxholes. Our squad was around the Iraqis. I saw Corporal Burton get behind the Iraqis with a 9-millimeter. He discharged a round. I did not see Corporal Burton actually pull the trigger. I saw Corporal Burton holding the weapon near the Iraqi's head. I saw the round when it was discharged. The weapon was at an angle beside the kid's head. The angle was about a 30-or 45-degree angle. Corporal Burton had the weapon inches away from the Iraqi's head when the round was discharged.

There were two vehicles on this patrol. There were four Iraqis near the foxholes. Two of the Iraqis were teenagers, about 14 or 17 years old. The other two were about 9 and 12 years old. The Iraqi that was in front of Corporal Burton was about 10 to 12

years old. I was 10 to 15 feet away from the incident inside the HMMWV. I didn't want to have anything to do with what they were doing, so I stayed in the HMMWV. I was not sleeping. I can't remember if the Iraqis were on their knees or if they were standing. The foxhole was about 3 to 5 feet wide and about 3 feet in length.

My HMMWV was the one closest to the foxhole. At the time of the incident, I was the only one in the HMMWV. I don't remember where Corporal Burton was when I arrived at the incident. I don't recall the positioning of the Iraqis' hands.

After the round was discharged, the Iraqis ran off. They looked scared and relieved. The kids were crying. Corporal Burton seemed to think it was a good time because [illegible]

Corporal Burton did not say anything to me about the incident afterward.

CROSS-EXAMINATION

I did not know who sprayed the looter with the fire extinguisher. I cannot say that it was Corporal [illegible] sprayed the Iraqi. In a statement I made earlier, I cannot recall if I described the looter as a kid.

I do not like what Corporal Burton did. Corporal Burton had to discipline me for sleeping on guard duty. On other occasions, he had to correct my behavior. I am being discharged from the Marine Corps.

Regarding the pistol incident, Lance Corporal (b)(6) was not in the HMMWV with me. I may have been on patrol the night before this incident. The mission that this incident occurred on was not the first mission that we had. I testified earlier that this was the first mission that we had once we moved to Camp Got Some. Lance Corporal (b)(6) was not in the back of the HMMWV when this incident occurred. Previously I testified that there were six Iraqis when we picked them up, but four in front of the foxholes. One of the Iraqis was an older man. He was let go. I can't remember if Corporal Burton was wearing a holster or not. The other Marines who were there were outside of the vehicle. These Marines were standing withing 10 feet of Corporal Burton. I believe there were about 8 t 12 Marines there. The Marines that I recall who were there were Corporal (b)(6) Sergeant Taylor. Lance Corporal (b)(6) Lance Corporal (b)(6) Lance Corporal (b)(6) and I cannot remember the rest. My view was pretty clear.

[redacted]

REDIRECT EXAMINATION

I did not want any part of what they were doing because I thought that they were all messing around. I didn't think that that was what we were supposed to be doing. I thought they seemed like they were having too much fun.

EXAMINATION BY THE COURT

I am being discharged because of a pattern of misconduct.

The witness was excused and withdrew from the courtroom.

JASON H. FLANERY, Lance Corporal, Weapons Company, 3d Battalion, 5th Marines

DIRECT EXAMINATION

I am a member of 81's platoon. I joined the unit 28 January 2003. I deployed with this unit in support of Operation Iraqi Freedom on 7 February 2003. In June and July of 2003, our unit was located in Al Diwaniya, Iraq. My squad leader was [illegible] and Corporal Smith. Our squad was performing security missions in HMMWV's or in the streets. We patrolled around Camp Got Some. The accused is in my platoon.

I recall that we caught some guys at the tank factory which had unexploded ordnance inside of it. We caught them, and took them away. We parked our vehicles to eat lunch, and there was an old Iraqi tank next to us. When we were about to leave, Corporal Burton put the Iraqis in there with a bottle of water. Corporal Burton secured the hatch, but left one hatch open. We left and went back to camp. Corporal Burton went out with the next squad within the hour to ensure that the Iraqis had gotten out of the tank. When he got there, they were gone. I belive there were quite a few vehicles on that patrol. The Iraqis were placed in the tank sometime in the morning hours. I believe this incident happened in June or July of 2003. I was probably with the Marines who caught these particular Iraqis. This incident happened away from the tank factory. These Iraqis ran when we saw them. To catch them, we would yell at them. When they saw our weapons, they would usually drop to the ground.

After we took them into custody, we would call them thieves. I saw the Iraqis in the back of the HMMWV before they were placed in the tank. In May, June, and July it gets hot in Iraq during the day. In the morning, it is not that bad.

I did not have interaction with Corporal Burton prior to the Iraqis being placed in the tank. Before the Iraqis were placed in the tank, I would say they were a little scared.

I recall chasing a few Iraqis down who had donkey carts. When we caught the Iraqis, the donkeys ran. Once we caught the donkeys, we all met up again. Corporal Burton sprayed the fire extinguisher at the Iraqi. The Iraqi laughed and turned around and walked off. Everyone was laughing. Corporal Burton was about 8 feet away from the Iraqi when he sprayed him with the fire extinguisher. The Iraqi was hit in the upper torso area. I believe that one Iraqi had already left the scene. There were about six or eight Marines standing around the Iraqi. I don't remember what the Iraqi was stealing.

At the incident with the tank, after the Iraqis were put in the tank we left the scene within five or ten minutes. We did not stay there for a lengthy period of time while the Iraqis were in the tank. I don't know when the Iraqis got out of the tank, but I

The witness was excused and withdrew from the courtroom.

The court-martial recessed at 0936, 16 June 2004.

The court-martial was called to order at 0955, 16 June 2004.

The military judge and all parties previously present were again present. The members were present.

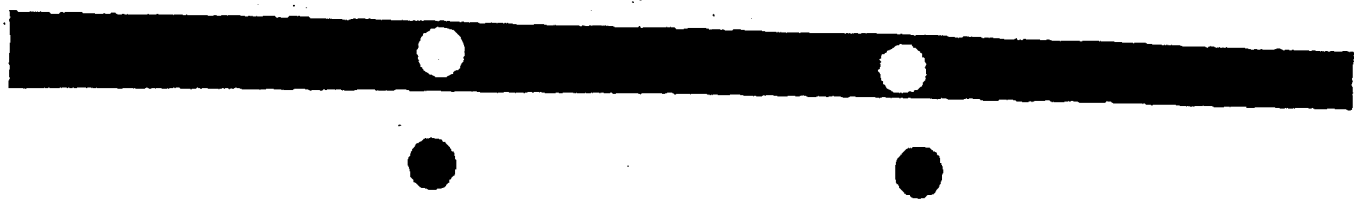
(b)(6) Lance Corporal, Weapons Company, 3d Battalion, 5th Marines, recalled

REDIRECT EXAMINATION

I interpreted heavy hands to be a punch or a push.

The military judge sustained an objection by the civilian defense counsel as to leading.

The military judge sustained an objection by the civilian defense counsel as to relevance.



The members withdrew from the courtroom, and an Article 39(a) session was called to order at 0958.

In response to the military judge, the trial counsel stated that the witness's interpretation of the heavy hands doctrine is relevant. The civilian defense counsel stated that he requests an instruction to the members if the trial counsel is using this witness's testimony for impeachment purposes. The trial counsel stated that he wanted to ask whether the witness thought that it was within regulations to spray an Iraqi with a fire extinguisher or discharge a weapon. The military judge stated that this question was answered the day prior. The trial counsel stated that the witness could be excused.

The Article 39(a) terminated at 1003.

The members entered the courtroom.

(b)(6) Special Agent, Naval Criminal Investigative Service, Camp Pendleton, California

DIRECT EXAMINATION

I am a staff sergeant in the U.S. Marine Corps. I've been with NCIS for three years. I deployed as a special agent with NCIS in support of Operation Iraqi Freedom. I did conduct an investigation into alleged abuse of Iraqis along with Special Agent (b)(6) . I know the accused from the investigation.

We interviewed witnesses as part of this investigation. Corporal Burton was one of the witnesses. His interview lasted about an hour and a half. Corporal Burton was read and waived his Article 31(b) rights and made a statement.

The bailiff handed the witness Prosecution Exhibit 6.

I recognize Prosecution Exhibit 6 as a Military Suspect's Acknowledgement and Waiver of Rights for Corporal Burton and his subsequent statement. I received this in July of 2003.

The bailiff retrieved Prosecution Exhibit 6 from the witness and published Prosecution Exhibit 6 to the members.

The witness was excused and withdrew from the courtroom.

(b)(6) a civilian, Bethesda, Maryland

DIRECT EXAMINATION

I was on active duty in the U.S. Marine Corps from July of 2000 to July of 2004. I left active duty as a first lieutenant. My MOS was 0302. I was attached to 3d Battalion 5th Marines. My billets included Platoon Commander for India Company, 2d Platoon; Platoon Commander for 81's Platoon; and the Executive Officer for Weapons Company, 3d Battalion, 5th Marines. I was the platoon commander for 81's Platoon from July or August of 2002 until June of 2003. After that, I became the Executive Officer for Weapons Company for about a year. I did deploy in support of Operation Iraqi Freedom.

Phase IV operations began in April, approximately 30 days after the war started. During this time, Weapons Company was at Camp Got Some, then we moved to the mayor's house, then we moved to Camp Got Some. During this time period, 81's Platoon did patrolling. When we moved to the mayor's house, we set up the police department as well as patrolling with the police and training them. We were at the mayor's house about mid-June to mid-July. The mission changed a little bit when I took over as the executive officer. The 977 MP Company joined us and took over a lot of the police duties and we moved towards a motorized company. We would conduct patrols and escort missions.

As the executive officer, I was aware of the missions and sent the actual Marines out on each mission. We were on a nine-day rotation which meant that for nine days a group would go on escort-type missions, then conduct security patrols for nine days, followed by nine days of rest, relaxation, and training. During this time period, we had problems with looters in our area. At Camp Got Some, we were trying to keep the looters outside of small arms range of the compound. We also had to keep the looters out of the city. We would apprehend them and take them to jail or to our compound. I believe this intent on what to do with looters was passed down to the platoons. It was standard operating procedure. Anybody in our unit could apprehend looters.

When the Marines apprehended a looter, they were to put them in the HMMWV's and transport them to the jail or the compound. We did not have a policy on how to handle them as far as physically. We just had the Phase IV rules of engagement. Sometimes the looters were treated roughly. To apprehend a looter, a Marine would have to tackle him, so the apprehension begins ~~with a~~ physically. The looters are sometimes dragged to the HMMWV's. They are placed in the HMMWV in a physical manner, sometimes

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thrown in. I would characterize this as an escalation of force because how the situation begins. To take a looter into custody, they would usually be tackled. The Marines would have to tailor their actions to the situation at hand.

The senior man of a patrol would make the decision of what to do with a looter. During April and May, the platoon commanders would go on patrols. The NCO's on the patrols had a lot of trust from their superiors. Before the war, we did some DTG's and law of war classes. They were command dictated. We did discuss the general handling of Iraqis.

The military judge sustained an objection by the civilian defense counsel as to leading.

Grabbing, holding, and binding an Iraqi's hands behind his or her back would be acceptable means of apprehension.

Corporal Burton was in my platoon for about a year. Corporal Burton was part of my platoon during the war. I did learn about these incidents concerning him when the investigations started about a month before we left Iraq.

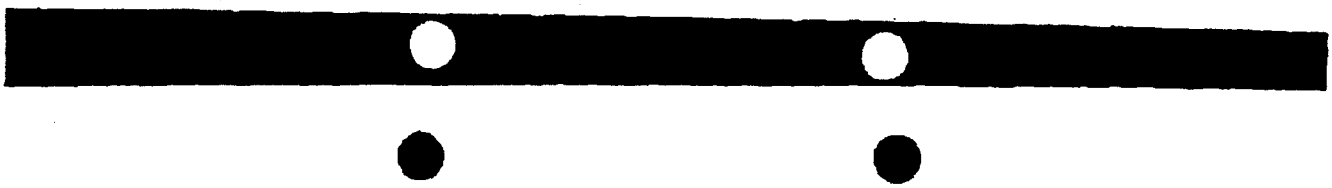
The military judge sustained an objection by the civilian defense counsel as to relevance.

During Phase IV operations, my Marines had quite a bit of experience dealing with Iraqi looters and the Iraqi population in general.

CROSS-EXAMINATION

I graduated from Stanford University with a degree in Marine Biology. I do not have any advanced degrees. I joined the Marine Corps about a month after graduation. I am currently working at a think tank in Washington, D.C. I left the Marine Corps on 1 June 2004.

Corporal Burton did his job very well during the combat phase of the war. During the combat, Marines were being told that the way home was through Baghdad. I believe I said that. When it was determined that we were not returning home after the combat phase of the war, it was sort of a surprise to us. The Marines took the news pretty well. In my opinion, my Marines were not specifically trained to apprehend looters. My Marines were not trained to seize donkeys at the School of Infantry. This was a completely different environment from the combat phase of the war. My Marines were trained to fight.



There were significant leadership changes after the combat phase of the war. The battalion commander, executive officer, S-3, S-3A, most of the company commanders and first sergeants left, as well as the senior NCO leadership due to the lift on the stop-loss program. In June of 2004 the leadership needed some direction.

My Marines had not been trained to catch looters. I had heard that some of the Iraqis that we apprehended were being set free again only to continue looting. Specifically, some of the Marines apprehended an Iraqi with some grenade fuses and bodies. The 977 MP Company let him go. When we ran a jail, we could only hold the Iraqis for 48 hours. My Marines were told to apprehend an Iraqi if they came within small arms range of the camp. I knew the Marines were frustrated because of this situation. I'm sure there were periods of sleep deprivation.

The military judge sustained an objection by the trial counsel as to relevance.

I am aware of the allegation against Corporal [redacted] involving spraying an Iraqi with a fire extinguisher.

The military judge overruled an objection by the trial counsel as to relevance.

I am aware of other instances where an Iraqi was sprayed with a fire extinguisher.

I have heard the term "heavy hands" before, but not in connection with our mission in Iraq.

The military judge overruled an objection by the trial counsel as to relevance.

I know that my Marines knew that myself and other officers had apprehended Iraqis. Sometimes apprehending Iraqis who do not want to be apprehended is by nature assaultive [sic]. I think that it would be possible that my Marines observed me using more force than necessary to exercise control over an Iraqi. It is possible that they may have talked about what they observed officers doing. It is possible that that observation could have influenced their own behavior. I don't feel that it was outside of the norm at all. ~~I was not aware of an allegation~~

The military judge overruled an objection by the trial counsel as to relevance.

I have become aware of an allegation that Lieutenant (b)(6) [ph] had fired shots in the area of looters from talking to the counsel on this case.

On every patrol there was someone in charge. I do know Sergeant Taylor. It was typical that he would be in charge of a patrol. He was in a position of leadership on the patrols.

