

COURT-MARTIAL RECORD

NAME WERST, SHANE A. SSG

SSN _____

ACTIONS CODED:

INITIAL

ACCA

FINAL

COMPANION(S):

ASSIGNED TO:

PANEL

~~EXAM-DIV.~~ ✓

ACCA CLERK OF COURT

RETURN THIS FILE TO:
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US ARMY JUDICIARY
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VOL III OF III VOL(S)

ARMY 20050648

**SUMMARIZED
RECORD OF TRIAL**
(and accompanying papers)
of

Volume III of III
ORIGINAL
APPELLATE EXHIBITS

WERST, SHANE ALLEN

SSG/E6

(Name, Last, First, Middle Initial)

(Social Security Number)

(Rank)

HHC

4th Infantry Division

U.S. Army

Fort Hood, Texas

(Unit/Command Name)

(Branch of Service)

(Station or Ship)

By

GENERAL

COURT-MARTIAL

Convened by

COMMANDER

(Title of Convening Authority)

Headquarters, 4th Infantry Division

(Unit/Command of Convening Authority)

Tried at

Fort Hood, Texas

26 April, 16 May, and
23-26 May 2005

(Place or Places of Trial)

On

(Date or Dates of Trial)

ACTION OF JUDGE ADVOCATE OR GENERAL COURT-MARTIAL CONVENING AUTHORITY(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		Companion Cases: None.
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 departmental regulations		

JUDGE ADVOCATE OR LAW SPECIALIST

SIGNATURE

11 2 06 EFB-L-P2:11

RANK

DATE SIGNED

See inside back cover for instructions as to use, preparation and arrangement.

DD FORM 491, MAY 2000

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20050648

APA V1.00

Front Cover

APPELLATE EXHIBITS

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, Middle Initial) WERST, SHANE ALLEN	2. SSN	3. GRADE OR RANK SSG	4. PAY GRADE E-6
5. UNIT OR ORGANIZATION Headquarters and Headquarters Company, 4th Infantry Division, Fort Hood, Texas 76544		6. CURRENT SERVICE a. INITIAL DATE 7/21/2004 b. TERM Indefinite	
7. PAY PER MONTH a. BASIC <i>OM</i> b. SEA/FOREIGN DUTY 2779.20 2685.30 2685.30 <i>OM</i> NONE		8. NATURE OF RESTRAINT OF ACCUSED Pre-Trial Confinement	
		9. DATE(S) IMPOSED 11/20/2004 - <i>11/30/2004</i> <i>OM</i>	

II. CHARGES AND SPECIFICATIONS

10. CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 118

SPECIFICATION: In that SSG (E6) Shane A. Werst, U.S. Army, did, at or near Balad, Iraq, on or about 3 January 2004, with premeditation, murder Naser Ismail by means of shooting him with a rifle.

CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 134

SPECIFICATION: In that SSG (E6) Shane A. Werst, U.S. Army, did, at or near Balad, Iraq, on or about 3 January 2004, wrongfully endeavor to impede an investigation and influence the actions of PFC Nathan Stewart and SPC Charles Pannell, by directing them to alter their statements regarding the murder of Naser Ismail.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, Middle Initial) LUIS E. GUARDA	b. GRADE CPT	c. ORGANIZATION OF ACCUSER Headquarters and Headquarters Company, 4th Infantry Division
d. SIGNATURE OF ACCUSER <i>LSG</i>	e. DATE (YYYYMMDD) 20041124	

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 24th day of November, 2004, 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.

Steven B. Fuller

Typed Name of Officer

HHC, 4th Infantry Division

Organization of Officer

CAPTAIN

Grade

Signature

ARTICLE 136, UCMJ

Official Capacity to Administer Oath

(See R.C.I. *OM* he is a commissioned officer)APPELLATE EXHIBIT *I*

12.

On 24 November, 2004, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me (See R.C.M. 308 (a)). (See R.C.M. 308 if notification cannot be made.)

LUIS E. GUARDA

Typed Name of Immediate Commander

CPT

Grade

Signature

Headquarters and Headquarters Company, 4ID

Organization of Immediate Commander

13.

The sworn charges were received at 1600 hours, 24 November, 2004 at HQs, 124th Special Troops Battalion, Designation of Command or
4th Infantry Division.
Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE¹

JAY K. CHAPMAN

Typed Name of Officer

Commanding

Official Capacity of Officer Signing

MAJ

Grade

Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY

Headquarters, 4th Infantry Division

b. PLACE

Fort Hood, Texas

c. DATE

5 March 2004

Referred for trial to the General court-martial convened by Court-Martial Convening Order Number 2
 dated

9 July, 2004, subject to the following instructions:² To be tried
 as a non-capital case.

By

COMMAND

of

MAJOR GENERAL THURMAN

Command or Order

CHRISTINE A. COBB

Typed Name of Officer

NCOIC, CRIMINAL LAW

Official Capacity of Officer Signing

SFC

Grade

Signature

15.

On 7 March, 2005, I (caused to be) served a copy hereof on (each of) the above named accused.

STEVEN B. FULLER

Typed Name of Trial Counsel

CPT

Grade or Rank of Trial Counsel

Signature

FOOTNOTES: 1—When an appropriate commander signs personally, inapplicable words are stricken.
 2—See R.C.M. 601(e) concerning instructions. If none, so state.

DEPARTMENT OF THE ARMY
GENERAL COURT-MARTIAL
UNITED STATES ARMY TRIAL JUDICIARY
THIRD JUDICIAL CIRCUIT

UNITED STATES)
)
) DEFENSE MOTION FOR
) UNLAWFUL PRETRIAL RESTRAINT
) CREDIT
)
 V.)
)
 WERST, Shane)
 SSG, USA)

1. Nature of Motion. The defense moves for pretrial confinement credit because the accused was subjected to pretrial restriction tantamount to confinement. *United States v. King*, 58 M.J. 110 (CAAF 2003).
2. Summary of Facts. SSG Werst is charged with one specification of premeditated murder of an Iraq insurgent while conducting a raid outside of a small town in Balad, Iraq, and a related specification of attempting to impede a subsequent investigation. Charge Sheet.

On November 30, 2004, after being released from pretrial confinement by a neutral and detached magistrate who conducted a hearing under Rules for Courts-Martial 305, the accused's command restricted him to Fort Hood. Exhibit 1. The command prohibited the accused from taking any leave or obtaining any passes. The accused was not allowed off post on any occasion other than for religious, financial or other needs not met on post. The accused was not allowed a pass to visit in-state relatives during the holiday season. He was not allowed to leave post without permission. For three months, the accused requested to travel to Austin, Texas, but only

APPELLATE EXHIBIT I
RECOGNIZED R. _____

after repeated attempts was he allowed to travel to Austin and that was for 6 hours. The only leave extended to the accused was to allow him to attend a funeral of a family member.

3. Discussion.

Pretrial restraint is defined as a "moral or physical restraint on a person's liberty which is imposed before and during disposition [of] offenses. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, arrest, or confinement." R.C.M. 304(a). R.C.M. 304 further notes the types of pretrial restraint: Conditions on Liberty¹, Restriction in Lieu of Arrest², and Arrest. R.C.M. 304(f) states that pretrial restraint should not be used as punishment. This is an extension of the principles delineated in Article 13, UCMJ, which prohibits illegal pretrial punishment. *See also United States v. Folk*, 37 M.J. 851 (A.F.C.M.R. 1993).

R.C.M. 304(c) provides the criteria under which a person may be restrained. Specifically, R.C.M. 304(c)(3) states that the restraint ordered must be required by the circumstances. Further, the Discussion which accompanies R.C.M. 304(c) provides that the restraint should be no more rigorous than the circumstances require to ensure the presence of the person restrained or to prevent foreseeable serious criminal conduct. *See also United States v. James*, 28 M.J. 214 (C.M.A. 1989); *United States v. Herrin*, 32 M.J. 983 (A.C.M.R. 1991). RCM 305(h)(2)(B) defines "serious misconduct" as the intimidation of witnesses or other obstruction of justice; seriously injuring others; or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States.

¹ Conditions on liberty are imposed by orders directing a person to do or refrain from doing specified acts. Such conditions may be imposed with other forms of restraint or separately.

² Restriction in lieu of arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits; a restricted person shall, unless otherwise directed, perform full military duties while restricted.

According to *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985)(summary disposition), in cases of pretrial restraint that are "tantamount to confinement," day-for-day credit is to be awarded against the approved sentence to confinement. Whether pretrial restriction rises to the level of confinement is a question of fact based on the "totality of the conditions imposed." *United States v. Calderon*, 34 M.J. 501, 506 (A.F.C.M.R. 1991).

Courts closely scrutinize facts which reflect substantial impairment of the basic rights and privileges enjoyed by servicemembers. As a result of this factual scrutiny, levels of restraint can be identified as falling somewhere on a spectrum ranging from "restriction" to "confinement." If the level of restraint falls so close to the "confinement" end of the spectrum as to be tantamount thereto, an accused is entitled to appropriate and meaningful administrative credit against his sentence. Factors to consider include the nature of the restraint, the area or scope of the restraint, the types of duties performed during the restraint and the degree of privacy included within the area of restraint. *United States v. Smith*, 20 M.J. 528, 531 (A.C.M.R. 1985).

Pretrial restriction that is tantamount to confinement is impermissible under Rule for Courts-Martial 304(a)(2) and gives rise to credit against confinement. "The determination whether the conditions of restriction are tantamount to confinement must be based on the totality of the conditions imposed." *United States v. King*, 58 M.J. 110, 113 (C.A.A.F. 2003). Factors to consider include

the nature of the restraint (physical or moral), the area or scope of the restraint (confined to post, barracks, room, etc.), the types of duties, if any, performed during the restraint (routine military duties, fatigue duties, etc.), and the degree of privacy enjoyed within the area of restraint. Other important conditions which may significantly affect one or more of these factors are: whether the accused was required to sign in periodically with some supervising authority; whether a charge of quarters or other authority periodically checked to ensure the accused's presence; whether the accused was required to be under armed or unarmed escort;

whether and to what degree [the] accused was allowed visitation and telephone privileges; what religious, medical, recreational, educational, or other support facilities were available for the accused's use; the location of the accused's sleeping accommodations; and whether the accused was allowed to retain and use his personal property (including his civilian clothing). *Id.*

Here, the conditions on the accused's pretrial restriction was tantamount to confinement.

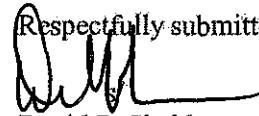
He deserves substantial confinement credit. *United States v. Suzuki*, 14 M.J. 491 (CMA 1983).

4. Conclusion. The defense respectfully requests the opportunity to submit additional evidence and to present oral argument on this motion. The defense respectfully requests that the Court grant the motion in its entirety.



Mark Santos
CAPT, JA, USA
Detailed Defense Counsel

Respectfully submitted,


David P. Sheldon
Civilian Defense Counsel

Certificate of Service

I certify that this document was delivered by electronic mail to the Military Judge, Third Judicial Circuit, Fort Hood, Texas and to the trial counsel on 29 April, 2005.

S/
David P. Sheldon

DEVELOPMENTAL COUNSELING FORM			
For use of this form see FM 22-100.			
DATA REQUIRED BY THE PRIVACY ACT OF 1974			
AUTHORITY: 3 USC 301, Departmental Regulations, 10 USC 3013, Secretary of the Army and E.O. 9397 (SSN)			
PRINCIPAL PURPOSE: To assist leaders in conducting and recording counseling data pertaining to subordinates.			
ROUTINE USES: For subordinate leader development (A W FM 22-100). Leaders should use this form as necessary.			
DISCLOSURE: Disclosure is voluntary.			
PART I - ADMINISTRATIVE DATA			
Name (Last, First, MI) Werst, Shane A.	Rank / Grade SSG/E6	Social Security No.	Date of Counseling 30 November 04
Organization DTC, STB, 4ID FORT HOOD TEXAS 76544	Name and Title of Counselor 1SG MARTELL, OSVALDO COMPANY 1SG		
PART II - BACKGROUND INFORMATION			
Purpose of Counseling: (Leader states the reason for the counseling, e.g. Performance/Professional or Event-Oriented counseling and includes the leaders facts and observations prior to the counseling): Event-oriented Counseling Informed soldier of <input type="checkbox"/> Pass privileges revoked <input type="checkbox"/> Administratively Restricted to Post and the work area <input type="checkbox"/> Restricted to your worship denomination on post (Red Team Chapel) <input type="checkbox"/> Authorized only to use commissary service			
PART III - SUMMARY OF COUNSELING			
Complete this section during or immediately subsequent to counseling.			
<p>Key Points of Discussion: SSG Werst this counseling is to inform you of the restrictions that have been placed upon you by the Battalion Commander, LTC Baker. Your leave/pass privileges are revoked, you are permitted to drive to and from your place of residence; to your place of worship, place of work, your lawyer's office, and to the commissary. During the duty day you will report to SGM Blevins. At any time you need to do anything (i.e. register vehicle) you will request permission from and sign in/out with CPT Luis E. Guarda. From now until the day of your court martial you will obey by these rules and any deviation from these will force the chain of command to confine you again and take your case to trial for courts martial.</p>			
<p><i>If this behavior continues, you may be recommended for separation action UP AR 635-200. If separated under chapters 13 or 14 of AR 635-200, you could receive an honorable, general, or other than honorable discharge. Honorable discharge is a separation with honor based on the quality of service which meets the standards of acceptable conduct and performance of duty. General discharge is a separation under honorable conditions, based on a military record being satisfactory, but not sufficiently meritorious to warrant an honorable discharge. A discharge under other than honorable conditions is an administrative separation based upon a pattern of behavior or one or more acts or omissions that constitutes a significant departure from the conduct expected of a soldier. A less than honorable discharge could result in the loss of VA and military related benefits (including G.I. Bill education documents), hardship in obtaining other employment, or personal stigma. It is also unlikely that you will be successful in any attempt to have the character of your service changed to a more favorable characterized.</i></p>			
OTHER INSTRUCTIONS			
This form will be destroyed upon: reassignment (other than rehabilitative transfers), separation at ETS, or upon retirement. For separation requirements and notification of loss of benefits/consequences see local directives and AR 635-200.			

DA FORM 4856-E, JUN 99

EDITION OF JUN 85 IS OBSOLETE

Plan of Action: (Outlines actions that the subordinate will do after the counseling session to reach the agreed upon goal(s). The actions must be specific enough to modify or maintain the subordinate's behavior and include a specific time line for implementation and assessment (Part IV below):

- You will request permission from the Company Commander to deviate from these restrictions.
 - You will report to work with out incident. If you are to be delayed you must contact your supervisor or the Company Commander

Session Closing: (The leader summarizes the key points of the session and checks if the subordinate understands the plan of action. The subordinate agrees/disagrees and provides remarks if appropriate).

Individual counseled: I agree / disagree with the information above

Individual counseled remarks:

Signature of Individual Counselor:

Date: 30 May 04

Leader Responsibilities: (Leader's responsibilities in implementing the plan of action):

Signature of Counselor:

Date: 30 Nov 04

PART IV - ASSESSMENT OF THE PLAN OF ACTION

Assessment: (Did the plan of action achieve the desired results? This section is completed by both the leader and the individual counseled and provides useful information for follow-up counseling):

Counselor: _____ **Individual Counselled:** _____ **Date of Assessment:** _____

Note: Both the counselor and the individual counseled should retain a record of the counseling.

DA FORM 4856-E (REVERSE)

SSG WERST PASS DIRECTIVES

19 MARCH 2005

- SSG Werst will sign out in person with CPT Guarda prior to his departure and sign back in with CPT Guarda upon his return.
- SSG Werst will call CPT Guarda at (254) 681-4800 upon arrival in Austin, each time he moves to a new location, and when he departs back to Killeen.
- Any deviation from above and stated directives must be coordinated in advance with CPT Guarda.
- Any deviation from the above will result in UCMJ action being taken, the revocation of leave, and possible pre-trial confinement.

SSG Werst has been cleared for travel to and from Austin Texas to visit the following locations:

Museums at various downtown Austin locations

**From: 1000 19 March 2005
Until: 1800 hrs 19 March 2005**

***SSG Werst is permitted to make stops as necessary for food, gas, and rest stops within the Austin area.**

4ID SPECIAL TROOPS BATTALION

UCMJ/ADMIN ACTION TRACKER

As of 03 JAN 08
LEGAL**UCMJ**

KING, RAYMOND	SPC	ACE	OP	12/7/2004 TO 12/20/2004	12/7/2004 TO 12/20/2004
MCENERNEY, MATT	SPC	ACE	315/10002	PENDING 2D READING	NONE
CASTRO, MICHAEL	SGT	ACE	OP	PENDING 2D READING	NONE
MONAGHAN, DAVID	SPC	ACE	OP	PENDING 2D READING	NONE
CARTER,	PV2	NSC	320/10002	12/13/2004 TO 12/31/2004	12/13/2004 TO 12/31/2004

ADMIN

KING, RAYMOND	SPC	ACE	allowed	allowed	allowed	restricted	allowed	allowed
MCENERNEY, MATT	SPC	ACE	allowed	allowed	allowed	restricted	allowed	allowed
CASTRO, MICHAEL	SGT	ACE	allowed	allowed	allowed	restricted	allowed	allowed
MONAGHAN, DAVID	SPC	ACE	allowed	allowed	allowed	restricted	allowed	allowed
WERST, SHANE	SSG	DIV TRPS	allowed	restricted	allowed	not restricted	allowed	allowed
CARTER	PV2	NSC	pulled	restricted	allowed	restricted	revoked	banned
HATCHER	SPC	NSC	pulled	restricted	allowed	restricted	allowed	banned
PATTERSON, HERB	SPC	NSC	pulled	restricted	allowed	restricted	revoked	banned
FIFE, GREGORY	PFC	NSC	allowed	restricted	restricted	not restricted	allowed	allowed
FORD	PFC	HHC	pulled	restricted	restricted	restricted	revoked	banned
MERRILL	SPC	HHC	pulled	restricted	allowed	restricted	allowed	banned

FOR: SD & CQ

UNCLASSIFIED/FOR OFFICIAL USE ONLY

IN THE UNITED STATES ARMY
THIRD JUDICIAL CIRCUIT

UNITED STATES)	
)	
V.)	
)	Response to Defense Motion
)	for Article 13 Credit
WERST, Shane A.)	
SSG, U.S. Army,)	
Headquarters and Headquarters Company,)	
4th Infantry Division (Mechanized))	5 May 2005
Fort Hood, Texas, 76544)	

1. Pursuant to the Rules for the Trial of Courts-Martial in the 3d Judicial Circuit, United States Army, the Government hereby submits the follow motion in opposition to the Defense Motion for Article 13 credit. The motion should be denied.