REDIRECT EXAMINATION

Corporal Burton was a corporal during the war. As the platoon commander, I did give my NCO's a significant amount of responsibility. I am familiar with the five S's and a T. It is basically the SOP for detaining EPW's. It is an acronym that Marines are taught. These are the basic skills. At this time of the operation, my platoon had a lot of experience with Iraqis and Iraqi looters. Common sense plays a factor when Marines are on patrol as well as with deciding what is right and what is wrong. It is hard to train for every situation, so common sense has to be a factor.

RECROSS-EXAMINATION

In June of last year in the area of Camp Got Some, the Iraqis did not have any respect for the Marines.

The witness was warned, excused, and withdrew from the courtroom.

The government had nothing further to present.

The court-martial recessed at 1043, 16 June 2004.

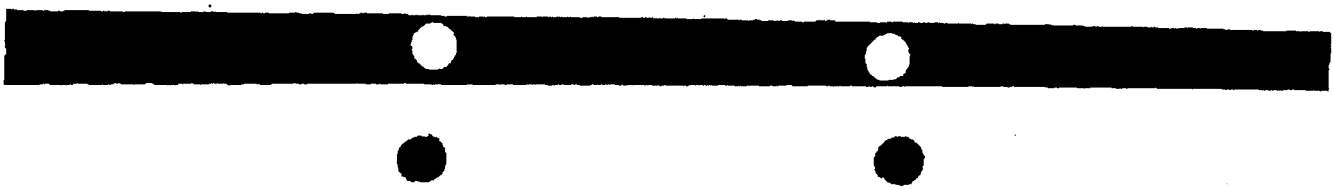
The court-martial was called to order at 1103, 16 June 2004.

The military judge and all parties previously present were again present. The members were absent.

The military judge summarized an 802 conference held between all parties in the presence of the accused before coming on the record. Both counsel agreed with the military judge's summation. Specifically, the trial counsel requested to re-open their case to ask Mr. (b)(6) two more questions. The defense counsel objected. The military judge sustained the defense's objection.

The members entered the courtroom.

The civilian defense counsel stated that they did not have evidence to present and rested.



The court-martial recessed at 1107, 16 June 2004.

The court-martial was called to order at 1314, 16 June 2004.

The military judge and all parties previously present were again present. The members were absent.

The military judge and counsel for both sides discussed the instructions to be given to the members as to findings. The findings instructions were marked as Appellate Exhibit VII.

The findings worksheet was marked as Appellate Exhibit VIII.

The court-martial recessed at 1316, 16 June 2004.

The court-martial was called to order at 1345, 16 June 2004.

The military judge and all parties previously present were again present. The members were present.

The government presented argument on findings.

The court-martial recessed at 1428, 16 June 2004.

The court-martial was called to order at 1430, 16 June 2004.

The military judge and all parties previously present were again present. The members were present.

The defense presented argument on findings.

The government presented closing argument.

The military judge instructed the members in accordance with R.C.M. 920, including the elements of each offense, the presumption of innocence, reasonable doubt, and burden of proof as required by Article 51(c), and on the procedures for voting on the findings worksheet. There were no objections to the instructions or requests for additional instructions.

The members departed the courtroom and an Article 39(a) session was called to order at 1524.

The trial counsel stated that he was concerned with the language contained on the findings worksheet. The military judge asked the trial counsel if he wanted an additional instruction for the members. The trial counsel did not request such an instruction.

the members concerning procedures for voting, the responsibilities of the members, and the matters the members should consider in accordance with R.C.M. 1005(e). The members were given Appellate Exhibit XX, a sentence worksheet. There were no objections to the instructions or requests for additional instructions.

The court-martial recessed at 1137, 17 June 2004.

The court-martial was called to order at 1234, 17 June 2004.

The military judge and all parties previously present were again present. The members were present.

The military judge further instructed the members as to their responsibilities in voting on a sentence.

The court-martial closed for deliberations on sentencing at 1238 on 17 June 2004.

The court-martial opened at 1319 on 17 June 2004.

The military judge and all parties previously present when the court-martial closed for deliberations on sentencing were again present. The members were present.

The President announced the following sentence:

> To forfeit $156.00 pay per month for **6 months, to perform hard labor without confinement for 1 month, and to be reduced to the pay grade of E-3.**

The members were excused and withdrew from the courtroom.

The military judge ascertained that the accused had read and discussed Appellate Exhibit XXII, his appellate rights, with his defense counsel. The military judge further ascertained that the accused understood his appellate rights and did not have any questions of the military judge.

The military judge further ascertained that the accused requested that his copy of the record of trial and staff judge advocate's recommendation be delivered to Mr. Spinner.

The court-martial adjourned at 1324 on 17 June 2004.

**AUTHENTICATION OF THE RECORD OF TRIAL**

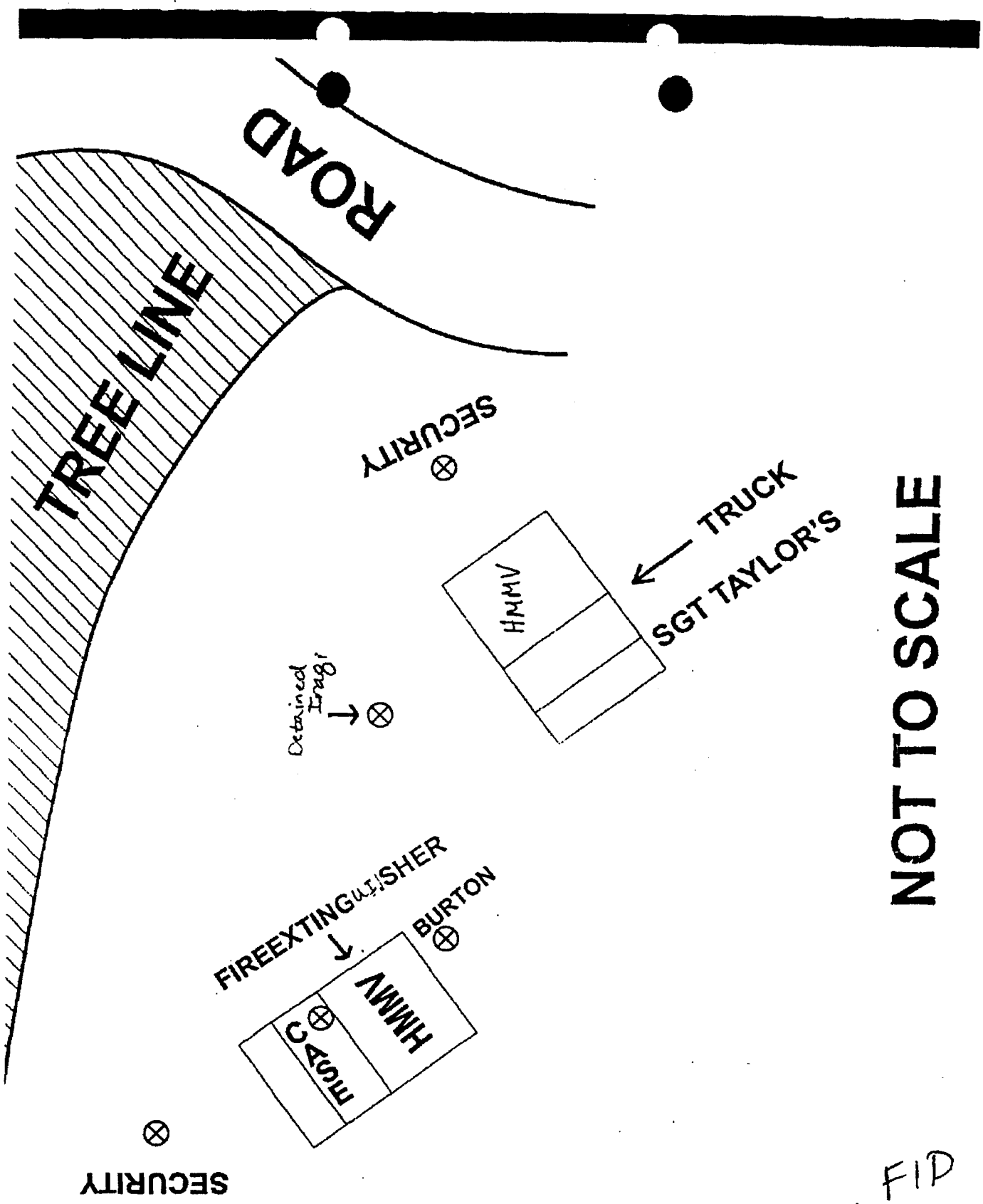
in the case of

Corporal Scott A. Burton (b)(6) , U.S. Marine Corps, 3d Battalion, 5th Marines, 1st Marine Division (REIN), Camp Pendleton, California 92055.

S. M. IMMEL
Lieutenant Colonel,
U.S. Marine Corps
Military Judge
26 AUG 04

I have examined the record of trial in the foregoing case.

E. M. MANNINS
Captain, U.S. Marine Corps
Trial Counsel
040822

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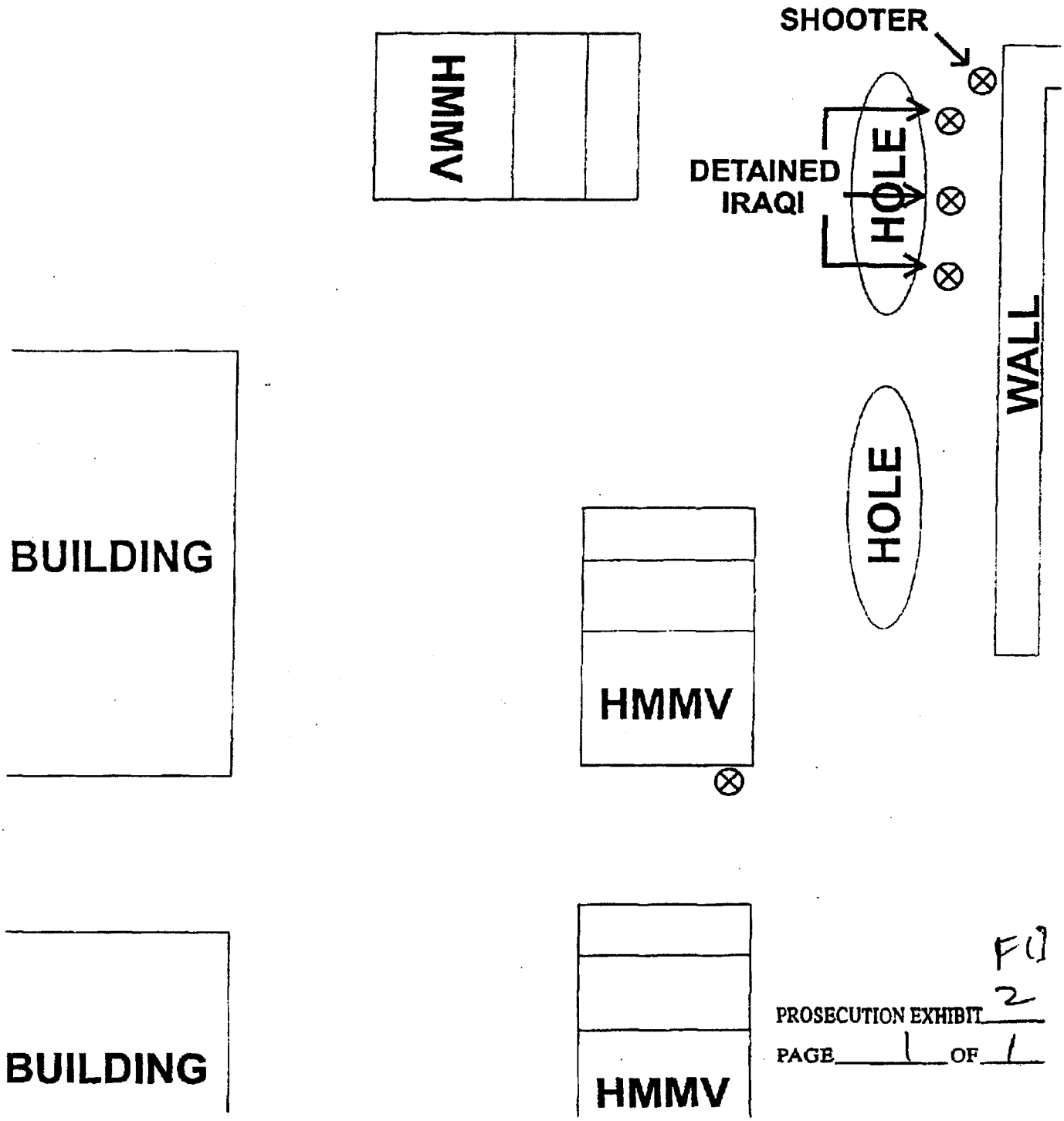
PROSECUTION EXHIBIT 1

SHEET 1 OF 1

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PROSECUTION EXHIBIT

PAGE 1 OF 1

PROSECUTION EXHIBIT 5

1 OF 1

## MILITARY SUSPECT'S ACKNOWLEDGEMENT AND WAIVER OF RIGHTS

Place: Camp Tor Swift, Ad Diwaniyah
1440, 3/6 Wpns

I, CPL Scott A Burton/USMC (b)(6)

have been advised by Special Agent(s) (b)(6)

that I am suspected of Assault

I have also been advised that:

(1) I have the right to remain silent and make no statement at all;
(2) Any statement I do make can be used against me in a trial by court-martial or other judicial or administrative proceeding;
(3) I have the right to consult with a lawyer prior to any questioning. This lawyer may be a civilian lawyer retained by me at no cost to the United States, a military lawyer appointed to act as my counsel at no cost to me, or both;
(4) I have the right to have my retained civilian lawyer and/or appointed military lawyer present during this interview; and
(5) I may terminate this interview at any time, for any reason.

I understand my rights as related to me and as set forth above. With that understanding, I have decided that I do not desire to remain silent, consult with a retained or appointed lawyer, or have a lawyer present at this time. I make this decision freely and voluntarily. No threats or promises have been made to me.

Signature: Scott A Burton

(b)(6)

Date & Time: 030706 1320z

Witnessed:

Date & Time: 06JUN03

At this time, I, CPL Scott A. Burton/USMC (b)(6) desire to make the following voluntary statement. This statement is made with an understanding of my rights as set forth above. It is made with no threats or promises having been extended to me.

continued on page 2

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## ARTICLE 82

A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws, regulations or orders. However, no proceedings or punishments contrary to the provisions of this Chapter shall be allowed.

If any law, regulation or order of the Detaining Power shall declare acts committed by a prisoner of war to be punishable, whereas the same acts would not be punishable if committed by a member of the forces of the Detaining Power, such acts shall entail disciplinary punishments only.

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MCRP 4-11.8C

# Enemy Prisoners of War and Civilian Internees

U.S. Marine Corps

PCN 144 000047 00

EXHIBIT ( - )

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DEPARTMENT OF THE NAVY
Headquarters United States Marine Corps
Washington, D.C. 20380-1775

29 April 1998

# FOREWORD

## 1. PURPOSE

Marine Corps Reference Publication (MCRP) 4-11.8C, *Enemy Prisoners of War and Civilian Internees*, describes enemy prisoner of war (EPW) classification criteria and provides guidance on EPW treatment. This publication is intended to provide information to Marines assigned the task of controlling the movement and actions of individuals captured or acquired during combat.