RELIEF SOUGHT

2. The Defense's Motion for Article 13 credit should be denied because the Defense has failed to make the requisite showing under Article 13 of the U.C.M.J., and R.C.M. 304, to justify credit. Specifically, the Defense has failed to show the Government's restriction of the Accused was to punish, nor has the Defense shown the restriction is unnecessary given the circumstances.

BURDEN OF PROOF

3. The Defense, as the moving party, bears the burden of this motion by a preponderance of the evidence pursuant to RCM 905(c)(1).

FACTS

4. The Accused was apprehended in Michigan while working for the U.S. Army as a recruiter on 20 November 2004. The Accused was placed in pre-trial confinement in Bell County on or about 21 November 2004. The military magistrate released SSG Werst on 30 November 2004. Upon being released, the command restricted the Accused to post. Within days of his release, the Army moved the Accused's family to Fort Hood. The Accused is married with two children. The Accused and his family were placed in Government housing on post where they have resided to date.

5. The Accused has been allowed to leave post on at least two occasions. Once to California for two weeks on emergency leave, and once to the Austin, Texas area.

APPELLATE EXHIBIT **III**
RECOGNIZED R. _____

LAW

6. The following authorities are relevant to this case:

- a. RCM 304. (MCM 2002 Edition)
- b. RCM 305. (MCM 2002 Edition)
- c. Article 13. (MCM 2002 Edition)
- b. United States v. King, 58 M.J. 110 (CAAF 2003)
- c. United States v. Calderon, 34 M.J. 501 (A.F.C.M.R. 1991)
- d. United States v. Smith, 20 M.J. 528, 531 (A.C.M.R. 1985)

WITNESSES

7. No witnesses required.

ARGUMENT

8. Restriction to post is no different than a command pulling soldiers leave and pass privileges.

9. The restriction of the Accused is not punishment. Using Article 13 and the factors listed in R.C.M. 304(f) and 305 as a guideline, the restriction of the Accused does not warrant confinement credit. The Accused has not been required to work punitive duty hours or training. The Accused does not perform punitive labor, nor does he wear a distinctive uniform in order to single him out. In stark contrast, the Accused has been given a job in the 4th Infantry Division Special Troops Battalion commensurate with his rank and position as an NCO.

10. Although the Accused is restricted to the boundaries of Fort Hood, this alone is not the determining factor in whether credit should be awarded.

11. R.C.M. 304(c), discusses when a soldier may be restrained, and all three prongs of this subsection have been met by the Government. First, an offense triable by court-martial has been committed; secondly, the Accused committed it; and thirdly, the restraint is required given the circumstances. (See paragraphs 11- 13)

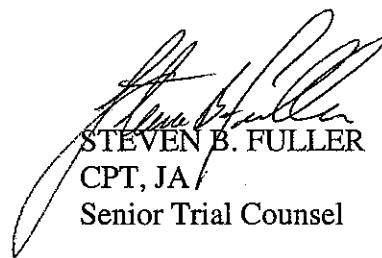
12. The decision to impose pretrial restraint should be made on a case-by-case basis, as the discussion to R.C.M 304(f), states. All of the factors listed in both R.C.M. 304, and 305, were considered in making the decision to restrain. The charged offenses are serious; the weight of evidence against the Accused is heavy; the Accused lacks ties to the local area; and the likelihood of further misconduct is both real and still being investigated, a fact the Defense concedes in their motion. (RCM 305(h)(2)(B), defines “serious misconduct” as the intimidation of witnesses or other obstruction of justice,) One of the charged offenses is Article 134, obstructing justice.

13. Additionally, the restraint is no more rigorous than the circumstances require. The restraint will ensure his presence at trial and will effectively prevent further serious criminal misconduct. Being restricted to Fort Hood lessens the opportunities of further obstruction of justice.

14. As the Defense states in their motion, the question of whether the restraint rises to the level of confinement is based on the “totality of the conditions imposed.” United States v. Calderon, 34 M.J. 501 (A.F.C.M.R. 1991). In this case the conditions of the restraint are not tantamount to confinement. Fort Hood is the largest Army post in the Unites States. Fort Hood is a self-contained city with all of the amenities of its civilian counterpart. There are two commissarys, two large AAFES stores, several shoppettes, a bowling alley, movie theatres, dozens of gyms, restaraunts, and more. These amenities combined with his family living on post in Government quarters very closely simulates a family serving in an OCONUS environment.

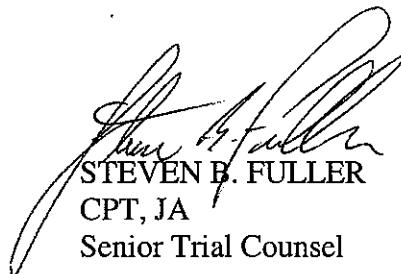
CONCLUSION

15. In light of the above facts and the law applied to those the facts, the Government submits the Defense motion should be denied in its entirety.



STEVEN B. FULLER
CPT, JA
Senior Trial Counsel

I certify that I have served or caused to be served a true copy of the above on the Trial Defense Counsel on 5 May 2005.



STEVEN B. FULLER
CPT, JA
Senior Trial Counsel

DEPARTMENT OF THE ARMY
GENERAL COURT-MARTIAL
UNITED STATES ARMY TRIAL JUDICIARY
THIRD JUDICIAL CIRCUIT

UNITED STATES)
)
) DEFENSE MOTION TO ABATE
) THE PROCEEDINGS OR FOR
) APPROPRIATE RELIEF IN THE
) ALTERNATIVE
 V.)
)
 WERST, Shane)
 SSG, USA)

1. Nature of Motion. The defense moves to abate the proceedings under Rule for Courts-Martial 703(b)(3) for namely one reason: a critical witness, Matthew Cunningham, CAPT, USA, has notified the defense through his counsel that he will not testify in the defense's case on the merits unless the government extends immunity to him for his testimony. This witness is central to the defense's case. The government orally notified the defense that it would not grant immunity to CAPT Cunningham, although no formal action has been taken on the defense's request. See Exhibit 1.

In the alternative, the defense requests that the military judge direct the convening authority to grant testimonial immunity. See R.C.M. 704(e).

2. Summary of Facts. SSG Werst is charged with one specification of premeditated murder of an Iraq insurgent while conducting a raid outside of a small town in Balad, Iraq, and a related specification of attempting to impede a subsequent investigation. Charge Sheet.

The Defense submitted a timely request for a grant of immunity for CAPT Cunningham. *Id.* The defense previously has also requested this witness at trial. CAPT Cunningham's

APPELLATE EXHIBIT **IV**

RECOGNIZED R. _____

counsel, Mr. Richard D. Stevens, P.O. Box 31553, Alexandria, VA 22310(703) 798-3064 fax (703) 997-1367, has indicated that CAPT Cunningham would testify substantially that:

CPT Cunningham was the company commander for Alpha Company, 1/8 Infantry at the time of the alleged misconduct. He was present at the mission on 3 January 2004. The mission was planned for weeks prior to that date. He gave the operations order to the platoon's leadership and told that leadership to abide by the rules of engagement. There were no orders given to unlawfully kill any Iraqi insurgents.

The government intends to present the testimony of First Lieutenant Jack M. Saville, USA, in support of its argument that CPT Cunningham gave an illegal order with which the accused complied. On information and belief, LT Seville has been given immunity for this testimony. The defense requested immunity for CAPT Cunningham so that his critical testimony could be heard. On April 26, 2005, trial counsel indicated that the immunity request for CAPT Cunningham would be "denied."

3. Discussion. If a witness testimony is of "such a central importance to an issue that is essential to a fair trial," the military judge may permit the counsel to present an "adequate substitute" for such testimony. *See United States v. Davis*, 29 M.J. 357 (C.M.A. 1991). Adequate substitutes could include deposition testimony, videotaped statements, or stipulations of expected testimony or of fact. But in some cases, if there is no adequate substitute, a military judge may either grant a continuance in order to secure the witness's presence, or abate the proceedings. *See United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); *United States v. Bennett*, 12 M.J. 463 (C.M.A. 1982); *United States v. Daniels*, 23 C.M.A. 94, 98, 48 C.M.R. 655 (1974). Abatement does not mean the prosecution stops, it merely connotes a period of continuance. *See United States v. Harris*, 24 M.J. 622 (ACMR 1987).

Here, the defense seeks to present the testimony of a critical, indeed, central witness in this case. *See Harris*, 24 M.J. 624. CAPT Cunningham's presence is required. The government

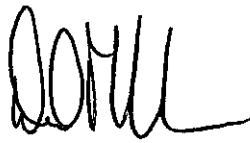
can provide him immunity if it must, but the government cannot hide behind the shield of an invocation of privilege when it can provide him immunity. What is fundamentally important is to ensure a fair trial where the members can judge the credibility of this witness's testimony in light of LT Saville's, among others. *See* RCM 704(e).

4. Conclusion. The defense respectfully requests the opportunity to submit additional evidence and to present oral argument on this motion. The defense respectfully requests that the Court grant the motion in its entirety.

Respectfully submitted,



Mark Santos
CAPT, JA, USA
Detailed Defense Counsel

s/ 

David P. Sheldon
Civilian Defense Counsel

Certificate of Service

I certify that this document was delivered by electronic mail to the Military Judge, Third Judicial Circuit, Fort Hood, Texas and to the trial counsel on 29 April, 2005.

S/
David P. Sheldon



DEPARTMENT OF THE ARMY
US ARMY TRIAL DEFENSE SERVICE
REGION IV, FORT HOOD FIELD OFFICE
1ST CAVALRY DIVISION BRANCH OFFICE
FORT HOOD, TEXAS 76544

REPLY TO
ATTENTION OF:

AFZF-JA-TDS

26 April 2005

MEMORANDUM THRU

CPT Steven Fuller, Trial Counsel, Office of the Staff Judge Advocate, 4th Infantry Division, Fort Hood, Texas 76544

CPT Thomas Schiffer, Chief of Military Justice, Office of the Staff Judge Advocate, 4th Infantry Division, Fort Hood, Texas 76544

LTC Tracy Barnes, Staff Judge Advocate, Office of the Staff Judge Advocate, 4th Infantry Division, Fort Hood, Texas 76544

FOR Commander 4th Infantry Division, Fort Hood, Texas 765444

SUBJECT: Request for Witness Immunity, United States v. SSG Shane Werst, Headquarters and Headquarters Company, 4th Infantry Division, Fort Hood, Texas 76544

1. IAW Rule for Court-Martial (R.C.M.) 704 the Defense in the above referenced case requests that the Convening Authority grant testimonial immunity to the following witnesses:

- a. LTC Nathan Sassman, 1/8 INF, Fort Carson, CO 80913;
- b. CPT Matthew Cunningham, 1/8 INF, Fort Carson, CO 80913;
- c. 1LT Daniel Maurer, E Co. 1/8 INF, Fort Carson, CO 80913;
- d. 1LT David Nelson, HHC, 5th Ranger Training Battalion, Camp Merrill, Dahlonega, GA 30533; and

e. SPC John Plato, 1/8 INF, Fort Carson, CO 80913.

2. The above requested individuals are relevant and necessary witnesses in the case of United States v. SSG Shane Werst. As of this date, several of the above requested individuals have all spoken with legal counsel and are currently exercising their right to remain silent in accordance with Article 31, Uniform Code of Military Justice (U.C.M.J.).

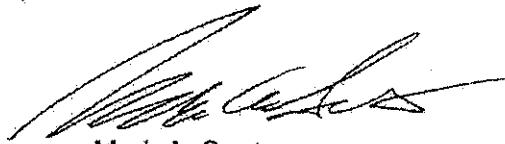
3. The Defense requests that grants of immunity for these witnesses be issued as soon as possible. SSG Werst's case was referred on 17 February 2005 and the Military

AFZF-JA-TDS

SUBJECT: Request for Witness Immunity, United States v. SSG Shane Werst
Headquarters and Headquarters Company, 4th Infantry Division, Fort Hood,
Texas 76544

Judge has set a trial date for 23 May 2005. Without a grant of immunity issued by the Convening Authority the Defense cannot currently question these individuals or adequately prepare for trial.

4. POC is the undersigned at (254) 287-9419/ DSN 737-9419/ FAX 287-4993.



Mark A. Santos
CPT, JA
Defense Counsel

DEPARTMENT OF THE ARMY
GENERAL COURT-MARTIAL
UNITED STATES ARMY TRIAL JUDICIARY
THIRD JUDICIAL CIRCUIT

UNITED STATES)
)
 v.) SUPPLEMENT TO DEFENSE MOTION
) TO ABATE THE PROCEEDINGS OR FOR
 WERST, Shane,) APPROPRIATE RELIEF IN
) THE ALTERNATIVE
 SSG, U.S. Army,)
 Headquarters and Headquarters Company,)
 4th Infantry Division,) 5 May 2005
 Fort Hood, Texas 76544)

1. Nature of Motion. The defense now supplements its Motion to Abate the Proceedings or For Appropriate Relief in the Alternative filed on 29 April 2005 in the above referenced case to show good cause for the filing of this motion after the Accused entered a plea of "Not Guilty" to all charges and specification on 26 April 2005. The defense filed this motion after the entering of pleas only because it was notified after the Accused's arraignment on 26 April 2005 that the Government would not grant the immunity requested for CPT Matthew Cunningham. As such, the defense did not have any knowledge concerning this legal issue at the time of arraignment and could not have raised the issue with the Court at that time.

2. Summary of Facts. On 26 April 2005 the defense submitted through trial counsel a Request for Witness Immunity for several merits and sentencing witnesses including CPT Matthew Cunningham, formerly the Accused's company commander in Iraq at the time of the alleged misconduct. Attachment 1. This submission was hand delivered to trial counsel at the Lawrence H. Williams Judicial Center at Fort Hood, Texas before the Accused's arraignment on 26 April. Subsequently, on approximately 28 April 2005 the defense also served on the Government its Request for Witnesses. Attachment 2. This Request for Witnesses was served in a timely

APPELLATE EXHIBIT 

RECOGNIZED R. _____

manner on the Government pursuant the Court's Pretrial Order dated 2 March 2005. Attachment

3. The Defense Witness Request included CPT Cunningham and pursuant to R.C.M. 703(2) the defense stated the following synopsis of his testimony:

CPT Cunningham was the company commander for Alpha Company, 1/8 Infantry at the time of the alleged misconduct. He was present at the mission on 3 January 2004. He will testify that the mission was planned for weeks prior to that date. He gave the operations order to the platoon's leadership and told that leadership to abide by the rules of engagement. There were no orders given to unlawfully kill any Iraqi insurgents. His live testimony is necessary to give the finder of fact an accurate portrayal regarding the facts of the alleged offenses as well as to allow his veracity and truthfulness to be evaluated.

Also, on 28 April 2005 trial counsel verbally notified defense counsel that the Government would not grant immunity to CPT Matthew Cunningham as requested. Subsequently on 29 April 2005 the defense filed its Motion to Abate the Proceedings or for Appropriate Relief in the Alternative. Because the defense did not know at the time of the Accused's arraignment that the Government would not be willing to grant CPT Cunningham immunity, it could not have raised the issue with the Court at that time.

3. Discussion. The defense seeks to present the testimony of a critical, indeed, central witness in this case through the testimony of CPT Matthew Cunningham. See *United States v. Harris*, 24 M.J. 622 (A.C.M.R. 1987). The decision to grant immunity is a matter within the sole discretion of the appropriate general court-martial convening authority unless a defense request to immunize a witness has been denied. R.C.M. 704(e). After a defense request for immunity has been denied the military judge may, upon motion by defense counsel, grant appropriate relief by directing that the convening authority grant testimonial immunity to the requested witness or abate the proceedings. *Id.* The military judge may do this upon findings that:

(1) the witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify (2) The Government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the Government,

through its own overreaching has forced the witness to invoke the privilege against self-incrimination; and (3) The witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses. Id.

Addressing R.C.M. 704's requirements in order, first, the defense has been notified that CPT Matthew Cunningham intends to invoke his right against self-incrimination if called to testify in this case. Attachment 4. The defense has been unable to interview CPT Cunningham to this point because of this invocation but Attachment 4 confirms what the defense believes CPT Cunningham will testify to at trial:

Were CPT Cunningham to be immunized as required by defense counsel, you can expect that he would testify that his platoon traveled from Balad to Samarra to engage in this planned operation. CPT Cunningham was present with his platoon for the operation and no illegal operations order was given by CPT Cunningham, or by anyone else in his presence, and the platoon was to abide by the rules of engagement for this operation. Attachment 4, Paragraph 3.

Additionally, CPT Cunningham has never given sworn testimony, subject to cross-examination, concerning the facts of this case. As such, there is not even a potential for an alternate form of his testimony.

The Government is engaging in the discriminatory use of immunity to gain a tactical advantage. The defense previously submitted a Request for Witness Immunity to the Government on 28 February 2005. Attachment 5. This request was approved by the convening authority after the Accused's Article 32 Hearing. Attachment 6. Trial counsel has verbally stated that the Government will grant some of the witnesses on the Request for Witness Immunity dated 26 April 2005 but not all. Additionally, 1LT Jack Saville, one the Government's chief witnesses has been granted immunity, pursuant to an offer to plead guilty. 1LT Saville, is expected to testify to that CPT Cunningham gave an illegal order to kill Iraqi insurgents before the raid on 3 January 2004. 1LT Saville's testimony goes to the heart of the Government's case

alleging that SSG Werst's acts on 3 January 2004 were premeditated. However, this testimony is directly opposite to CPT Cunningham's proffer of expected testimony through counsel in Attachment 4. Thus, the Government, through its denial of immunity for CPT Cunningham, is denying the defense the ability to rebut testimony of 1LT Saville on the most important issue the panel members will decide in this case, premeditation. Only with respect to CPT Cunningham in this case has the government indicated that it would deny immunity for a witness.