## 2. SCOPE

MCRP 4-11.8C provides specific guidance on legal and tactical requirements for EPW handling procedures. This publication also defines procedures for handling civilian internees and states the Geneva Convention guidelines that are to be followed.

## 3. SUPERSESSION

FMFRP 4-26, *Enemy Prisoners of War and Civilian Internees*, dated 3 December 1993.

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4. CERTIFICATION

Reviewed and approved this date.

BY DIRECTION OF THE COMMANDANT OF THE MARINE CORPS

J. E. RHODES
Lieutenant General, U.S. Marine Corps
Commanding General
Marine Corps Combat Development Command

DISTRIBUTION: 144 000047 00

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## To Our Readers

**Changes:** Readers of this publication are encouraged to submit suggestions and changes that will improve it. Recommendations may be sent directly to Commanding General, Doctrine Division (C 42), Marine Corps Combat Development Command, 3300 Russell Road, Suite 318A, Quantico, VA 22134-5021 or by fax to 703-784-2917 (DSN 278-2917) or by E-mail to **smb@doctrine div@mccdc**. Recommendations should include the following information:

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  - Publication number and title
  - Current page number
  - Paragraph number (if applicable)
  - Line number
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  - Add, delete
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**Unless otherwise stated, whenever the masculine or feminine gender is used, both men and women are included.**

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## Chapter I

## Categories of Prisoners of War and Civilian Internees

### 1. Types of People to be Controlled or Guarded

One of the many tasks you may be asked to perform during combat operations is to control the movement and actions of individuals you have captured or individuals turned over to you to guard. In general there are two types of people you will be tasked to guard:

a. Prisoners of War.
b. Civilian Internees.

According to the Geneva Conventions, a prisoner of war is a person belonging to one of the categories listed in section 2 of this chapter who has fallen into the power of the enemy. To avoid confusion with references to American POWs, the prisoners of war discussed in this booklet will be referred to as "enemy prisoners of war" (EPWs).

A civilian internee is a person in your custody who is not entitled to EPW status. This term will be further explained in section 3 of this chapter.

### 2. Categories of Prisoners of War

The following people are entitled to prisoner of war status if they fall into the power of the enemy:

a. Members of the armed forces (soldiers in uniform).

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b. Civilians who are authorized to accompany the armed forces in the field.

For example, on enemy ships you may find civilians who assist in the ship's operations or maintain its weapon systems. (These people are sometimes called "tech reps.") If an enemy ship is captured, the enemy sailors and marines on board would clearly be entitled to prisoner of war status. The Geneva Conventions require the people who capture the enemy ship to treat the tech reps aboard with the same high level of care as the enemy sailors and marines would receive. If you capture a tech rep, you never have the option of executing him as a spy just because he was not wearing a uniform at the moment of capture. In addition, you are prohibited from putting the tech rep into a civilian internment camp or a civilian jail.

The rule concerning the treatment of civilians who are authorized to accompany the armed forces also applies to:

- War correspondents.
- Red Cross or USO-type personnel.
- Civilian members of military aircraft crews.
- Supply contractors.
- Labor units.
- Merchant Marine crews.
- Crews of civilian ships and aircraft which support the military.

These civilians should have some type of identification or documentation to show that they are authorized to accompany the armed forces in the field. For example, the enemy government may charter a civilian aircraft to transport its soldiers. If you capture the aircraft, the enemy

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soldiers will be put into a camp for prisonersof war. How the civilian crew is treated will be determined by higher military authority. The civilian crew may be released or kept in custody; if kept, the civilians are considered EPWs as opposed to spies or unprivileged combatants (people who are not authorized to take part in armed conflict).

c. Members of a military organization that does not require its members to wear formal military uniforms (for example, a militia or volunteer corps, including organized resistance movements). The members of this type of military organization will be entitled to EPW status if their military organization follows the following rules:

(1) It is commanded by a person responsible for the actions of his subordinates;

(2) The members wear or display a fixed distinctive sign (for example, a particular type or color of shirt) recognizable at a distance. The sign should clearly distinguish them from civilian noncombatants;

(3) The members carry their weapons openly; and;

(4) conduct their operations in accordance with the laws (Geneva Conventions) and customs of war.

If the military organization meets all four rules, its members will be entitled to EPW status if captured. Some military organizations refuse to take prisoners of war due to their "live off the land" style of operations. Other military organizations allow their members to attempt to trick their enemy by waving a white flag and then continuing to fight. Military organizations like the ones described above have failed to conduct their operations in accordance with

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the laws and customs of war (which is one of the four rules). Because the organization falls the test, none of its members are entitled to EPW status if captured. However, Marine Corps policy is to still treat them as EPWs as long as they are in your custody. Higher military authority will decide at a later date whether the members of military organizations that refuse to abide by the law of war should continue to be treated as if they are entitled to EPW status.

### 3. Civilian Internees

According to Joint Pub 1-02, a "civilian internee" is a civilian who is interned during armed conflict or occupation due to:

- Operations security considerations of the armed force that took the civilian into custody.
- A need to protect the civilian.
- Alleged unauthorized participation in hostile acts such as sabotage, attacking U.S. forces, and storing weapons in their home. These people are sometimes called "unprivileged combatants." Civilian internees are not entitled to EPW status; however, they still are protected to a lesser degree by the Geneva Conventions. (There is a separate Geneva Convention concerning the protection of civilians.)

The Geneva Conventions list the duties you have in dealing with civilian internees. Civilian internees may take the following forms:

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- Unprivileged combatant.
- Displaced person.
- Refugee.
- Evacuee.
- Detainee.

The Geneva Convention concerning civilians refers to a civilian internee as a "protected person." If the Geneva Convention concerning civilians did not exist, a civilian in the custody of an unfriendly force would be at the mercy of his captors.

## 4. Protection of Individuals in Your Custody

As a rule of thumb, you should initially treat all people in your custody as if they are entitled to EPW status. People who are determined by higher military authority to be unprivileged combatants can be separated from the EPWs at a later date. As a general rule, all individuals in your custody should receive humane treatment. In other words, treat them as well as you would want to be treated if you were captured by an enemy force. Once someone is in your custody, you have a duty to protect him from—

- The dangers of the battlefield.
- Natural dangers such as quicksand, wild animals, etc.; and
- The attempts (by your fellow Marines, allied troops, fellow EPWs, and civilians) to harm the EPWs based on a desire for revenge.

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In addition to protecting an EPW from acts of violence, you have a duty to protect him against acts of intimidation, and against insults and public curiosity. This means that you should not allow anyone (including the news media) to take photographs or videotapes of EPWs unless this is approved by the highest possible military authority. Any media contact with EPWs in your custody should be conducted in compliance with guidance from higher military authority.

- You should never allow anyone to pose for any type of photographs that indicate an EPW has been or is about to be mistreated. An example of this is a photograph of a Marine holding a gun to the head of a blindfolded EPW.

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# Chapter II

## Legal Requirements

### 1. Geneva Conventions and Other Laws Concerning the Treatment of EPWs and Civilian Internees

You are expected to treat all people in your custody firmly and fairly. One of the reasons you are expected not to mistreat an EPW or civilian internee is because these people are protected by the Geneva Conventions. The Geneva Conventions are treaties between the U.S. and over 100 other nations. A U.S. treaty is a Federal law, and just like any other Federal law you are required to obey it. Some of the rules found in the Geneva Conventions (for example, the rule against torturing EPWs or civilian internees) are repeated in the UCMJ as well as Marine regulations, directives, and orders. All Marines are required to obey these rules. If you mistreat an EPW or civilian internee, you would be in violation of—

- A Marine Corps regulation, or order, and
- Federal law (the UCMJ and the Geneva Conventions).

### 2. The Geneva Conventions are Like the U.S. Bill of Rights

The Geneva Conventions could be compared to the U.S. Bill of Rights. Just as the U.S. Bill of Rights gives American citizens certain rights and protection, the Geneva Conventions give people who become "war victims"

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(for example, sick, wounded, or shipwrecked soldiers or sailors, prisoners of war, and civilian internees) protection from the enemy soldiers who take them into custody. The Geneva Conventions even protect civilians who give up their status as noncombatants by taking part in the battle.

While the Geneva Conventions do not allow them to take part in the battle, it does give them certain rights when they are apprehended for their improper involvement in hostile acts. For example, even if you apprehend a civilian who was shooting at Marines, you may not execute him on the spot. (You should never execute any person, military or civilian, who is in your custody.) You should send him to the rear where he will receive a trial or hearing.

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# Chapter III

## Handling EPWs

### 1. Treatment of an EPW at Time of Capture

As soon as you capture someone or accept custody of an EPW, you should start to think of several routine security guidelines. These guidelines are: Search, Silence, Segregate, Safeguard, and Speed. They are sometimes called the "five S's".

a. SEARCH. Each EPW should be thoroughly searched for weapons and for intelligence material.

b. SILENCE. EPWs should not be allowed to talk except to answer your questions. Talk among recently captured individuals tends to center around plans to overpower their captors or to escape. By insisting on silence, you will cut down on their ability to plan an escape. Operational considerations may also dictate that EPWs in your custody remain silent. While gagging an EPW is not necessarily illegal, it should be used only in extreme circumstances.

c. SEGREGATE. Whenever possible, officer EPWs should be separated from enlisted EPWs; SNCO EPWs should be separated from junior enlisted ranks. The purpose for separating the EPWs according to rank is to break up the enemy chain of command in order to decrease their military effectiveness during the early stages of captivity. Once they are interned in an EPW facility there is less need to segregate different ranks.

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d. SAFEGUARD. As mentioned above, you have a duty to safeguard everyone in your custody. There also is a duty to safeguard intelligence material found on an EPW.

e. SPEED. As soon as possible after you capture an EPW (keeping in mind tactical and security considerations), he should be sent to the rear for interrogation and processing. You should make maximum use of available transportation returning to the rear. Speedy removal from familiar surroundings, and their own units, will lesson the likelihood of an attempted escape.

## 2. Capture Tags

As soon as you capture an EPW, you should complete a capture tag. The capture tag should show the following information:

a. Name of the EPW.
b. Rank.
c. Service number.
d. Date of birth.
e. Date of capture.
f. EPW's unit.
g. Location of capture.
h. Capturing unit.
i. Special circumstances of capture.
j. Description of weapons/documents.

A capture tag should have three parts, each of which includes the 10 items listed above. Part #1 should be attached (by string or stapled to the uniform) to the EPW. Part #2 should be forwarded to the MAGTF holding facility or released to the U.S. Army or U.S. Navy when they take custody of the EPWs. Part #3 should be attached to

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captured weapons or documents taken from the EPW.

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Due to the confusion that is normally present on the battlefield, front-line Marines are not always able to complete the capture tag.

If the Marine who captured the EPW has been unable to fill out the capture tag, you as the person who accepts custody of the EPW for purposes of guarding or transporting him should attempt to fill in the missing information as soon as you take custody of the EPW.

Although the capture tag is the only documentation required by the U.S. Army before transferring custody of an EPW to them, each MP collection point and holding facility must maintain a log of all EPWs passing through their facility. The log should show the following information:

a. Name.
b. Rank.
c. EPW's unit.
d. From whom the EPW is received.
e. To whom the EPW is transferred.
f. Personal property (with chain of custody).
g. Appropriate dates.

## 3. Equal Treatment for All EPWs

The Geneva Conventions require that all EPWs be treated equally. You may not single out a class of EPWs (e.g., members of a particular battalion) for harsh treatment based on misdeeds of the past.

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## 4. No Collective Punishment

The Geneva Conventions forbid any type of collective punishment directed toward EPWs. An EPW may be punished only for his own misconduct.

If the individual in your custody is entitled to EPW status, he is, in the eyes of the law, a "war victim" and a "noncombatant" because his status as an EPW deprives him of his lawful authority to fight. He has lost his "license to kill."

While you retain your license to kill enemy soldiers not yet wounded or captured, you may not harm any noncombatants including an EPW who, prior to his capture, had attempted to kill you and your fellow Marines.

You owe him the same duty of care as you would owe a Marine prisoner in your custody.

## 5. Questioning an EPW

When questioning an EPW, certain rules should be followed. The Geneva Conventions require an EPW to provide his name, rank, service number (or serial or social security number), and date of birth.

If an EPW refuses to give this information, he may not be threatened or punished; however, his privileges (benefits over and above the minimum rights provided by the Geneva Conventions) may be restricted or forfeited.

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## 6. Movement of EPWs to the Rear Area

You should evacuate EPWs in your custody from the combat zone as soon as you can, keeping in mind security considerations and the requirements of your mission. During the evacuation, EPWs may not be placed at greater risk than the Marines guarding them. You may not force an EPW to "take the point" in order to navigate your way through a mine field. EPWs should not be considered expendable human resources. The purpose of this rule is to avoid a situation like the World War II "Death March" from Bataan in the Philippines. When evacuating EPWs you may use blindfolds if security considerations require it; however, this is considered an extreme measure. Standard metal or disposable handcuffs or similar restraints are permitted if there is a high likelihood an EPW will attempt to escape while in transit.

## 7. Use of Riot Control Agents

In dealing with large numbers of EPWs, there may be a need to use nonlethal riot control agents. Riot control agents are an effective tool to protect the lives of the people guarding the EPWs as well as the EPWs themselves. As part of your planning for the control of EPWs, you should determine whether you are allowed to use riot control agents, and also, where they are kept. Advance Presidential approval is required before riot control agents are employed in wartime (including instances of armed conflict short of a declared war). Check with your chain of command to learn whether Presidential authority has been granted.

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# Chapter IV

## EPW Property

### 1. Taking Property From an EPW

When searching an EPW, you must decide what things an EPW should be allowed to keep in his possession. Items of identification such as military ID card, dog-tag, or a letter of authorization reflecting a civilian EPW's status as an individual permitted to accompany the armed forces in the field should never be taken away from an EPW. In some instances this identification is necessary to convince a captor that his prisoner is not a spy. You may take documents from an EPW if they have some potential military intelligence value.

### 2. Confiscating or Impounding Property

If an EPW has an expensive watch, it may not be confiscated (taken away without an obligation to return it) because it has no military intelligence value. However, if an EPW has in his possession an item of high monetary value, it may subject the EPW to robbery (possibly accompanied by physical harm) by other EPWs. For his own safety, the watch should be impounded (taken away with an obligation to return it, perhaps when the EPW is released from captivity). Another reason to keep items of value out of the possession of EPWs is that such items may be used as a means to bribe guards or to pay others to set up an escape. As a general rule, money and articles of value may be impounded for reasons of security, but only by order of an officer. A receipt must be given to the EPW.

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## 3. Tagging Property Taken From an EPW

As mentioned earlier, if you take documents or personal property from an EPW, you should attach a capture tag to the items in order to maintain a record of ownership and to provide information for intelligence personnel.