CPT Cunningham's testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses. 1LT Saville is expected to testify that CPT Cunningham gave an illegal order to kill Iraqi insurgents on the night of 3 January 2004. The most obvious theory of the Government's case is that SSG Werst heard this order and followed it on 3 January 2004. As such, his testimony is material. It is also clearly exculpatory in that his expected testimony directly disputes 1LT Saville's testimony. 1LT Saville's testimony is the Government's chief evidence of premeditation against SSG Werst. Attachment 4 clearly indicates that CPT Cunningham disputes that he gave an illegal order. Without allowing CPT Cunningham to testify the defense is essentially precluded from rebutting the testimony of 1LT Saville.

There is no witness on the face of the earth that can give the testimony CPT Matthew Cunningham can in this case. He is the commander who gave the operations order for the mission on 3 January 2004. He, more than anyone in the company, understands the unit's mission on that night and how he communicated the rules of engagement that they were to follow to the platoon's leadership, including SSG Werst. No other source can testify to what CPT Cunningham intentions were when he gave an operations order to the platoon leadership. Finally, while CPT Cunningham's testimony rebutting 1LT Saville's testimony may affect 1LT

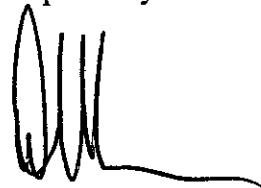
Saville's credibility it does much more than that. It clearly indicates, contrary to the most obvious theory of the Government's case, that SSG Werst was not acting under an illegal order to kill Iraqi insurgents on 3 January 2004.

4. Conclusion. For the above reasons, the defense respectfully requests the court grant its Motion to Abate the Proceedings or for Appropriate Relief in the Alternative. Any other result precludes SSG Shane Werst from being able to defend himself at trial.



Mark Santos
CAPT, JA, USA
Detailed Defense Counsel

Respectfully submitted,



David P. Sheldon
Civilian Defense Counsel

Attachment 1



DEPARTMENT OF THE ARMY

US ARMY TRIAL DEFENSE SERVICE
REGION IV, FORT HOOD FIELD OFFICE
1ST CAVALRY DIVISION BRANCH OFFICE
FORT HOOD, TEXAS 76544

REPLY TO
ATTENTION OF:

AFZF-JA-TDS

26 April 2005

MEMORANDUM THRU

CPT Steven Fuller, Trial Counsel, Office of the Staff Judge Advocate, 4th Infantry Division, Fort Hood, Texas 76544

CPT Thomas Schiffer, Chief of Military Justice, Office of the Staff Judge Advocate, 4th Infantry Division, Fort Hood, Texas 76544

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FOR Commander 4th Infantry Division, Fort Hood, Texas 765444

SUBJECT: Request for Witness Immunity, United States v. SSG Shane Werst, Headquarters and Headquarters Company, 4th Infantry Division, Fort Hood, Texas 76544

1. IAW Rule for Court-Martial (R.C.M.) 704 the Defense in the above referenced case requests that the Convening Authority grant testimonial immunity to the following witnesses:

- a. LTC Nathan Sassman, 1/8 INF, Fort Carson, CO 80913;
- b. CPT Matthew Cunningham, 1/8 INF, Fort Carson, CO 80913;
- c. 1LT Daniel Maurer, E Co. 1/8 INF, Fort Carson, CO 80913;
- d. 1LT David Nelson, HHC, 5th Ranger Training Battalion, Camp Merrill, Dahlonega, GA 30533; and
- e. SPC John Plato, 1/8 INF, Fort Carson, CO 80913.

2. The above requested individuals are relevant and necessary witnesses in the case of United States v. SSG Shane Werst. As of this date, several of the above requested individuals have all spoken with legal counsel and are currently exercising their right to remain silent in accordance with Article 31, Uniform Code of Military Justice (U.C.M.J.).

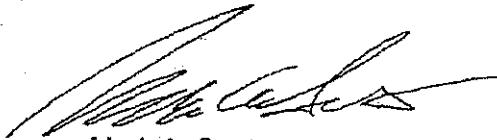
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AFZF-JA-TDS

SUBJECT: Request for Witness Immunity, United States v. SSG Shane Werst,
Headquarters and Headquarters Company, 4th Infantry Division, Fort Hood,
Texas 76544

Judge has set a trial date for 23 May 2005. Without a grant of immunity issued by the
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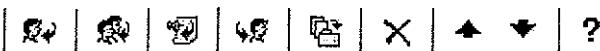
4. POC is the undersigned at (254) 287-9419/ DSN 737-9419/ FAX 287-4993.



Mark A. Santos
CPT, JA
Defense Counsel

Attachment 2

10525

**Close**

From: Phillip Sundel [SMTP:
To: steven.b.fuller@us.army.mil
Cc: David Sheldon; mark.a.santos@hood.army.mil
Subject: Witness Request - Werst
Sent: 4/28/2005 8:46 AM **Importance:** Normal

Captain Fuller;

On behalf of David Sheldon, the attached witness request ICO U.S. v. Werst is forwarded for your attention.

If you would confirm receipt either by phone or return e-mail it would be appreciated. Please let me know if you have any questions.

Sincerely,

Philip Sundel

Law Offices of David P. Sheldon, P.L.L.C.

Barracks Row

telephone)

(facsimile)

[Witness Production Request \(28 Apr 05\).doc](#)

UNITED STATES)
v.) DEFENSE REQUEST FOR
WERST, Shane,) WITNESSES
SSG, U.S. Army,)
Headquarters and Headquarters Company,)
4th Infantry Division,) 28 April 2005
Fort Hood, Texas 76544)

Merits Witnesses

1. IAW Rule for Court-Martial (R.C.M.) 701(b)(1)(A), 703(a), 703(b)(1) and 703(c)(2), the Defense both notifies the Government that it intends to call during its case in chief and requests that the Government produce the following witnesses at the above trial:

a. LTC Nathan Sassman, 1/8 Infantry, Fort Carson, CO, (719) 526-8917.

Synopsis: LTC Sassman was the battalion commander for 1/8 Infantry at the time of the alleged misconduct. He will testify that the mission the unit conducted on 3 January 2004 was planned for weeks prior to that date. The mission contained a list of several Iraqi insurgents known to have been involved in attacks against US forces. He will testify that no illegal orders were given to his knowledge to unlawfully kill any Iraqi insurgents. LTC Sassman was present on 3 January 2004 during the mission. He will testify that he heard gun shots from the direction of SSG Werst's squad and there could not have been more than 5 shots discharged. His live testimony is necessary to give the finder of fact an accurate portrayal regarding the facts of the alleged offenses as well as to allow his veracity and truthfulness to be evaluated.

b. CPT Matthew Cunningham, Currently Represented by Legal Counsel. Mr. Richard D. Stevens, ^{ax}

Synopsis: CPT Cunningham was the company commander for Alpha Company, 1/8 Infantry at the time of the alleged misconduct. He was present at the mission on 3 January 2004. He will testify that the mission was planned for weeks prior to that date. He gave the operations order to the platoon's leadership and told that leadership to abide by the rules of engagement. There were no orders given to unlawfully kill any Iraqi insurgents. His live testimony is necessary to give the finder of fact an accurate portrayal regarding the facts of the alleged offenses as well as to allow his veracity and truthfulness to be evaluated.

c. SSG Bryon Hillis, 1/8 Infantry, Fort Carson, CO, (719) 210-4958.

Synopsis: SSG Bryon Hillis was one of the Accused's team leaders during the mission on 3 January 2004. He will testify that one of the insurgents that the squad captured during the mission escaped briefly and was captured by another squad. He will also testify that SSG Werst discussed the death of CPT Eric Paliwada with the squad. He will testify that SSG Werst assured the chain of command that the squad would be professional on the mission. He will also provide testimony about statements made by SSG Werst after the death of Mr. Nasser Ismail. He will testify that SSG Werst suggested that PFC Pannell get credit for the shooting. His live testimony is necessary to give the finder of fact an accurate portrayal regarding the facts of the alleged offenses as well as to allow his veracity and truthfulness to be evaluated.

d. SSG Mathew P. Salinas, Alpha Company, 4th Ranger Training Battalion, Fort Benning, GA. No telephone number available the time of this request.

Synopsis: SSG Salinas will testify regarding the operations order that was given for the mission on 3 January 2004. He will testify regarding the substance of the operations order as it was related down the chain of command. He will testify that CPT Cunningham reiterated the importance of abiding by the rules of engagement. He will testify that no illegal order to kill Iraqi insurgents was given. His live testimony is necessary to give the finder of fact an accurate portrayal regarding the facts of the alleged offenses as well as to allow his veracity and truthfulness to be evaluated.

e. SPC John Plato, Echo Company, 1/8 Infantry, Fort Carson, CO 80913, Currently Represented by Legal Counsel, CPT Robin K. Bunch, Senior Defense Counsel, Fort Leavenworth, KS, (913) 684-1860, (913) 683-3219.