These tags should be provided at the local level; however, if tags are not available, substitute tags will have to be used.

## 4. Property That Should Be Confiscated

In addition to confiscating weapons, you should confiscate any item which may facilitate escape (for example, a compass or map). This rule should not be taken to an extreme level. While confiscating an EPW's boots would tend to decrease his ability to escape, you are not permitted to do this. In general, EPWs should remain in possession of all articles of personal use such as their clothing, food and personal equipment. Items of personal protection like their helmets may be retained by an EPW because the Geneva Conventions forbid a captor from placing an EPW at greater risk than his captors. If the Marines who capture an EPW are wearing their helmets and flak jackets, these items of personal protection should not be confiscated from the EPWs. Once an EPW is sent to the rear and interned in a safe facility removed from the area of operations, the items of personal protection may then be confiscated.

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## 5. Property an EPW May Keep

Badges of rank and personal decorations may be retained by an EPW. These items have no military intelligence value and will not help an EPW to escape. These items are the personal property of the EPW.

Taking these items would be characterized as looting EPWs, which could be considered a violation of the Geneva Conventions and the UCMJ. You should not confiscate personal field rations, winter coats, shelter halves, and first-aid kits even if you or your fellow Marines have an urgent need for these items. Confiscation is prohibited unless the EPWs have no need for the articles or satisfactory substitutes are given to the EPWs.

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# Chapter V

## Collection Points and EPW Facilities

### 1. Definition

Collection points are areas where EPWs are held temporarily while awaiting evacuation to the rear. At collection points EPWs are sometimes interrogated for intelligence information which may help Marines in the ongoing battle. Sick or seriously wounded EPWs can be cared for by corpsmen or transferred to the closest medical facility.

### 2. Selecting a Location for a Collection Point

In selecting a collection point, several things should be taken into consideration:

a. It should be near a main supply route (MSR) for ease of transportation.

b. It should not put an EPW in a position to gather intelligence or to commit acts of sabotage.

c. It should not expose an EPW to health hazards (natural or man-made).

d. It should not be near a legitimate military target (e.g., placing EPWs near your artillery or ammo dump as "human shields").

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## 3. Who is in Charge of Collection Points

Collection points may be set up at any unit level depending on the number of EPWs. At the company level, tactical troops will guard the EPWs. Collection points are usually established at the battalion level.

Capturing units evacuate EPWs to a battalion collection point established at a central location designated by the ground combat element (GCE) commander. This collection point is usually operated by the military police. From the GCE and aviation combat element (ACE) collection points, EPWs are transported to various transfer points and from there to an MP-operated MAGTF holding facility.

## 4. Transferring EPWs to U.S. Army

In most cases, the EPWs captured by Marines eventually will be transferred to the U.S. Army for processing and internment. In the event the U.S. Army is not involved in the operation, the Marines will have to process the EPWs and guard them until they either are authorized to release the EPWs, or higher military authority makes arrangements to take the EPWs off the Marines' hands.

## 5. Transferring EPWs to Allied Armed Forces

If Marines are involved in an operation with allied troops, there may be an agreement between the U.S. and an allied nation that allows U.S. forces to transfer their EPWs to the allied nation. Even if an agreement like this exists, you should not automatically transfer your EPWs to the custody of allied troops. You should not transfer

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EPWs out of U.S. control unless you receive specific orders from higher military authority.

According to the Geneva Conventions, EPWs, in the custody of the U.S. may be transferred to an allied force only if the U.S. government is satisfied that the allied force is willing and able to provide the protection of the Geneva Conventions to the transferred EPWs. The purpose of this rule is to stop individuals who have captured EPWs from washing their hands of their responsibilities under the Geneva Conventions by turning over their EPWs to anyone who will take them. For example, if you were a captured pilot whose payload had missed the target and destroyed a schoolhouse, would you want to be turned over to the local villagers?

Another example is the case where EPWs of one religion are transferred to the custody of members of a rival religion whose beliefs call for the killing of the EPWs. In this case, the U.S. government would not be able to determine that the allied force is able and willing to protect the EPWs. In many cases the U.S. and an allied nation will sign an agreement allowing U.S. armed forces to transfer their EPWs to the allied nation. As mentioned above, even if there is a transfer agreement, do not give up custody of your EPWs to allied troops unless you have specific orders to do so.

## 6. Location of Internment Facility

The Geneva Conventions and U.S. policy require that when it can be avoided, EPWs should not be imprisoned on ships. However, there are exceptions to this general rule. EPWs picked up at sea may be temporarily held aboard ship based on operational requirements, until

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there is a reasonable opportunity to transfer them ashore to an EPW facility or to another ship for evacuation to a shore facility. EPWs may be temporarily held aboard ship while being transported between land facilities.

EPWs may be temporarily held aboard ship if this would greatly improve the safety or health prospects of the EPWs, such as avoidance of exposure to severe environmental or combat conditions, or improved access to medical care for those requiring it.

## 7. Work You May Assign to an Enlisted EPW

You may order an enlisted EPW to work; however, there are certain restrictions. An EPW may be assigned to public works projects (for example, roads, reservoirs, etc.) as long as the project is not designed primarily to help the enemy military forces. An EPW may be forced to build EPW barracks, medical facilities, and other structures designed for the benefit of war victims such as EPWs, sick and wounded, civilian refugees, etc. An EPW may be ordered to carry sick and wounded Marines to medical facilities.

Because Marines like this are considered "war victims," the assistance provided by EPWs to the Marines is not considered aiding an enemy armed force. Just because an EPW obeys your order to work does not mean he is guilty of collaboration with his enemy. An EPW may not be forced to participate in jobs which assist his enemy in support of military operations. Examples are digging artillery emplacements, transporting ammunition and building a bridge designed primarily for military use (like the movie "Bridge on the River Kwai").

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Officers may not be required to work; however, they may volunteer to work. NCOs may be required to perform supervisory work only. As mentioned above, other enlisted ranks may be required to work. However, unless he volunteers, an enlisted EPW may not be employed in work which is unhealthy or dangerous.

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# Chapter VI

## EPW Discipline

### 1. Types of Punishment

In order to fulfill your duty to protect EPWs, you must be able to control the movement and actions of each EPW in your custody. According to the Geneva Conventions an EPW must obey all laws, regulations, and orders in effect for the armed forces of his captor (for example, an EPW captured by Marines is subject to the UCMJ). If an EPW violates one of these rules, he may be given judicial or nonjudicial punishment. For example, if an EPW under your custody killed a Marine, a civilian, or another EPW, he would be charged with violation of the UCMJ and tried by a court martial just as a Marine would be treated if he murdered another Marine, a civilian, or an EPW. In addition to the laws, regulations and orders in effect for the armed forces of the EPW's captor (for example, the UCMJ if the U.S. is the captor), the person who is in charge of guarding EPWs may issue rules designed to regulate the conduct of EPWs (for example, a rule prohibiting escape attempts).

### 2. Nonjudicial Punishment

If an EPW disobeys one of the rules that applies only to EPWs, the punishment is limited to NJP. For example, the rule against trying to escape from an EPW facility only applies to EPWs, not to MPs or other Marines. (If a Marine left the EPW facility without authorization, he would be charged with desertion or unauthorized absence, not with attempting to escape from an EPW camp.)

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Certain offenses which would ordinarily result in judicial punishment (e.g., theft or destruction of government or civilian property) will be treated as NJP matters if they were committed during an escape attempt.

For example, if a Marine in the brig stole a set of civilian clothing, attacked and seriously harmed an MP, stole a jeep, escaped from the base, but was recaptured after crashing into a civilian vehicle, he would face a court martial on all five acts. If convicted, he could receive judicial punishment for his crimes. On the other hand, if an EPW stole a set of civilian clothing, attacked and seriously harmed an MP, stole a jeep, escaped from the custody of the MPs, but was recaptured after destroying the jeep as well as a civilian vehicle, he would face judicial punishment only for the attack on the MP. The rule against EPW escapes is one of the rules directed only at EPW conduct; so the punishment is limited to NJP. Because stealing the civilian clothing and the jeep, as well as destroying the jeep and a civilian vehicle—

- Were acts committed as part of the escape attempt;
- Were not committed in order to enrich the EPW; and
- Did not involve an act of violence (like attacking the MP), these acts are treated as NJP matters.

APPELLATE EXHIBIT IV
22 91

# Chapter VII

## Protection of Civilian Internees

### 1. Humane Treatment for Civilian Internees

The Geneva Convention concerning civilians provides a list of actions you may not take against a civilian in your custody, as well as a list of actions you must take to help the civilian internees. The Geneva Convention provides a "safety net" for those civilians who are taken into custody by their enemy. A good rule of thumb for treating civilian internees is to treat them as if they were EPWs.

At the time a civilian first comes into your custody, it would be wise to keep a record of why you apprehended/detained the civilian. Examples of why you would apprehend a civilian are:

a. He shot at Marines, or

b. While searching his home, you find a cache of weapons.

In some instances, you may be ordered to forcibly evacuate a group of families from their homes for security reasons (for example, a Marine convoy would be passing through their hamlet, and you do not want anyone to learn about the convoy). If you are going to turn the civilian internees over to other Marines, U.S. Army personnel or allied forces, it would be helpful if you inform the leader of these forces whether the civilian internees are suspected of criminal acts, or if they are innocent civilians who are being temporarily evacuated for security reasons.

APPELLATE EXHIBIT IV
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## 2. "Military Necessity" is No Excuse for Mistreating Civilian Internees

You may not ignore the Geneva Convention concerning civilians based on the dictates of "military necessity." For example, you may not use physical force to get information from a civilian in your custody no matter how much you need the information. As a general rule, civilian internees must be treated in a humane manner at all times. However, you may control the actions and movements of civilian internees, not as punishment, but as a security measure. In selecting a collection point or a field expedient brig for civilian internees, you should avoid a site that would expose the civilians to harm due to its closeness to a legitimate target, such as an ammo dump.

## 3. Transferring Civilian Internees to Allied Armed Forces

Handling and protecting civilian internees may be burdensome. There may be allied military forces or civilian authorities that are willing to take the civilians off your hands. You should not transfer civilian internees out of U.S. custody unless you receive express orders to do so from higher military authority.

You may accept help from non-U.S. forces or civilian authorities in your handling of civilian internees, but as long as they are still in your custody, you are responsible for their safety. If you are looking for someone to help you in controlling civilian internees, you must consider whether the people you are asking for help are willing and able to provide humane treatment to civilians under your control. For example, if you are responsible for the protection of civilian internees of one religion\tribe\political

APPELLATE EXHIBIT IV

persuasion, you should determine whether the people you are asking for help have an old score to settle or whether their religion or tribe requires them to injure or kill the civilian internees you are trying to help.

## 4. Rule Against Forcing Civilian Internees to Assist You

While you may ask the civilian internees for help, you may never force them to act as guides or to do other dangerous acts. You may not force them to give you information. As a general rule, there should be no corporal punishment, torture, or collective punishment for past deeds or as warnings against future actions.

## 5. Forcible Relocation of Civilian Internees

From time to time, military considerations such as combat preparations or maintenance of security will require you to relocate civilian internees. This type of forcible relocation is not a violation of the Geneva Convention. If you must search a village for enemy troops or supplies, you may forcibly evacuate the village. When the danger is over, the civilian internees should be allowed to return to their homes. If there is an ongoing security problem with the village, you may force the civilian internees to evacuate and relocate permanently. Hopefully, the host nation will provide for them. In times of armed conflict, a certain amount of disruption is unavoidable.

As long as you attempt to limit to the minimum extent possible the adverse effects of war, you will not be faulted.

APPELLATE EXHIBIT IV
PAGE 36 OF 50

## 6. Work You May Assign to a Civilian Internee

You may not force civilian internees to work for you if it would involve their taking part in battle or battle preparations, or if it would subject them to the dangers of the battlefield. However, you would be allowed to compel them to assist you in providing assistance to war victims such as the sick and wounded. For example, you could force the local civilian internees to work as stretcher bearers in a field hospital provided it was in a safe location.

You could not force civilian internees to retrieve the wounded during the battle because this would put them in a dangerous position. You could force them to carry to the rear, food and supplies intended for sick or wounded Marines or for EPWs because those Marines and EPWs are considered war victims.

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# Chapter VIII

## Civilian Property

### 1. Destruction of Property

**While military necessity is not an excuse for harming a civilian internee, it could be a justification for the destruction of civilian property. Keep in mind that there is a distinction between the duty of care you owe a civilian in your custody (a civilian internee) and the duty you owe to civilians you do not have in your custody. If a sniper shoots at you from a house, you are allowed to damage or destroy the house if there is no other way to neutralize the sniper. If you later learn that the sniper was a civilian shooting from his own home, you may not destroy the home as an act of revenge or as an object lesson for other civilians. Once the sniper has vacated the home (due to capture, death, or retreat), there is no military advantage to destroying the home. Any type of property (real property), may be destroyed if there is a clear showing of military necessity (as opposed to convenience of the military) for this action.**

### 2. Taking Civilian Property

**In addition to destroying civilian property, you may have reason to confiscate, seize or requisition civilian property. To confiscate something means to take away without an obligation to return it or to pay for it. To seize something means to take away (permanently or temporarily) with an obligation to pay an amount of money to be determined at the end of the war. To requisition**

APPELLATE EXHIBIT JJJ
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something means to take, with or without the permission of the owner, with an obligation to pay for it at the time the property is taken.

There are two possible reasons for taking or destroying civilian property:

a. you need the property, or

b. you want to deny your enemy the use of the property.

If there is damage or destruction to any civilian property as a result of military operations (before, during or after the battle), there is neither a violation of the Geneva Convention nor an obligation to pay for any damage or de-

value (vehicles, airplanes, ammunition, etc.) from falling into the hands of the enemy, you may destroy this property without obligation to compensate anyone.

a. You decide to redeploy from an area populated by civilians;

b. You suspect the enemy will follow you into the area and take civilian property like trucks, gasoline, aircraft, ammo, etc.; and

c. Your enemy will use these things against you then, you are allowed to destroy the civilian property. Under these circumstances, you may destroy the property regardless of who owns it. There is no duty to compensate the civilian owners of this property.