Synopsis: SPC Plato was one of SSG Werst's squad members on 3 January 2004 and was present during the mission. SPC Plato will testify about the operation order that SSG Werst gave his squad prior to the mission. SPC Plato will testify that during the mission one of the insurgents that the squad had captured that night escaped briefly. He will testify to certain statements made by PFC Stewart immediately following the mission to the effect that PFC Stewart related that he was scared at first and didn't know what was going on. PFC Stewart made these statements in reference to the events that led to the alleged shooting of Mr. Nasir Ismail. His live testimony is necessary to give the finder of fact an accurate portrayal regarding the facts of the alleged offenses as well as to allow his veracity and truthfulness to be evaluated

f. 1LT David Nelson, Headquarters and Headquarters Company, 5th Ranger Training Battalion, Camp Merrill, Dahlonega, GA, (706) 864-3327 ext. 276.

Synopsis: 1LT David Nelson will testify that during the unit's mission on 3 January 2004 the unit was attempting to capture members of an insurgent cell and that the insurgent cell contained several high value targets (HVT's). The leader of the insurgent cell that the unit was attempting to capture was an individual by the name of Fowze Younes. Intelligence suggested that this individual was highly dangerous and that if captured he might be wearing a suicide bomber's vest. Nasir Ismail was also a member of this insurgent cell. 1LT Nelson participated in the raid on 3 January 2004 and the squad he was with was responsible for searching for Fowze Younes. His squad captured several targets that night. His live testimony is necessary to give the finder of fact an accurate portrayal regarding the facts of the alleged offenses as well as to allow his veracity and truthfulness to be evaluated.

g. CPT Louis Guarda, Headquarters and Headquarters Company, 4th Infantry Division, Fort Hood, TX (407)782-9414.

Synopsis: CPT Guarda was the Accused company commander at Fort Hood from December 2004 through May 2005. He interacted extensively with the Accused on a daily basis and will testify about the Accused's good military bearing and character for purposes of good soldier defense. His live testimony is necessary to give the finder of fact an accurate portrayal regarding the facts of the alleged offenses as well as to allow his veracity and truthfulness to be evaluated.

h. SGM Teddy Blevins, 4th Infantry Division, Fort Hood, TX (254) 371-5983.

Synopsis: SGM Blevins directly supervised the Accused from December 2004 to Present. He interacts extensively with the Accused on a daily basis and will testify about the Accused's good military bearing and character for purposes of a good soldier defense. His live testimony is necessary to give the finder of fact an accurate portrayal

regarding the facts of the alleged offenses as well as to allow his veracity and truthfulness to be evaluated.

i. SFC John Staples, 1/310 Infantry Battalion, Fort Bragg, NC 28310, 396-3704.
Synopsis: SFC Staples was a platoon sergeant in Alpha Company, 1/8 Infantry Battalion. He was present at the operations order prior to the unit's mission on 3 January 2004. He will testify that there was no illegal order to unlawfully kill Iraqi insurgents. He will testify about the seizing and disposition of enemy force's weapons during the course of a mission. He will testify that CPT Cunningham emphasized the applications of the rules of engagement for the mission on 3 January 2004. His live testimony is necessary to give the finder of fact an accurate portrayal regarding the facts of the alleged offenses as well as to allow his veracity and truthfulness to be evaluated

j. Colonel Laura Carew, Fort Rucker, Alabama, (719)314-9494 (cell).
Synopsis: Colonel Carew took command of the 4th Engineer Battalion on 30 June 2003 in Iraq while the Accused was serving as a Squad Leader in Bravo Company, 4th Engineer Battalion. The Accused and his company were attached to 1-8 Infantry Battalion throughout Colonel Carew's tour of duty in Iraq, however she usually visited his company once a week. The Accused was one of her top squad leaders in the battalion; she had complete faith in his ability to lead the Soldiers in combat. She will testify about the Accused's good military bearing and character for purposes of a good soldier defense. Additionally, she will testify that she never had any reason to doubt his veracity or truthfulness. Her live testimony is necessary to give the finder of fact an accurate portrayal regarding the facts of the alleged offenses as well as to allow her veracity and truthfulness to be evaluated.

Sentencing Witnesses

2. IAW R.C.M. 701(b)(1)(B), 703(a), 703(b)(2), 703(c)(2) and 1001(e), the Defense both notifies the Government that it intends to call during presentencing proceedings and requests that the Government produce the following witnesses at the above trial:

a. Dwight Walker, SGM USMC (Ret.), ...
(915) 833-6971.

Synopsis: Mr. Walker is the father-in-law of SSG Werst. He will testify about SSG Werst's background, character and family. His live testimony is necessary to give the finder of fact an accurate portrayal regarding extenuation and mitigation as well as to allow his veracity and truthfulness to be evaluated.

b. Doris H. Werst,
Synopsis: Ms. Werst is the Accused's mother. She will testify about SSG Werst's background, character and rehabilitative potential. Her live testimony is necessary to give the finder of fact an accurate portrayal regarding extenuation and mitigation as well as to allow her veracity and truthfulness to be evaluated.

c. Ms. Stacey Werst,
Synopsis: Ms. Werst is the Accused's wife. She will testify about SSG Werst's background, character and rehabilitative potential. Her live testimony is necessary to give the finder of fact an accurate portrayal regarding extenuation and mitigation as well as to allow her veracity and truthfulness to be evaluated.

Defense Request for Witnesses -- U.S. v. Werst

3. The defense reserves the right to request additional witnesses should the need arise prior to trial. The defense will supplement this request immediately if such a need should rise.

MARK A. SANTOS
CPT, JA
Defense Counsel

Attachment 3

UNITED STATES ARMY
3rd JUDICIAL CIRCUIT
FORT HOOD, TEXAS 76544

UNITED STATES)
)
 v.)
)
 SSG Werst, Shane A.)
 HHC, Special Troops Bn, Spt Bde)
 4th ID, Fort Hood, TX 76544)

PRETRIAL ORDER

2 March 2005

1. Trial date – Trial will begin promptly at 0830 on 23 May 2005. An Article 39(a) session will begin promptly at 0830 26 April 2005 to resolve all pre-trial motions.
2. Witness lists – NLT 1700 21 April 2005 (for the motions) and NLT 1700 19 May 2005 (for the merits and presentencing), trial and defense counsel will provide the military judge and the court reporter a list containing each witness' full name and unit/duty station or residence for each witness to be called.
3. Trial documents – NLT 1700 16 May 2005, trial counsel will provide the military judge and defense counsel all court-martial convening orders and, in trials with members, a seating chart, flyer, and findings and sentence worksheets.
4. Voir dire questions – NLT 1700 17 May 2005, trial and defense counsel will submit their proposed collective voir dire questions to the military judge. Failure to comply with this requirement may result in counsel not being permitted to conduct collective voir dire.
5. Pleas and forum – NLT 1200 9 May 2005, defense counsel will notify the military judge and trial counsel, in writing, of trial forum and anticipated pleas.
6. Defense witnesses – NLT 1700 12 April 2005 (for the motions) and NLT 1700 28 April 2005 (for the merits and presentencing), defense counsel, IAW RCM 703(c)(2)(A), will submit to trial counsel a list of all witnesses the defense wants the government to produce. In this regard, a synopsis is a summary, in narrative form, of the requested witness' actual testimony and not merely a statement of the subject matter of the witness' testimony.
7. Defense experts – NLT 1700 4 April 2005, defense counsel will submit any request for the employment of a defense expert consultant and/or witness. The Government will respond to such requests NLT 1200 11 April 2005.
8. Motions – NLT 1200 12 April 2005, counsel will provide notice of any motions to opposing counsel and to the judge and will serve on opposing counsel and file with the court any written briefs. The responding party shall reply NLT 1200 on the third duty day after receipt of the motion.
9. Government witnesses – NLT 1200 15 April 2005 (for the motions) and NLT 1200 6 May 2005 (for the merits and presentencing), trial counsel will provide defense counsel a list of the intended government witnesses.