APPELLATE EXHIBIT IV
PAGE 39 OF 50

# DUTIES OF A MILITARY POLICEMAN CONCERNING ENEMY PRISONERS OF WAR AND CIVILIAN INTERNEES

This booklet was prepared for military police as a guide for the treatment of enemy prisoners of war and civilian internees. It can be used by any Marine tasked with the handling of enemy prisoners of war or civilian internees, or assigned to augment a military police company. If you have any questions concerning enemy prisoners of war and civilian internees, contact the Security and Law Enforcement Branch at Headquarters, U.S. Marine Corps. The mailing address and telephone numbers are as follows:

COMMANDANT OF THE MARINE CORPS (POS)
Security and Law Enforcement Branch
Operations Division
Headquarters, U.S. Marine Corps
Washington, D.C. 20380-1775
Commercial: (703) 614-4177, 614-2100
DSN: 224-4177, 224-2100

(reverse blank)

APPELLATE EXHIBIT IV
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## MILITARY SUSPECT'S ACKNOWLEDGEMENT AND WAIVER OF RIGHTS

Place: Camp Tortuga, Ad Diwaniyah

1442, 3/6 Widows

I, CPL SCOTT A. BOUTON/USMC (b)(6)

have been advised by Special Agent(s) (b)(6)

that I am suspected of Assault

I have also been advised that:

(1) I have the right to remain silent and make no statement at all;
(2) Any statement I do make can be used against me in a trial by court-martial or other judicial or administrative proceeding;
(3) I have the right to consult with a lawyer prior to any questioning. This lawyer may be a civilian lawyer retained by me at no cost to the United States, a military lawyer appointed to act as my counsel at no cost to me, or both;
(4) I have the right to have my retained civilian lawyer and/or appointed military lawyer present during this interview; and
(5) I may terminate this interview at any time, for any reason.

I have decided that I do not desire to remain silent, consult with a retained or appointed lawyer, or have a lawyer present at this time. I make this decision freely and without any threats or promises have been made to me.

Signature: [signature]

(b)(6)

Date & Time: 060300 Jun 03

Witnessed:

Date & Time: 06JUN03

At this time, I, CPL SCOTT A. BOUTON/USMC (b)(6) desire to make the following voluntary statement. This statement is made with an understanding of my rights as set forth above. It is made with no threats or promises having been extended to me.

continued on page 2

APPELLATE EXHIBIT IV

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NISFORM 001 REV 4-81

GPO 985-419

STATEMENT

PLACE: CAMP "GOT SOME"
AD-DIWANIYA, IRAQ
OCT 03

AT THIS TIME, I, CPL SCOTT A. DUATON MAKE THE FOLLOWING FREE AND VOLUNTARY STATEMENT TO (b)(6) WHOM I KNOW TO BE SPECIAL AGENTS OF THE UNITED STATES ARMY CRIMINAL INVESTIGATIVE SERVICE. I MAKE THIS STATEMENT OF MY OWN FREE WILL AND WITHOUT ANY THREATS MADE TO ME OR PROMISES EXTENDED. I FULLY UNDERSTAND THAT THIS STATEMENT IS GIVEN CONCERNING MY SUSPECTED ASSAULT ON IRAQ CITIZENS.

[illegible] HAVE BROWN HAIR AND LIGHT BROWN EYES. MY SOCIAL SECURITY (b)(6)

The following statements are written with remorse and a sense of regret having had the instances brought to my attention after the fact. My perspective has greatly changed after seeing the dramatic impression left on my company.

Unable to cite specific dates, these incedents occurred. All during vehicle& patrols in surrounding compounds which contains looters. In one instance we chased and stopped thieves

APPELLATE EXHIBIT IV
PAGE 42 OF 50

in a compound North-East of our current position. After repeatedly catching these looters and thanging off returning I searched for measures that would be slightly more drastic as incentive not to return. This was the compound in which men were caught and after search revealed AK-47s and I believe a rifle scope. I am not positive of the equipment, but they were in possession of weapons.

[illegible] on them at any time. Trying to [illegible] leaving one latch on top unlocked. Later, I returned to ensure the men had escaped and they did spit.

In a seperate occurence approximately 3-4 weeks ago, we caught a thief and he appeared to have no remorse so I sprayed him with a fire extinguisher. At the time I was intending not to harm the man, but I guess mentally it did.

APPELLATE EXHIBIT IV
PAGE 43 OF 50

The third instance happened approximately the same time. Three looters were caught and our SPBY yelling at them did not keep them away from previous time. I discharged one round in the air from a 9 mm and told them to run away. They did, and my 9 mm was holstered.

These occurrences I realize were unprofessional. At the time I was angry that we repeatedly [illegible] people stealing. After arresting a man [illegible] arresting and informed us he would be let go. I knew arresting these looters would not amount to anything so I looked for ways to deter them myselves. I understand the seriousness and will face the repercussions as an NCO in the United States Marine Corps. I just want to make it clear all of these things were done to bypass physical harm and that none was intended.

APPELLATE EXHIBIT IV
PAGE 44 OF 50

During these patrols often times 2 vehicles were used to flush and then catch. I am not positive as to where the other vehicles (personel) were during all of these situations.

The men caught with weapons were not done so by us. We were briefed of the search and recovery.

When the 9 mm was [illegible] opposite way. They found a weapon making condition one, and then a

NOT USED

APPELLATE EXHIBIT IV
PAGE 45 OF 50

THIS STATEMENT, CONSISTING OF THIS PAGE AND 4 OTHERS WAS WRITTEN BY ME AS I/WE DISCUSSED IT WITH SPECIAL AGENTS (b)(6) I HAVE READ OVER AND UNDERSTAND THE ABOVE STATEMENT. I HAVE BEEN GIVEN THE OPPORTUNITY TO MAKE ANY CHANGES OR CORRECTIONS I DESIRE TO MAKE AND HAVE PLACED MY INITIALS OVER CHANGES AND CORRECTIONS. THIS STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Scott A Burton
PRINT

[signature]
SIGN

030706
DATE

CAD
1345Z
TIME

SWORN AND SUBSCRIBED BEFORE ME THIS 6TH DAY OF JULY, 2003 AT CAMP "GOT SOME" AD-DIWANIYA, IRAQ

(b)(6)

SPECIAL AGENT, U.S. NAVAL CRIMINAL INVESTIGATIVE SERVICE
AUTH: SECNAVINST 5520.3B OF 04JAN93

APPELLATE EXHIBIT IV
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CAMP "GOT SOME"
HD-DIWANIYA, IRAQ

STATEMENT (CONTINUED) 030106

AS AN ADENDUM TO MY PREVIOUS STATEMENT, I WOULD LIKE TO ADD THE FOLLOWING.

The position of the 9mm pistol was above and to the right of the farthest right male's head. It was fired at close to a 90° angle in the air. There was no possible way the projectile could impact any of the men.

I SWEAR THAT THE ABOVE STATEMENT (INCLUDING) IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

PRINT
030706
DATE

SIGN
1534
TIME

SWORN AND SUBSCRIBED BEFORE ME THIS 6TH DAY OF JULY, 2003 AT CAMP "GOT SOME" AD DIWANIYA, IRAQ

(b)(6)

SPECIAL AGENT, U.S. NAVAL CRIMINAL INVESTIGATIVE SERVICE
ADDITIONAL BASIS OF JURISDICTION

APPELLATE EXHIBIT IV
PAGE 47 OF 50

## MILITARY SUSPECT's ACKNOWLEDGEMENT AND WAIVER OF RIGHTS

Place: CAMP "GET SOME"

AL DIWANIYA, IRAQ

I, CPL (b)(6)

have been advised by Special Agent(s) (b)(6)

that I am suspected of ASSAULT

I have also been advised that:

(b)(6) (1) I have the right to remain silent and make no statement at all;

(2) Any statement I do make can be used against me in a trial by court-martial or other judicial or administrative proceeding;

(b)(6) (3) I have the right to consult with a lawyer prior to any questioning. This lawyer may be a civilian lawyer retained by me at no cost to the United States, a military lawyer appointed to act as my counsel at no cost to me, or both;

(b)(6) (4) I have the right to have my retained civilian lawyer and/or appointed military lawyer present during this interview; and

(b)(6) (5) I may terminate this interview at any time, for any reason.

I understand my rights. I have decided that I do not desire to remain silent, consult with a retained or appointed lawyer, or have a lawyer present at this time. I make this decision freely and voluntarily. No threats or promises have been made to me.

(b)(6)

Date & Time

(b)(6)

Witnessed:

Date & Time:

At this time, I, CONTINUED ON PAGE 02, desire to make the following voluntary statement. This statement is made with an understanding of my rights as set forth above. It is made with no threats or promises having been extended to me.

(b)(6)

NOT USED

APPELLATE EXHIBIT III (b)(6)

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NISFORM 001 REV 4-81

GPO 985-459

STATEMENT

PLACE: CAMP "COTSONE"
AD-DUWANIYA, IRAQ
06JUL03

AT THIS TIME, I, CPL (b)(6)
MAKE THE FOLLOWING FREE AND VOLUNTARY STATEMENT TO (b)(6)
AND (b)(6) WHOM I KNOW TO BE SPECIAL AGENTS OF THE
UNITED STATES NAVAL CRIMINAL INVESTIGATIVE SERVICE. I MAKE
THIS STATEMENT OF MY OWN FREE WILL AND WITHOUT ANY THREATS MADE
TO ME OR PROMISES EXTENDED. I FULLY UNDERSTAND THAT THIS
STATEMENT IS CONCERNING MY KNOWLEDGE OF THE [illegible]
ASSAULTS.

FOR THE PURPOSE OF IDENTIFICATION, I AM A WHITE MALE,
5'7" TALL WEIGHING APPROXIMATELY 195 POUNDS. I HAVE RED HAIR AND

[illegible] Sgt. Taylor his squad which consists of Cpl (b)(6)
Cpl Burton of his squad which consists of LCpl (b)(6)
(b)(6) His Squad which is (b)(6) went to catch thieves
In the old trash factory compound. We left early about 1:30 a.m.
About 1 hour into looking for thieves we went to the
other compound where the fiberglass sheeted/whatever is made out of [illegible]
is. Nothing going on there, we went back to trash compound
where 3 thieves started running. At this time we CLEARED
Him + Hit behind 2 of the 3 thieves (b)(6) ran after
the east trash. I went to pick him up myself cpl. [illegible]
[illegible] Squad. His [illegible] was after we cleared the theft with the [illegible]
& He picked up (b)(6) & the EOD. At which time we
went Back to where the ~~[illegible]~~ thieves were. CPL ~~[illegible]~~ BURTON
[illegible] spray him with a fire extinguisher. At which time I heard

APPELLATE EXHIBIT 49 PAGE 1 OF 2

**UNITED STATES MARINE CORPS**
**SPECIAL COURT-MARTIAL**
**SIERRA JUDICIAL CIRCUIT**

| | | |
|---|---|---|
| UNITED STATES | ) | |
| | ) | |
| v. | ) | MOTION TO DISMISS FOR FAILURE TO STATE OFFENSE |
| | ) | |
| SCOTT A. BURTON | ) | |
| (b)(6) | ) | |
| CORPORAL | ) | DATED: 7 June 2004 |
| U.S. MARINE CORPS | ) | |
| | ) | |

1. **Nature of Motion**:

Corporal Burton, by and through counsel, pursuant to Rule for Court-Martial (RCM)

Charge II and the Specifications thereunder have failed to state offenses in that the persons maltreated were not "subject to the orders" of the accused as a matter of law. Therefore, the

2. Summary of Facts:

Charge II alleges violations of Article 93, UCMJ, by Corporal Burton at various times between on or about 1 June 2003 and on or about 6 July 2003. The alleged victims, who are not identified by name are described, respectively under the specifications, as: "Iraqi detainees", "Iraqi detainee", and "civilian Iraqi detainees". There are no factual allegations in the specifications clarifying how or why these alleged victims were purportedly " subject to the orders" of CPL Burton. Nor is the term "detainee" defined under Article 93.

Appellate Exhibit V
Page 1 of 7

The brief interaction between CPL Burton and the alleged victims can best be described as "transitory contacts" and nothing more.

3. **Law and Discussion**:

Article 93, cruelty and maltreatment, governs conduct between persons subject to the UCMJ and individuals, including civilians, who are subject to their orders. MCM, United States, (2002), Part IV, paragraph 17c(1), defines the term, "Any person subject to his orders" as follows:

> [This term]means not only those persons under the direct or immediate command of the accused but extends to all persons, subject to the code or not, who by reason of some duty are required to obey the lawful orders of the accused, regardless whether the accused is in the direct chain of command over the person.

of Military Review in which it held that, when construing Article 93, the relationship between

No case law has been found that addresses the kind of relationship covered by the allegations in the accused's case. In other words, the alleged Iraqi victims were not prisoners, were not civilians employed by or otherwise working for United States military forces and had no generalized and continuing duty to obey the orders of United States uniformed members.

CPL Burton was not a member of law enforcement and had no lawful authority or power over ordinary Iraqi citizens. To the extent he may have had some authority to arrest or seize Iraqi citizens, there are no allegations and there is no evidence in this case that the Iraqi detainees in question were taken into custody or arrested in any formal way, making them prisoners.

Appellate Exhibit 44
Page 2 of 7

In fact, the best way to describe the relationship between CPL Burton and the Iraqis is that of a transitory or incidental nature. This is not the sort of relationship that is contemplated under Article 93 and its legislative history.

It is well understood that criminal statutes are to be strictly construed under the rule of lenity. Thus, any attempt by the prosecution to claim that the ambiguous term "[a]ny person subject to his orders" should be broadly construed to include the most transitory of contacts, is contrary to established statutory construction. See United States v. Ray, 51 M.J. 511 (N.M.Ct. Crim. App. 1999).

4. **Nature of Relief:**

The defense requests this Honorable Court to dismiss Charge II and the Specifications thereunder as failing to state an offense because the alleged Iraqi detainees are not, as a matter of law, persons subject to the orders of CPL Burton.

No evidence will be presented on this motion.

6. Oral Argument:

The defense requests oral argument on this motion

FRANK J. SPINNER
Defense Counsel

for CURTIS J. DEWBERRY, 1stLT, USMCR
Defense Counsel

Appellate Exhibit IV
Page 3 of 7

CERTIFICATE OF SERVICE

A true copy of this motion was served on Government Counsel and the Military Judge by telefacsimile on 7 June 2004, by undersigned counsel.

FRANK J. SPINNER
Defense Counsel

Appellate Exhibit IV
Page 4 of 7

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW
BEFORE

KENT A. WILLEVER R. A. STRICKLAND JAMES E. ORR

UNITED STATES
V.

Bernard N. CURRY, (b)(6)
Yeoman First Class (E-6), U. S. Navy

NMCM 88 0719R Decided 31 July 1991

Sentence adjudged 17 November 1987. Military Judge: Donald E. Edington. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, U.S. Naval Station, FPO Miami 34051-3001.

LT JEFFREY S. HORWITZ, JAGC, USNR, Appellate Defense Counsel
LT DEBRA E. SANDIFER, JAGC, USNR, Appellate Defense Counsel
Maj LAURA L. SCUDDER, USMC, Appellate Government Counsel

PER CURIAM:

of conduct (Charge I), two specifications of maltreating a subordinate (Charge II), forging a non-availability chit (Charge III), communicating indecent language (Charge IV) and bribery (Charge IV), in violation of Articles 92, 93, 123 and 134, Uniform Code of Military Justice (UCMJ), respectively. He was sentenced to a (b)(6) confinement for 4 months, forfeiture of $250.00 pay per month for 6 months and reduction to pay grade E-1. The convening authority approved the adjudged sentence and this Court affirmed the conviction.

This case is now before us on remand from the U.S. Court of Military Appeals with the following directions:

(a) Consider the sufficiency of the evidence supporting Charge II, and if sufficient, to consolidate as multiplicious Specifications 1 and 3 of Charge II;

(b) Consider whether Charge II is multiplicious with Specification 2 of Charge IV;

APPELLATE EXHIBIT V
PAGE 5 OF 7

CENTRAL FILES

(c) Dismiss Charge I;

(d) Determine what sentence should be affirmed.

United States v. Curry, 28 M.J. 419, 424-425 (1989).

Specifications 1 and 3 of Charge II 1/ allege that the appellant (E-6) oppressed the victim (E-4), a person subject to his orders, by wrongfully using his official position to improperly induce, coerce or in any other manner influence the victim to provide a body massage and by orally communicating indecent language to the victim, in violation of Article 93, UCMJ.

The appellant's military duties included checking-out personnel at the bachelor enlisted quarters (BEQ) and providing documentation affecting residents' pay allowances and reimbursements. The victim had moved out of the BEQ on 1 May 1987, but did not hand in her key and officially check-out with appellant until 22 May 1987. Due to difficulties in receiving her bachelor's allowance for quarters (BAQ), she needed a check-out document back-dated, which appellant provided after the victim visited him at the BEQ office on 28 May 1987. During their conversation, appellant suggested "a head to toe body massage" at a friend's house as a way for the victim to repay him for back-dating the document. The victim declined, but reported the appellant's conduct.

According to the Manual for Courts-Martial (MCM), United States, 1984, the elements of Article 93 are: "(1) That a certain person was subject to the orders of the accused; and (2) That the accused was cruel toward, or oppressed, or maltreated that person." Para. 17b, Part IV, MCM. The issue therefore is whether the victim, under the circumstances of this case, was "subject to" the orders of

The Manual for Courts-Martial makes clear that:

> "Any person subject to his orders" means not only those persons
>
> reason of some duty are required to obey the lawful orders of the accused, regardless whether the accused is in the direct chain of command over the person.

Para. 17(c)(1), Part IV (emphasis added).

The Government contends that the victim's presence in appellant's office was required in the checking-out process and, therefore, she fell under appellant's authority with regard to matters within his cognizance, regardless of their relationship in the chain of command. However, even though the victim was subordinate in rank to the appellant and may have needed to deal with the appellant in checking-out or in having her check-out backdated, such transitory contact did not, per se, establish "some duty" of the victim to obey the appellant. The victim needed appellant's improper assistance to receive her BAQ. She received that assistance and then appellant improperly suggested "repayment" with an indecent

1/ Specification 2 was dismissed by the military judge as being multiplicious with Specification 3 of Charge IV.



APPELLATE EXHIBIT VI

PAGE 6 OF 7

proposition. He did not order her (lawfully or otherwise) or attempt to order her to do anything.

Relevant history of Article 93, UCMJ, is set forth in United States v. Dickey, 20 C.M.R. 486 (A.B.R. 1956). In that case (dealing with foreign nationals performing manual labor for the United States Army), the Army Board stated: "the purpose of Article 93 is to prevent persons subject to the Code who are in a command capacity from maltreating those who are under their supervision . . . ." 20 C.M.R. at 488. The Court in Dickey emphasized that there was no doubt in that case that the victim had a duty to obey the lawful orders of the accused, as the accused had sufficient authority and jurisdiction to impose restrictions and conditions upon his daily activities. However, because proof of the first element of Article 93, UCMJ, is not present in the case at bar, we need not decide whether appellant's actions could constitute a violation of the Article under the appropriate fact pattern. See, e.g., United States v. Finch, 22 C.M.R. 698 (N.B.R. 1956). Accordingly, Charge II and its two remaining specifications are dismissed.

Having dismissed Specifications 1 and 3 of Charge II, it is no longer necessary for us to determine whether they are multiplicious for findings with Specification 2 of Charge IV. Furthermore, even though the remand by the U.S. Court of Military Appeals ordered us to dismiss Charge I, we respectfully decline to do so because that order was premised on our superior court's finding that, based on the facts then before them, the Article 92 offense of Charge I was preempted by Article 93 of Charge II. Curry, 28 M.J. at 424. However, because we have dismissed Charge II, the Article 92 charge is no longer factually preempted and we are of the opinion that the U.S. Court of Military Appeals did not intend that the appellant's actions, which violated a lawful general regulation on standards of conduct, should go unpunished. In fact, the wisdom of having such a regulation is borne out by the facts of this case where, as here, such an action cannot be punished under Article 93, UCMJ. We have considered and find that the Article 92 offense of Charge I is a separate offense from the bribery offense, Specification 2 of Charge IV, and they are not multiplicious for findings.

military judge considered the Specification of Charge I, Specifications 1 and 3 of Charge II, and Specification 1 of Charge IV to be multiplicious with Specification 2 of Charge IV. Accordingly, our modification of the findings does not affect the offenses for which appellant was sentenced and reassessment of the sentence is unnecessary. The sentence is therefore affirmed.

(ABSENT)
KENT A. WILLEVER, Chief Judge

R. A. STRICKLAND, Senior Judge

JAMES E. ORR, Judge

NMCM 88 0719R



APPELLATE EXHIBIT V

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SIERRA JUDICIAL CIRCUIT
UNITED STATES MARINE CORPS
SPECIAL COURT-MARTIAL

| | |
|---|---|
| **UNITED STATES**<br><br>**v.**<br><br>**SCOTT A. BURTON**<br>(b)(6)<br>**Corporal**<br>**U.S. Marine Corps** | **GOVERNMENT'S RESPONSE TO DEFENSE MOTION TO DISMISS FOR FAILURE TO STATE AN OFFENSE** |

1. Nature of Answer. The government respectfully submits its response to the defense's motion to dismiss for failure to state an offense, and the government respectfully requests the court deny the same

2. Summary of Facts. Corporal Burton was a member of the 81mm mortar platoon, Weapons Company, 3rd Battalion, 5th Marine Regiment. Around April 20, 2003, Phase [illegible] a permissive environment for coalition forces to operate and a non-[illegible]

diwaniyah, Iraq. In June and July of 2003, Weapons Company command post was located at Camp "Got Some" outside of Ad diwaniyah. The 81mm mortar platoon mission changed. They no longer provided fire support with 81mm mortars to the battalion, but assumed a law enforcement role and conducted patrols in the area surrounding Camp "Got Some." During this time, Capt (b)(6) was the Company Commander for Weapons Company. While Marines from 81mm mortar platoon were conducting patrols, there mission was to provide security and keep the peace. Marines were authorized to detain Iraqi civilians when they were caught breaking the law or were a security threat. Iraqi civilians detained by Marines were subject to the orders of those

APPELLATE EXHIBIT VII ORIGINAL
PAGE 1 OF 5

Marines. After taking an Iraqi into custody, a patrol would either transport the Iraqi back to Camp "Got Some," transport the Iraqi to the detention facility managed by the Army, or release the Iraqi. Marines on patrol were authorized to detain looters. Marines from Weapons Company afforded detained Iraqis with the same rights as enemy prisoners of war under the Geneva Convention while those Iraqis were detained and in custody. Marines also treated detained Iraqis with certain security guidelines. These guidelines are search, silence, segregate, safeguard, speed and tag. During all three incidences to which Cpl Burton is presently facing charges, the Iraqis were apprehended by the patrol, taken into custody and were restricted of their freedom. The Iraqis taken into custody were caught looting. Before being taken, the Iraqis attempted to flee the scene and evade capture. They were eventually caught by the patrol.

3. _____ The Iraqi detained by Cpl Burton's patrol on the three incidences took place were subject to his orders as they were caught looting, then taken

In the Military Judge's Benchbook, "subject to orders" under Article 93 of the UCMJ is defined as follows:

"...includes persons under the direct or immediate chain of command of the accused and all persons who by reason of some duty are required to obey the lawful orders of the accused, even if those persons are not in the accused's direct chain of command."

In this case, the issue is whether the detained Iraqis had ***some duty*** to obey the lawful orders of the accused. The three leading cases in this area are United States v. Finch, 22 C.M.R. 698 (N.B.R. 1956), United States v. Dickey, 20 C.M.R. 486 (A.B.R. 1956) and United States v. Sojfer, 44 M.J. 603 (NMCCA 1996.)

APPELLATE EXHIBIT VII

In its motion, the defense has argued that the contact between Cpl Burton and the Iraqi detainees was a "transitory contact" as discussed in United States v. Curry, NMCM 88 0719RR, 31 July 1991, an unpublished opinion. However, the facts of Curry are completely distinguishable from the case at bar. Therefore, the "transitory contact" analysis applied in Curry is inapplicable in the subject case. In Curry, the appellant's military duties were checking-out personnel at the bachelor enlisted quarters (BEQ) and providing documentations affecting a residents' pay and allowances. He was charged with a violation of Article 93 for inappropriately requiring that a subordinate checking out of the BEQ provide him with a full body massage for favors rendered. The court found that the "transitory contact" between the accused and the victim did not establish "some duty" on the victim to obey the accused.

Unlike in Curry, the accused, a squad, on a security [illegible] capacity similar to that of a police officer and had authority to detain and take Iraqi [illegible] conclusion that the Iraqi detainee's were subject to the orders of Cpl Burton can be reached by examining the case authority in the area and the applicable Marine Corps policies for the treatment of detainees.

In United States v. Dickey, 20 C.M.R. 486 (A.B.R. 1956), the Army Board of Review held that a Korean National working as a civilian employee could be the victim of maltreatment under Article 93. Moreover, in United States v. Finch, 22 C.M.R. 698 (N.B.R. 1956), the Navy Board of Review held that a brig guard could be convicted of maltreatment under Article 93 for abusing brig confines. In United States v. Soifer, 44

APPELLATE EXHIBIT VII

M.J. 603 (NMCA 1996), the Navy-Marine Corps Court of Criminal Appeals held that victims, not in the chain of command of the appellant, were still subject to his orders.

Under Article 82 of the Geneva Convention, prisoners of war shall be subject to the laws and regulations and orders of the armed force of the detaining power. Per MCRP 4-11C, Enemy Prisoners of War and Civilian Internees, Chpt I, para 4, "As a rule of thumb, you should initially treat all people in your custody as if they are entitled to EPW status under the Geneva Convention." Moreover, it is United States policy that all detainees receive prisoner of war treatment regardless of status under the Geneva Convention.

It is clear that the Marines in the Accused's platoon were permitted to take Iraqi [illegible] into custody. While in custody, that [illegible] determined how [illegible] the Marines. [illegible] options. The important issue to note in this analysis is that the Iraqis were physically [illegible], the Iraqis were [illegible] fled. In response, the Marines had to physically chase the Iraqis and take them into custody. They were taken into custody by the patrol, a guard was placed on the Iraqi detainees so that the detainees could not escape. In all situations, the detainees were not free to leave until released by the Marines. In this case, all Iraqi's were taken into custody and transported to another location while physically restrained of their freedom. The situation in this case is similar to that in United States v. Finch with Cpl Burton and the members of his squad acting in a sense as brig guards.

Clearly, U.S. policy has always been to provide all detainees with the same rights as those prisoners qualifying as prisoners of war under the Geneva Convention. As such,

APPELLATE EXHIBIT VI

Article 82 of the Geneva Convention applies. This policy is reiterated in the Marine Corps publication on prisoners of war and the guidance passed on by Capt (b)(6)

(b)(6)

Based on the foregoing, the government believes that the detained Iraqis did have "some duty" to obey the orders of Cpl Burton and his patrol. Therefore, the motion to dismiss should fail.

4. Evidence. The Government will provide documentary evidence and witness testimony.

5. Oral Argument. The government desires to make oral argument in opposition to this motion.

Date

R.M. MANNING
Captain, U.S. Marine Corps Reserve
Trial Counsel

CERTIFICATION OF SERVICE

A true copy of this motion was served on the detailed defense counsel by personal service on 11 June 2004.

R.M.MANNING

APPELLATE EXHIBIT VI
PAGE 5 OF 5

SIERRA JUDICIAL CIRCUIT
UNITED STATES MARINE CORPS
SPECIAL COURT-MARTIAL

| | |
|---|---|
| UNITED STATES<br><br>v.<br><br>SCOTT A. BURTON<br>(b)(6)<br>CORPORAL<br>U.S. MARINE CORPS | GOVERNMENT'S PROPOSED VOIR DIRE |

1. Has any member ever conducted a mock execution? If they do not understand the question, explain the term "mock execution."

2. Has any member ever hosed someone with a fire extinguisher? If you did, why did you do it?

3. At the conclusion of the trial, the judge is going to read you the following instruction: A "battery" is an unlawful and intentional or (culpably negligent) application of force or

that the Accused cannot be found guilty of this offense because the alleged conduct was the spraying of a powder projectile from a fire extinguisher?

permission, I hit Capt (b)(6) on the head with the pipe. Would you all agree based on the definitions I gave you that could constitute a battery?

5. Hypothetical 2: I have a straw and a little piece of paper, I make a spitball with the paper and a use the straw to spit the little paper ball at Capt (b)(6) without his permission. As ridiculous as that sounds, would you all agree that could constitute a battery?

6. Would you all agree that a person could commit a battery on another by spraying a powder projectile from a fire extinguisher?

7. Did all members deploy in support of Operation Iraqi Freedom?

8. Did any members deploy with 3rd Battalion, 5th Marine Regiment?

9. Of those members who deployed, how many of you had contact with Iraqi's being detained by coalition forces?

10. Has any member ever personally or had another Marine detain an Iraqi citizen while serving in OIF?

APPELLATE EXHIBIT VII
PAGE 1 OF 3

ORIGINAL

11. Has any member ever run a facility in Iraq, which housed detained Iraqi citizens?

12. Has any member ever worked at a detention facility?

13 Of those members who deployed, how many were in country for phase IV operations which began around 20 April?

14. Of those members who were deployed during Phase IV operations, were any of you located in Ad diwaniyah?

15. Of those who deployed, did all of you understand the rules of engagement (ROE) throughout the operation?

16. Of those who deployed, how many would say they received classes on the ROEs?

17. Are you all familiar with the concept 5Ss and a T?

18. Would you all agree that 5Ss and a T is a Marine Corps acronym utilized for dealing with detainees or prisoners?

20. Do all of you understand the purpose of the Geneva Convention?

21. Would you all agree that there is an appropriate way for Marines to escalate force when handling Iraqi detainees?

22. Would you also agree that the Iraqi citizen picked up on the street would be entitled to the same protections we give EPWs under the Geneva Convention?

23. Would you all agree that Iraqis should be afforded basic human rights?

24. Would you all agree that even Iraqi criminals should be afforded basic human rights?

25. Are you all familiar with the 4 weapons safety rules?

26. Does any member believe that it is okay for Marines to mistreat/abuse Iraqi criminals?

27. Does any Marine believe that warning shots were authorized during the war?

28. Hypothetically, let's say Corporal Burton committed the alleged offenses. Does any member feel that they could not hold Corporal Burton accountable for the crimes if Corporal Burton was not the senior man on the patrol?