THEODORE E. DIXON
COL, JA
Military Judge

Attachment 4

- LAW OFFICE OF -
RICHARD V. STEVENS, P.L.L.C.
P.O. Box 31553
Alexandria, Virginia 22310

Phone: (703) 798-3064
Fax: (703) 997-1367

stevenslaw@msn.com
www.militaryadvocate.com

2 May 2005

MEMORANDUM FOR ALL REVIEWING AUTHORITIES

SUBJECT: Notice of Representation and Request for Immunity – CPT MATT CUNNINGHAM

1. Please be advised that, as I previously notified the government, I represent CPT Matt Cunningham. As you know, CPT Cunningham has been held past his authorized date of separation due to an allegation made by LT Jack Saville, as part of Saville's PTA. Specifically, LT Saville claims that CPT Cunningham gave an illegal operations order that Saville interpreted to mean that certain Iraqi insurgent targets were to be executed during a platoon mission in Samarra.
2. We dispute the Army's claim of jurisdiction over CPT Cunningham in this matter and note the extremely dubious nature of LT Saville's claim, given that it was made in conjunction with a PTA and no other member of the platoon, to the best of our knowledge and belief, supports Saville's claim against CPT Cunningham. Be that as it may, CPT Cunningham has been held past his date of separation and we have been informed that he is pending the possible preferral of court-martial charges. The platoon mission referred to in LT Saville's claim against CPT Cunningham is the same mission on which SSGT Werst fatally wounded an Iraqi insurgent.
3. On behalf of CPT Cunningham, I submit this memorandum to inform all interested parties that CPT Cunningham will not submit to any interviews or motion/trial testimony without first being granted immunity. Further, if CPT Cunningham is granted immunity, he will not submit to any interviews without his defense counsel being present, at least by telephone. CPT Cunningham was the company commander at the time of the operation at issue. Were CPT Cunningham to be immunized as required by defense counsel, you can expect that he would testify that his platoon traveled from Balad to Samarra to engage in this planned operation. CPT Cunningham was present with his platoon for the operation and no illegal operations order was given by CPT Cunningham, or by anyone else in his presence, and the platoon was to abide by the rules of engagement for this operation.
4. As you may know, I have taken issue with how the Army has handled matters regarding CPT Cunningham to date. If CPT Cunningham is called to the stand without immunity, he will invoke his constitutional and Article 31 rights and refuse to testify. If CPT Cunningham is granted immunity, I expect the government, and all parties, to scrupulously abide by the limitations imposed by Kastigar v. United States, 406 US 441, 92 SCt 1653, 32 LEd2d 212 (1972); United States v. Mapes, 59 MJ 60 (CAAF 2003) and all associated case law – remembering that this does not apply only to prosecutors, but to other witnesses and individuals exposed to the immunized testimony.

- 1 -

500-121: CPT Cunningham (USA)
Richard V. Stevens, Esq.

2 May 2005
Request for Immunity

5. Please do not contact my client directly. If you have any questions concerning this memorandum, or wish to contact CPT Cunningham for any reason, please do so through me. I will be traveling for other courts-martial for the remainder of the month. You can reach me by e-mail, fax or by leaving me a voicemail message which I will return as soon as possible.

Respectfully,

//SIGNED//

RICHARD V. STEVENS, Esquire
LAW OFFICE OF RICHARD V. STEVENS, P.L.L.C.
P.O. Box 31553
Alexandria, VA 22310
Phone: (703) 798-3064
Fax: (703) 997-1367
E-Mail: stevenslaw@msn.com
Web: www.militaryadvocate.com

Attachment 5



DEPARTMENT OF THE ARMY

US ARMY TRIAL DEFENSE SERVICE
REGION IV, FORT HOOD FIELD OFFICE
1ST CAVALRY DIVISION BRANCH OFFICE
FORT HOOD, TEXAS 76544

REPLY TO
ATTENTION OF:

AFZF-JA-TDS

28 February 2005

MEMORANDUM THRU

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LTC Tracy Barnes, Staff Judge Advocate, Office of the Staff Judge Advocate, 4th Infantry Division, Fort Hood, Texas 76544

FOR Commander 4th Infantry Division, Fort Hood, Texas 765444

SUBJECT: Request for Witness Immunity, United States v. SSG Shane Werst, Headquarters and Headquarters Company, 4th Infantry Division, Fort Hood, Texas 76544

1. IAW Rule for Court-Martial (R.C.M.) 704 the Defense in the above referenced case requests that the Convening Authority grant testimonial immunity to the following witnesses:

- a. PFC Nathan D. Stewart, E Co. 1/8 INF, Fort Carson, CO 80913;
- b. SPC Charles M. Pannell, E Co. 1/8 INF, Fort Carson, CO 80913;
- c. SGT Jason Pizer, E Co. 1/8 INF, Fort Carson, CO 80913; and
- d. SGT Bryan D. Hillis, E Co. 1/8 INF, Fort Carson, CO 80913.

2. The above requested individuals are relevant and necessary witnesses in the case of United States v. SSG Shane Werst. As of this date, they have all spoken with legal counsel and are currently exercising their right to remain silent in accordance with Article 31, Uniform Code of Military Justice (U.C.M.J.).

3. The Defense requests that grants of immunity for these witnesses be issued as soon as possible. SSG Werst's case was referred on 17 February 2005 and the Government has requested a trial date of 29 March 2005. Without a grant of immunity issued by the Convening Authority the Defense cannot currently question these individuals or adequately prepare for trial.

AFZF-JA-TDS

SUBJECT: Request for Witness Immunity, United States v. SSG Shane Werst,
Headquarters and Headquarters Company, 4th Infantry Division, Fort Hood,
Texas 76544

4. POC is the undersigned at (254) 287-9419/ DSN 737-9419/ FAX 287-4993.



Mark A. Santos
CPT, JA
Defense Counsel

Attachment 6



REPLY TO
ATTENTION OF:

DEPARTMENT OF THE ARMY
HEADQUARTERS 4TH INFANTRY DIVISION
FORT HOOD, TX 76544-5000

AFYB-CG

MEMORANDUM FOR Private First Class Nathan D. Stewart, Company E, 1st Battalion, 8th Infantry Regiment, 3d Brigade, 4th Infantry Division, Fort Carson, Colorado 80913

SUBJECT: Grant of Testimonial Immunity and Order to Testify in the Courts-Martial of United States v. Staff Sergeant Shane Werst

1. As an officer empowered to convene general courts-martial, and pursuant to Rule for Courts-Martial (RCM) 704, Manual for Courts-Martial (2002 Edition), I make the following findings:

a. You possess information relevant and necessary to the court-martial pending against Staff Sergeant Shane Werst, specifically regarding the murder, and obstruction of justice charges. Your testimony is vital to justice and the good order and discipline of this command.

b. Absent immunity, you would have the right to decline to answer questions concerning your involvement with Staff Sergeant Shane Werst based upon your privilege against self-incrimination.

2. On the basis of these facts, pursuant to RCM 704(a)(2), you are ordered to appear and testify truthfully at any investigative hearings or courts-martial of United States v. Staff Sergeant Shane Werst concerning your knowledge of misconduct committed by Staff Sergeant Shane Werst. No statement, testimony, or other information given by you concerning the alleged misconduct by the accused, subsequent to this grant of immunity (or information directly or indirectly derived from such statement, testimony, or other information) in connection with this case shall be used against you in a later court-martial, except a prosecution for perjury, giving a false statement, or failing to comply with this order.

3. You shall also make yourself available to government investigating agencies, trial counsel, and defense counsel for Staff Sergeant Shane Werst to discuss the continuing investigation, deposition and court-martial proceedings. You will completely and truthfully answer all questions posed to you and provide all information known to you that is relevant to this case.

4. This order is effective when presented to you by the trial counsel or his representative.


JAMES D. THURMAN
Major General, USA
Commanding

MEMORANDUM FOR Commanding General, 4th Infantry Division, Fort Hood, Texas 76544

SUBJECT: Grant of Testimonial Immunity and Order to Testify in the Court-Martial of United States v. Staff Sergeant Shane Werst

I acknowledge receipt of a copy of the grant of testimonial immunity and order to testify in the court-martial of United States v. Staff Sergeant Shane Werst.

Date

NATHAN D. STEWART
PFC, USA



REPLY TO
ATTENTION OF:

AFYB-CG

DEPARTMENT OF THE ARMY
HEADQUARTERS 4TH INFANTRY DIVISION
FORT HOOD, TX 76544-5000

MEMORANDUM FOR Specialist Charles M. Pannell, ~~2nd Lieutenant~~ Company E, 1st Battalion, 8th Infantry Regiment, 3d Brigade, 4th Infantry Division, Fort Carson, Colorado 80913

SUBJECT: Grant of Testimonial Immunity and Order to Testify in the Courts-Martial of United States v. Staff Sergeant Shane Werst

1. As an officer empowered to convene general courts-martial, and pursuant to Rule for Courts-Martial (RCM) 704, Manual for Courts-Martial (2002 Edition), I make the following findings:
 - a. You possess information relevant and necessary to the court-martial pending against Staff Sergeant Shane Werst, specifically regarding the murder, and obstruction of justice charges. Your testimony is vital to justice and the good order and discipline of this command.
 - b. Absent immunity, you would have the right to decline to answer questions concerning your involvement with Staff Sergeant Shane Werst based upon your privilege against self-incrimination.
2. On the basis of these facts, pursuant to RCM 704(a)(2), you are ordered to appear and testify truthfully at any investigative hearings or courts-martial of United States v. Staff Sergeant Shane Werst concerning your knowledge of misconduct committed by Staff Sergeant Shane Werst. No statement, testimony, or other information given by you concerning the alleged misconduct by the accused, subsequent to this grant of immunity (or information directly or indirectly derived from such statement, testimony, or other information) in connection with this case shall be used against you in a later court-martial, except a prosecution for perjury, giving a false statement, or failing to comply with this order.
3. You shall also make yourself available to government investigating agencies, trial counsel, and defense counsel for Staff Sergeant Shane Werst to discuss the continuing investigation, deposition and court-martial proceedings. You will completely and truthfully answer all questions posed to you and provide all information known to you that is relevant to this case.
4. This order is effective when presented to you by the trial counsel or his representative.