APPELLATE EXHIBIT VII

29. Would you all agree that NCOs should lead by example?

30. Would any member automatically disregard the testimony of a witness if they learned that the witness was offered a pre-trial agreement in exchange for testimony in this court-martial?

31. Does anyone believe that a negligent/leadership failure by a senior marine excuses misconduct by his subordinates?

11 June 2004

R.M. Manning
Captain USMCR
Trial Counsel

DATE

**********

A true copy of this motion was served on Defense Counsel by email delivery on 11 June 2004.

R.M. Manning
Captain USMCR
Trial Counsel

APPELLATE EXHIBIT VII

UNITED STATES MARINE CORPS
IN THE SIERRA JUDICIAL CIRCUIT

| | |
|---|---|
| UNITED STATES<br><br>v.<br><br>SCOTT A. BURTON<br>330 76 8160<br>CORPORAL<br>U.S. Marine Corps | SPECIAL COURT-MARTIAL<br><br>DEFENSE PROPSED VOIR DIRE |

The defense would like to ask the members the following voir dire questions en banc:

1. Has any member not served in combat?

2. Has any member investigated allegations similar to those before you in this case?

3. Can every member set aside the news coverage of the prisoner abuse case at Abu Ghraib and

4. Does any member feel that the convening authority expects a particular outcome in this case?

5. Does every member understand that each member has an equal voice and vote, regardless of rank?

C. J. DEWBERRY
First Lieutenant, U.S. Marine Corps
Detailed Defense Counsel

I certify that a true copy of this proposed voir dire was served on Trial Counsel by email and personal service on the 14th day of June 2004.

C. J. DEWBERRY
First Lieutenant, U.S. Marine Corps
Detailed Defense Counsel

APPELLATE EXHIBIT VIII
PAGE 1 OF 1

SIERRA JUDICIAL CIRCUIT
UNITED STATES MARINE CORPS
SPECIAL COURT-MARTIAL

| | |
|---|---|
| **UNITED STATES**<br><br>**v.**<br><br>**SCOTT A. BURTON**<br>(b)(6)<br>**Corporal**<br>**U.S. Marine Corps** | **GOVERNMENT'S WITNESS LIST** |

1. The government may call the following witnesses to testify on the merits or at pre-sentencing:

a. Lance Corporal (b)(6) Division Schools, March AFB

b. Lance Corporal (b)(6) 3/5 Sniper Platoon

d. Private First Class (b)(6) , Weapons Company, 3/5

e. Lance Corporal (b)(6) Weapons Company, 3/5

f. Special Agent (b)(6) NCIS Camp Pendleton, CA

g. Mr. (b)(6) Civilian

h. Gunnery Sergeant (b)(6) , SOI

i. Captain (b)(6) , 5th Mar Regiment

j. Major (b)(6) , XO, 3/5

k. Corporal (b)(6) 62 Area guard

l. Lance Corporal (b)(6) Weapons Company, 3/5

ORIGINAL
APPELLATE EXHIBIT IX
PAGE 1 OF 2

2. The government requests the right to supplement this list should additional witnesses be discovered.

R.M. MANNING
Captain
United States Marine Corps Reserve
Trial Counsel

**********

CERTIFICATE OF SERVICE

A true copy of this notice was served on Detailed Defense Counsel by physical service on 11 June 2004.

R.M. MANNING
Captain
United States Marine Corps Reserve
Trial Counsel

APPELLATE EXHIBIT IX
PAGE 2 OF 2

CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 81

SPECIFICATION: In that Corporal Scott A. Burton, U.S. Marine Corps, on active duty, did, at Ad Diwaniyah, Iraq, between on or about 1 June 2003 and until on or about 6 July 2003, conspire with Corporal (b)(6) U.S. Marine Corps, to commit an offense under the Uniform Code of Military Justice, to wit: assault, and in order to effect the object of the conspiracy the said Corporal Scott A. Burton received a fire extinguisher from Corporal (b)(6) and then used that fire extinguisher to spray its contents in the face and body of an Iraqi detainee.

CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 93

SPECIFICATION 1: In that Corporal Scott A. Burton, U.S. Marine Corps, on active duty, did, at Ad Diwaniyah, Iraq, between on or about 1 June 2003 and until on or about 6 July 2003, maltreat Iraqi detainees, persons subject to his orders, by locking them in an abandoned tank.

SPECIFICATION 2: In that Corporal Scott A. Burton, U.S. Marine Corps, on active duty, did, at Ad Diwaniyah, Iraq, between on or about 1 June 2003 and until on or about 6 July 2003, maltreat an Iraqi detainee, a person subject to his orders, by spraying the detainee with a fire extinguisher.

SPECIFICATION 3: In that Corporal Scott A. Burton, U.S. Marine Corps, on active duty, did, at Ad Diwaniyah, Iraq, between on or about 1 June 2003 and until on or about 6 July 2003, maltreat Iraqi civilian detainees, persons subject to his orders, by forcing the detainees to kneel in front of fighting holes while he threw

SPECIFICATION 1: In that Corporal Scott A. Burton, U.S. Marine Corps, on active duty, did, at Ad Diwaniyah, Iraq, between on or about 1 June 2003 and until on or

to his head with a dangerous weapon, to wit: a loaded pistol.

SPECIFICATION 2: In that Corporal Scott A. Burton, U.S. Marine Corps, on active duty, did, at Ad Diwaniyah, Iraq, between on or about 1 June 2003 and until on or

body with a fire extinguisher.

APPELLATE EXHIBIT XI

PAGE 1 OF 1

UNITED STATES )
) COURT-MARTIAL
v. )
) WITH MEMBERS
BURTON )
)
)
CAPT ROBERTSON

MEMBER'S QUESTION

Directed to 1/CPL RAEL
(NAME OF WITNESS)

- WHY WOULD HE (CPL BURTON) CHAMBER A ROUND? CONDITION ONE IS SOP for Combat & PISTOLS → SHOULD HAVE BEEN FOUND IN CANISTER HEREAFTER.

(Member's Signature)

| | Obj | 39a | Non Obj |
|---|---|---|---|
| TC | | | 10 |
| DC | | | 75 |

APPELLATE EXHIBIT XII

UNITED STATES )
) COURT-MARTIAL
v. )
) WITH MEMBERS
)
)
)

MEMBER'S QUESTION

Directed to Cpl Rael
(NAME OF WITNESS)

Clarify type of humvees

(Member's Signature)

| | Obj | 39a | No Obj |
|---|---|---|---|
| TC | | | R |
| DC | | | 75 |

APPELLATE EXHIBIT XIII

UNITED STATES )
) COURT-MARTIAL
v. )
) WITH MEMBERS
)
)
)

MEMBER'S QUESTION

Directed to LCpl (b)(6)
(NAME OF WITNESS)

Were detainees often sprayed with fire extinguishers by weapons company

(Member's Signature)
Maj Cartright

| | Obj | 39a | No Obj |
|---|---|---|---|
| TC | | | 1 |
| DC | | | 75 |

APPELLATE EXHIBIT XIV

UNITED STATES )
) COURT-MARTIAL
v. )
) WITH MEMBERS
BURTON )
)
) CAPT ROBERTSON

MEMBER'S QUESTION

Directed to CPL (b)(6)
(NAME OF WITNESS)

WHO TOLD THEM TO USE
"HANDY WORK" -> WHAT DID
THAT MEAN TO YOU?

R
(Member's Signature)

| | Obj | 39a | No Obj |
|---|---|---|---|
| TC | | | N |
| DC | | | 75 |

APPELLATE EXHIBIT XV

UNITED STATES )
) COURT-MARTIAL
v. )
) WITH MEMBERS
)
)
)

MEMBER'S QUESTION

Directed to PFC (b)(6) (NAME OF WITNESS)

Is it relevant to ask why he's

(Member's signature)

| | Obj | 39a | No Obj |
|---|---|---|---|
| TC | | | |
| DC | | | |

APPELLATE EXHIBIT XVI

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 charges 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 in order 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 evidence in the record of trial.

In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of each of the following elements:

(1) That between on or about 1 June 2003 and on or about 6 July 2003 at Ad Diwaniyah, Iraq, the accused entered into an agreement with Corporal (b)(6) U.S. Marine Corps to commit an assault, an offense under the Uniform Code of Military Justice; and

(2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, Corporal Scott A. Burton received a fire extinguisher from Corporal (b)(6) and then used that fire extinguisher to spray its contents in the face and body of an Iraqi detainee for the purpose of bringing about the object of the agreement.

*The elements of the offense which the accused is charged with conspiracy to commit (i.e., simple assault) are as follows:*

(1) That between on or about 1 June 2003 and until on or about 6 July 2003 at Ad Diwaniyah, Iraq, the accused offered to do bodily harm to an Iraqi detainee;



APPELLATE EXHIBIT XVII

PAGE 1 OF 12

**(2) That the accused did so by spraying the contents of a fire extinguisher into the face and body of the Iraqi detainee; and**

**(3) That the offer was done with unlawful force or violence.**

*Definitions that apply to the sole specification of charge I:*

Proof that the offense of assault actually occurred is not required. However, it must be proved beyond a reasonable doubt that the agreement included every element of the offense of assault.

The agreement in a conspiracy does not have to be in any particular form or expressed in formal words. It is sufficient if the minds of the parties reach a common understanding to accomplish the object of the conspiracy, and this may be proved by the conduct of the parties. The agreement does not have to express the manner in which the conspiracy is to be carried out or what part each conspirator is to play.

The overt act required for this offense does not have to be a criminal act, but

The overt act may be done either at the time of or following the agreement

The overt act must clearly be independent of the agreement itself; that is, it must be more than merely the act of entering into the agreement or any act necessary to reach the agreement.

Definitions that apply to the specification of Charge I and both specifications of Charge III:

An act of force or violence is unlawful if done without legal justification or excuse and without the lawful consent of the victim.

An assault is an offer with unlawful force or violence to do bodily harm to another. An "offer to do bodily harm" is an intentional act which foreseeably causes another to reasonably believe that force will immediately be applied to his person. Specific intent to inflict bodily harm is not required. There must be an apparent present ability to bring about bodily harm. Physical injury or offensive touching is not required. The mere use of threatening words is not an assault.

In the 3 specifications of Charge II, the accused is charged with the offense of maltreatment of subordinates in violation of Article 93 of the UCMJ. In



APPELLATE EXHIBIT XXVII

PAGE 2 OF 12

order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt of each of the below elements:

*For specification 1 of Charge II:*

**(1) That Iraqi detainees were subject to the orders of Corporal Scott A. Burton U.S. Marine Corps; and**

**(2) That between on or about 1 June 2003 and until on or about 6 July 2003 at Ad Diwaniyah, Iraq, the accused maltreated Iraqi detainees by locking them in an abandoned tank.**

*For specification 2 of Charge II:*

(1) That an Iraqi detainee was subject to the orders of Corporal Scott A. [illegible]

[illegible]

*For specification 3 of Charge II:*

[illegible] Scott A. Burton U.S. Marine Corps; and

(2) That between on or about 1 June 2003 and until on or about 6 July 2003 at Ad Diwaniyah, Iraq, the accused maltreated Iraqi detainees by forcing the detainees to kneel in front of fighting holes while he drew his pistol behind them and fired a round next to the head of one of the detainees.

*Definitions that apply to the 3 specifications of Charge II:*

"Subject to the orders of" includes persons under the direct or immediate command of the accused and all persons who by reason of some duty are required to obey the lawful orders of the accused, even if those persons are not in the accused's direct chain of command.

The maltreatment must be real, although it does not have to be physical. The imposition of necessary or proper duties on a Marine and the



APPELLATE EXHIBIT XVII
3 17

requirement that those duties be performed does not establish this offense even though the duties are hard, difficult, or hazardous.

"Maltreated" refers to treatment that, when viewed objectively under all the circumstances, is abusive or otherwise unwarranted, unjustified, and unnecessary for any lawful purpose and that results in physical or mental harm or suffering, or reasonably could have caused, physical or mental harm or suffering.

Assault and improper punishment may constitute this offense.

In specification 1 of charge III, Corporal Burton is charged with the offense of aggravated assault in violation of Article 128 of the UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of each of the following elements:

[illegible] 2003 at Al Diwaniyah, Iraq, the accused [illegible]

(2) That the accused did so with a loaded service pistol by firing a round next to the Iraqi detainee's head;

(3) That the offer was done with unlawful force or violence;

(4) That the weapon was used in a manner likely to produce death or grievous bodily harm, and,

(5) That the weapon was a loaded firearm.

*Definitions that apply to specification 1 of Charge III:*

An act of force or violence is unlawful if done without legal justification or excuse and without the lawful consent of the victim.

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

A weapon is likely to produce death or grievous bodily harm when the natural and probable results of its particular use would be death or grievous



APPELLATE EXHIBIT XVII
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bodily harm. It is not necessary that death or grievous bodily harm actually result.

The likelihood of death or grievous bodily harm is determined by measuring two factors. Those two factors are (1) the risk of the harm and (2) the magnitude of the harm. In evaluating the risk of the harm, the risk of death or grievous bodily harm must be more than merely a fanciful, speculative, or remote possibility. In evaluating the magnitude of the harm, the consequence of death or grievous bodily harm must be at least probable and not just possible, or in other words, death or grievous bodily harm would be a natural and probable consequence of the accused's act. Where the magnitude of the harm is great, you may find that an aggravated assault exists even though the risk of harm is statistically low. For example, if someone fires a rifle bullet into a crowd and a bystander in the crowd is shot, then to constitute an aggravated assault, the risk of harm of hitting that [illegible] person.

An assault is an offer with unlawful force or violence to do bodily harm to another. An "offer to do bodily harm" is an intentional act which foreseeably causes another to reasonably believe that force will immediately be applied to his person. Specific intent to inflict bodily harm is not required. There must be an apparent present ability to bring about bodily harm. Physical injury or offensive touching is not required. The mere use of threatening words is not an assault.

"Firearm" means any weapon which is designed to or may be readily converted to expel any projectile by the action of an explosive. A service pistol, when used as a firearm and not as a club, may not be considered a dangerous weapon or means likely to produce death or grievous bodily harm unless it is loaded. A functional magazine fed weapon is a loaded weapon if there has been inserted into it a magazine containing a round of live ammunition, regardless of whether there is a round in the chamber.

A victim may not lawfully consent to an assault in which a weapon is used in a manner likely to produce death or grievous bodily harm.

You are advised that if you do not find the accused guilty of specification 1 of Charge III that you may find the accused guilty of the lesser offense of simple assault.



APPELLATE EXHIBIT XVII

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In order to find the accused guilty of the lesser offense of simple assault, you must be convinced by legal and competent evidence beyond reasonable doubt:

**(1) That between on or about 1 June 2003 and until on or about 6 July 2003 at Ad Diwaniyah, Iraq, the accused offered to do bodily harm to an Iraqi detainee;**

**(2) That the accused did so by firing a round next to the Iraqi detainee's head; and**

**(3) That the offer was done with unlawful force or violence.**

In specification 2 of charge III, Corporal Burton is charged with the offense of assault and battery in violation of Article 128 of the UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:

(1) That between on or about 1 June 2003 and until on or about 6 July 2003 at Ad Diwaniyah, Iraq, the accused did bodily harm to an Iraqi detainee;

(2) That the accused did so by striking an Iraqi detainee in the face and body with a fire extinguisher; and

(3) That the bodily harm was done with unlawful force or violence.

*Definitions that apply to specification 2 of charge III:*

An assault is an attempt or offer with unlawful force or violence to do bodily harm to another. An assault in which bodily harm is inflicted is called a battery. A "battery" is an unlawful and intentional application of force or violence to another. The act must be done without legal justification or excuse and without the lawful consent of the victim. "Bodily harm" means any physical injury to or offensive touching of another person, however slight.

You are advised that if you do not find the accused guilty of specification 2 of Charge III that you may find the accused guilty of the lesser offenses of simple assault.



APPELLATE EXHIBIT XVII
PAGE 6 OF 12

In order to find the accused guilty of the lesser offense of simple assault, you must be convinced by legal and competent evidence beyond reasonable doubt:

**(1) That between on or about 1 June 2003 and until on or about 6 July 2003 at Ad Diwaniyah, Iraq, the accused offered to do bodily harm to an Iraqi detainee;**

**(2) That the accused did so by spraying toward the Iraqi detainee with a fire extinguisher; and**

**(3) That the offer was done with unlawful force or violence.**

You are further advised that specification 2 of charge II is a more serious offense than specification 2 of charge III. [illegible] aimed at the same alleged misconduct, if you find [illegible] specification 2 of charge III or it's lesser offense.

Because specification 1 of charge III and specification 3 of charge II are [illegible] specification 1 of charge III, or it's lesser offense, then you may not find the accused guilty of specification 3 of charge II.

**Further Instructions:**

Evidence may be direct or circumstantial. Direct evidence is evidence that tends directly to prove or disprove a fact in issue. If a fact in issue were whether it rained during the evening, testimony by a witness that he saw it rain would be direct evidence that it rained.

On the other hand, circumstantial evidence is evidence that 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 a witness testified that the street was wet in the morning that would be circumstantial evidence from which you might reasonably infer it rained during the night.



APPELLATE EXHIBIT XVIII
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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.

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;

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 [illegible]

reasonable doubt.

[illegible] evidence or lack of it in the case. It is a genuine misgiving caused by insufficiency of proof of guilt. Reasonable doubt is a fair and rational doubt based upon reason and common sense and arising from the state of the evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of Corporal Burton's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of a specification then you must find him guilty of that specification. If, on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution that 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



APPELLATE EXHIBIT XVII
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doubt of the truth of each and every element, then you should find the accused guilty.

You have a duty to determine the credibility, that is believability, of the witnesses. In performing this duty, you must consider each witness's intelligence, ability to observe and accurately remember, in addition to the witness's sincerity and conduct in court. 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 discrepancies between witnesses, you should consider whether they resulted from an innocent mistake or a deliberate lie. Taking all these matters into account, you should then consider the probability of each witness's testimony and the inclination

consider the inconsistency in evaluating the believability of the testimony of LCpl (b)(6) and/or PFC (b)(6)

was ordered to testify truthfully by the convening authority. Under this grant of immunity, nothing the witness said, and no evidence derived from that testimony, can be used against that witness in a criminal trial.

If LCpl (b)(6) did not tell the truth, he can be prosecuted for perjury. In determining the credibility of this witness, you should consider the fact this witness testified under a grant of immunity along with all the other factors that may affect the witness' believability.

A witness is an accomplice if he was criminally involved in an offense with which the accused is charged. The purpose of this advice is to call to your attention a factor specifically affecting the witness' believability, that is, a motive to falsify his testimony in whole or in part, because of an obvious self-interest under the circumstances.

For example, an accomplice may be motivated to falsify testimony in whole or in part because of his own self-interest in receiving immunity or a pretrial



APPELLATE EXHIBIT XXVII
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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 in accordance with the law I have given you, the evidence admitted in court, and your own conscience.

As the government has the burden of proof, trial counsel may open and close. Trial counsel, you may proceed.

(ARGUMENT OF COUNSEL)

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 required to vote.

If you find the accused guilty of the specification under the charge, the finding as to that charge is also 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 4 members, that means 3 members must concur in any finding of guilty.

If you have at least 4 votes of guilty to the offense then that will result in a finding of guilty for that offense. If fewer than 4 members vote for a finding of guilty, then your ballot resulted in a finding of not guilty.

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



APPELLATE EXHIBIT XVII

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reconsideration of a finding has been proposed. Do not state whether the finding proposed to be reconsidered is a finding of guilty or not guilty.

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 that the Bailiff may now hand to the president. Major Curtright, do you have any questions regarding this worksheet?

If, during your deliberations, you have any [illegible]



APPELLATE EXHIBIT XVII

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U[illegible]ITED STATES MARINE CORPS
IN THE SIERRA JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL

| | | |
|---|---|---|
| UNITED STATES | ) | |
| | ) | |
| v. | ) | FINDINGS |
| | ) | |
| Scott A. Burton | ) | WORKSHEET |
| Corporal | ) | |
| (b)(6) | ) | |
| U.S. Marine Corps | ) | |

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language stricken.]

II. Mixed Findings

Of the Specification of Charge I: (Not Guilty) (~~Guilty~~)

Of Charge I: (Not Guilty) (~~Guilty~~)

Charge II: Violation of the UCMJ, Article 93

Of Specification 1 of Charge II: (Not Guilty) (~~Guilty~~)

Of Specification 2 of Charge II: (Not Guilty) (~~Guilty~~)

Of Specification 3 of Charge II: (~~Not Guilty~~) (Guilty)

Of Charge II: (~~Not Guilty~~) (Guilty)

APPELLATE EXHIBIT XVIII

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**Charge III: Violation of the UCMJ, Article 128**

Of the Specification 1 of Charge III: (Not Guilty) (~~Guilty~~)

Of Specification 2 of Charge III: (Not Guilty) (~~Guilty~~)

Of Charge III: (Not Guilty) (~~Guilty~~)

**III: Conviction by exceptions and substitutions:**

Of Specification 3 of Charge 2: Guilty

(except the word(s): ~~the head of~~,
substituting therefor the words (none); of the
excepted word(s), Not Guilty, of the substituted words Guilty.)

Of Specification _____ of Charge _____: Guilty

IV: Conviction of lesser included offenses:

Of Specification 1 of Charge III: Not Guilty

Of the Lesser Included Offense of simple assault ~~Guilty~~

Of Specification 2 of Charge III: Not Guilty

Of the Lesser Included Offense of simple assault ~~Guilty~~

Of Charge III: ~~Guilty~~

~~Signature of President~~

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PAGE 2 OF 2

Anger and Fr ist on

APPELLATE EXHIBIT XIX

AGE 1 OF 12

Fac

- **Undisputed Fact :**
  - No dispute that Cpl B: laced the Iraqis into a tank.
  - No dispute the Cpl Bu: rayed the Fire Extinguisher.
  - No dispute that Cpl B ulled the trigger.

APPELLATE EXHIBIT XIX

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**APPELLATE AND POST-TRIAL RIGHTS**

You are advised that your defense counsel (DC) is required by law to fully explain to you the following post-trial and appellate rights, and, that you have the right to request the military judge explain all or any portion of your appellate rights in open court prior to adjournment of your court-martial.

Record of trial (ROT)

A copy of the ROT will be prepared and given to you. You may request that your copy of the ROT be delivered to your DC.

Staff Judge Advocate or Legal Officer's Recommendation (SJAR)

If you received a punitive discharge or were sentenced by a general court-martial, the convening authority (CA)'s staff judge advocate or legal advisor will submit an SJAR to the CA. Before forwarding the SJAR and the ROT to the CA, this legal advisor will serve a copy of the SJAR upon your DC. A separate copy will be served on you. If it is impracticable to serve the SJAR on you for reasons including, but not limited to, your transfer to a distant place, your unauthorized absence, or military exigency, your copy will be forwarded to your DC. You may also request on the record at this court-martial or in writing that your copy be sent to your DC instead of you.

Submission of Matters to the Convening Authority

matters later.

Action by the Convening Authority

on findings of guilty. The action to be taken on the findings and sentence is within the sole discretion of the CA and is a matter of command prerogative. The CA is not required to review the case for legal errors or factual sufficiency. In taking action on the sentence, the CA may approve, disapprove, commute, or suspend the sentence in whole or in part. **The CA may never increase the severity of the sentence.** The CA is not empowered to reverse a finding of not guilty; however, the CA may change a finding of guilty to a charge or specification to a finding of guilty to a lesser offense included within that charge or specification, may disapprove a finding of guilty and order a rehearing, or may set aside and dismiss any charge or specification.

Review

If you were tried by a special court-martial and your sentence, as finally approved by the CA, does not include a punitive discharge, your case will be reviewed under the direction of the staff judge advocate for the CA's superior general court-martial convening authority (GCMCA). You may suggest, in writing, possible legal errors for the judge advocate to consider and that judge advocate must file a written response to legal errors noted by you. After such review, and completion of any required action by the GCMCA, you may request the Judge Advocate General of the Navy (TJAG) to take corrective action. Such a request must be filed within two years of the CA's action, unless the time is extended for good cause.

If you were tried by a general court-martial and your sentence, as finally approved by the CA, does not include a punitive discharge or at least one year's confinement, your case will be forwarded to TJAG. You may suggest in writing, possible legal errors or other matters for consideration by TJAG. The ROT may be examined for any legal errors

APPELLATE EXHIBIT XXII

PAGE 1 OF 2

and for appropriateness of the sentence and TJAG may take corrective action, if appropriate.

If your sentence, as finally approved by the CA, includes a punitive discharge (regardless of the type of court-martial), dismissal, a year or more of confinement, or death, your case will be reviewed by the Navy-Marine Corps Court of Criminal Appeals (NMCCA) for legal errors, factual sufficiency, and appropriateness of sentence. This review is automatic. Following this, your case could be reviewed by the United States Court of Appeals for the Armed Forces (CAAF), and finally it might be reviewed by the United States Supreme Court.

Waiver of Review

You may waive appellate review, giving up the foregoing rights, or you may withdraw your case from appellate review at a later time. Once you file a waiver of withdrawal, your decision is final and appellate review is barred. If you waive or withdraw appellate review, your case will be reviewed by a judge advocate for certain legal errors. You may submit, in writing, suggestions of legal errors for consideration by the judge advocate, who must file a written response to each. The judge advocate's review will be sent to the GCMCA for final action. Within two years after such final action, you may request TJAG to take corrective action in your case. The two year period may be extended for good cause. You have the right to [illegible] deciding to waive your post-trial and appellate rights.

If your case is reviewed by NMCCA, military counsel will be appointed to represent you at no cost to you. If you choose, you may engage a civilian counsel at no expense to the United States. If your case should be reviewed by CAAF or by the United States Supreme Court, you must [illegible]

Acknowledgment

I acknowledge (1) that prior to adjournment of my court-martial, I was provided with the above written advice; (2) that I have read and I understand my post-trial and appellate rights; (3) that I discussed my rights with my DC prior to signing this form; and (4) that the military judge will discuss my appellate rights with me on the record prior to adjournment of the court, if I so desire.

I specifically request that my copy of the ROT be delivered to:

_____ me. SAB my counsel, Frank Spinner.

I specifically request that my copy of the SJAR be delivered to:

_____ me. SAB my counsel, Frank Spinner.

Curtis J Dewberry
First Lieutenant
USMC
Detailed Defense Counsel

Scott A Burton
Scott A. Burton
Corporal
USMC
Accused

APPELLATE EXHIBIT XXII
PAGE 2 OF 2

UNITED STATES )
) COURT-MARTIAL
v. )
) WITH MEMBERS
)
)

CAPT ROBERTSON

MEMBER'S QUESTION

Directed to SSGT (b)(6) REDACTED
(NAME OF WITNESS)

1) DID YOU OR NOT GIVE CC CONVERSATION

2) WHAT PROMOTION MARKS WOULD YOU RECOMMEND BASED ON CC BEHAVIOR & PERFORMANCE IN SASO?

(Member's Signature)

| | Obj | 39a | No Obj |
|---|---|---|---|
| TC | | | ✓ |
| DC | | | ✓ |

APPELLATE EXHIBIT XXIII
PAGE 1 OF 1

APPELLATE EXHIBIT _____

## INSTRUCTIONS FOR PREPARING AND ARRANGING RECORD OF TRIAL

USE OF FORM - This form and MCM, 1984, Appendix 14, will be used by the trial counsel and the reporter as a guide to the preparation of the record of trial in general and special court-martial cases in which a verbatim record is prepared. Air Force uses this form and departmental instructions as a guide to the preparation of the record of trial in general and special court-martial cases in which a summarized record is authorized. Army and Navy use DD Form 491 for records of trial in general and special court-martial cases in which a summarized record is authorized. Inapplicable words of the printed text will be deleted.

COPIES - See MCM, 1984, RCM 1103(g). The convening authority may direct the preparation of additional copies.

ARRANGEMENT - When forwarded to the appropriate Judge Advocate General or for judge advocate review pursuant to Article 64(a), the record

either trial counsel or the convening or reviewing authority, whichever has custody of them.

2. Judge advocate's review pursuant to Article 64(a), if any.

3. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate rights, if applicable.

4. Briefs of counsel submitted after trial, if any (Article 38(c)).

5. DD Form 494, "Court-Martial Data Sheet."

6. Court-martial orders promulgating the result of trial as to each accused, in 10 copies when the record is verbatim and in 4 copies when it is summarized.

7. When required, signed recommendation of staff judge advocate or legal officer, in duplicate, together with all clemency papers, including clemency recommendations by court members.

8. Matters submitted by the accused pursuant to Article 60 (MCM, 1984, RCM 1105).

9. DD Form 458, "Charge Sheet" *(unless included at the point of arraignment in the record).*

10. Congressional inquiries and replies, if any.

11. DD Form 457, "Investigating Officer's Report," pursuant to Article 32, if such investigation was conducted, followed by any other papers which accompanied the charges when referred for trial, unless included in the record of trial proper.

12. Advice of staff judge advocate or legal officer, when prepared pursuant to Article 34 or otherwise.

13. Requests by counsel and action of the

a. Errata sheet, if any.

record or certificate in lieu of receipt.

c. Record of proceedings in court, including Article 39(a) sessions, if any.

d. Authentication sheet, followed by certificate of correction, if any.

e. Action of convening authority and, if appropriate, action of officer exercising general court-martial jurisdiction.

f. Exhibits admitted in evidence.

g. Exhibits not received in evidence. The page of the record of trial where each exhibit was offered and rejected will be noted on the front of each exhibit.

h. Appellate exhibits, such as proposed instructions, written offers of proof or preliminary evidence *(real or documentary)*, and briefs of counsel submitted at trial.