JAMES D. THURMAN
Major General, USA
Commanding

MEMORANDUM FOR Commanding General, 4th Infantry Division, Fort Hood, Texas 76544

SUBJECT: Grant of Testimonial Immunity and Order to Testify in the Court-Martial of United States v. Staff Sergeant Shane Werst

I acknowledge receipt of a copy of the grant of testimonial immunity and order to testify in the court-martial of United States v. Staff Sergeant Shane Werst.

Date

CHARLES M. PANNELL
SPC, USA



REPLY TO
ATTENTION OF:

AFYB-CG

DEPARTMENT OF THE ARMY
HEADQUARTERS 4TH INFANTRY DIVISION
FORT HOOD, TX 76544-5000

MEMORANDUM FOR Staff Sergeant Bryon D. Hillis, _____, 3d Brigade, 4th Infantry Division, Fort Carson, Colorado 80913

SUBJECT: Grant of Testimonial Immunity and Order to Testify in the Courts-Martial of United States v. Staff Sergeant Shane Werst

1. As an officer empowered to convene general courts-martial, and pursuant to Rule for Courts-Martial (RCM) 704, Manual for Courts-Martial (2002 Edition), I make the following findings:
 - a. You possess information relevant and necessary to the court-martial pending against Staff Sergeant Shane Werst, specifically regarding the murder, and obstruction of justice charges. Your testimony is vital to justice and the good order and discipline of this command.
 - b. Absent immunity, you would have the right to decline to answer questions concerning your involvement with Staff Sergeant Shane Werst based upon your privilege against self-incrimination.
2. On the basis of these facts, pursuant to RCM 704(a)(2), you are ordered to appear and testify truthfully at any investigative hearings or courts-martial of United States v. Staff Sergeant Shane Werst concerning your knowledge of misconduct committed by Staff Sergeant Shane Werst. No statement, testimony, or other information given by you concerning the alleged misconduct by the accused, subsequent to this grant of immunity (or information directly or indirectly derived from such statement, testimony, or other information) in connection with this case shall be used against you in a later court-martial, except a prosecution for perjury, giving a false statement, or failing to comply with this order.
3. You shall also make yourself available to government investigating agencies, trial counsel, and defense counsel for Staff Sergeant Shane Werst to discuss the continuing investigation, deposition and court-martial proceedings. You will completely and truthfully answer all questions posed to you and provide all information known to you that is relevant to this case.
4. This order is effective when presented to you by the trial counsel or his representative.


JAMES D. THURMAN
Major General, USA
Commanding

MEMORANDUM FOR Commanding General, 4th Infantry Division, Fort Hood, Texas 76544

SUBJECT: Grant of Testimonial Immunity and Order to Testify in the Court-Martial of United States v. Staff Sergeant Shane Werst

I acknowledge receipt of a copy of the grant of testimonial immunity and order to testify in the court-martial of United States v. Staff Sergeant Shane Werst.

Date

BRYON HILLIS
SSG, USA

IN THE UNITED STATES ARMY
THIRD JUDICIAL CIRCUIT

UNITED STATES)	
)	
)	
v.)	
)	Response in Opposition
)	to Defense Motion for Abatement
WERST, Shane A.)	of the Proceedings
SSG, U.S. Army.)	
Headquarters and Headquarters Company,)	
4th Infantry Division (Mechanized))	5 May 2005
Fort Hood, Texas, 76544)	

1. Pursuant to the Rules for the Trial of Courts-Martial in the 3d Judicial Circuit, United States Army, the Government hereby submits the follow motion in opposition to the Defense Motion for Abatement of the Proceedings. The motion should be denied.

RELEIF SOUGHT

2. The Defense's Motion for Abatement of the Proceedings should be denied because the Defense has failed to make the requisite showing under R.C.M. 704(e), to justify abatement. Specifically, the Defense has failed to show the Government engaged in discriminatory use of immunity to obtain a tactical advantage, or through its own overreaching forced the witness to invoke.

BURDEN OF PROOF

3. The Defense, as the moving party, bears the burden of this motion by a preponderance of the evidence pursuant to RCM 905(c)(1).

FACTS

4. CPT Cunningham will refuse to testify concerning the events of 3 January 2004. Through counsel, CPT Cunningham has made it clear that he intends to invoke his rights against self-incrimination to the extent permitted by law. See Defense Motion to Abate.

5. The Defense's request for testimonial immunity for CPT Cunningham was sent to the Commanding General of 4th Infantry Division. The Commanding General denied the request grant of immunity on 5 May 2005. All other grants of immunity requested by the Defense have been granted. The basis of this denial is that CID and the OSJA are actively investigating CPT Cunningham with a view towards Courts-Martial. Although CPT Cunningham is not a co-accused, his case can be called a companion, with many of the same facts at issue.

APPELLATE EXHIBIT VI

WITNESSES

6. No witnesses requested.

LAW

7. The following authorities are relevant to this case:

- a. RCM 704(e). (MCM 2002 Edition)
- b. United States v. Richter, 51 M.J. 213 (CAAF 1999)
- c. United States v. Rath, 2001 CCA LEXIS 55 (Feb. 1, 2001)
- d. United States v. Ivey, 53 M.J. 685 (ACCA 2000)
- e. United States v. James, 22 M.J. 929, 933 (N.M.C.M.R. 1986)
- f. Blissett v. Lefevre, 924 F.2d 434, 442 (2d Cir. 1991)
- g. United States v. Bolkan, 2000 CCA LEXIS 156

ARGUMENT

8. The relevant standard for determining whether defense-requested immunity must be granted or the proceedings abated is set out in United States v. Richter, 51 M.J. 219 (CAAF 1999). Pursuant to RCM 704 (e), the Defense must show:

- (1) The witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify; and
- (2) The Government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the Government, through its own overreaching, has forced the witness to invoke the privilege against self-incrimination; and
- (3) The witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses.

The three prongs are stated in the conjunctive and thus the Defense is required to prove all of them. See, 51 M.J. 219, 223.

9. Invocation. The Government would submit that CPT Cunningham will attempt to invoke his rights.

10. Discriminatory Use of Immunity or Forcing the Witness to Invoke. There is no discriminatory use of immunity in this case. Even if a prosecution witness had been granted immunity and a defense witness had been denied, that would not constitute a "discriminatory use of immunity." See Blissett v. Lefevre, 924 F.2d 434, 442 (2d Cir. 1991). The Government has not attempted to distort the fact-finding process by selectively denying CPT Cunningham immunity, while granting other requests for

immunity. In fact the Government has granted all requests for immunity the Defense has asked for except CPT Cunningham. In United States v. Bolkan, 2000 CCA LEXIS 156, the court explained the second prong in R.C.M. 704(e), which requires a finding that the government either engaged in discriminatory use of immunity to obtain a tactical advantage, or, through its own overreaching, forced a witness to invoke the privilege against self-incrimination. The Court stated, "Where, as in this case, the witness is a prosecution target and awaiting trial, the second prong is not met, and 'there can be no claim of discrimination or overreaching.'" Richter, 51 M.J. at 223 (quoting United States v. Shandell, 800 F.2d 322, 324 (2d Cir. 1986)). CPT Cunningham is most definitely a prosecution target and will be facing charges as soon as the investigation allows.

Additionally, the Government has not overreached by forcing the witness to invoke. In fact, the complete opposite is true. The Government has no present intention of calling CPT Cunningham. Should CPT Cunningham invoke at trial, it would be because he is called as a defense witness.

11. Material, clearly exculpatory, non-cumulative, not obtainable by other sources, and does not merely affect the credibility of other witnesses.

a. Material and Clearly Exculpatory. The Defense proffered in its Request for Immunity that CPT Cunningham would testify that an order to kill was never given. The issue of whether the order was given is not an element to the charged offenses, and his testimony is not material to a defense. "Clearly exculpatory" means that the evidence clearly negates guilt. See United States v. James, 22 M.J. 929, 933 (N.M.C.M.R. 1986). There has been no showing that any other evidence that CPT Cunningham could provide would be "clearly exculpatory" to any element of any offense charged which would negate guilt of the charged offenses.

b. Non-cumulative and not obtainable by other sources. Additionally, the supposed testimony of CPT Cunningham concerning whether the order to kill was given can be obtained by other means. The Defense's request for production of witnesses states that SSG Matthew Salinas will testify that no order was given. This makes CPT Cunningham's testimony both cumulative and obtainable by other sources. *See enclosed Defense Witness Document.*

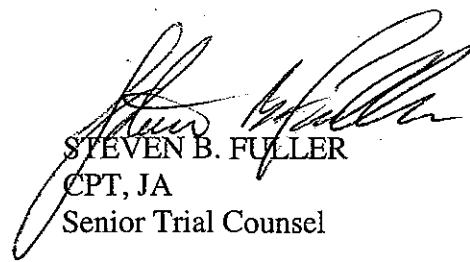
c. Merely affect the credibility of other witnesses. Lastly, any testimony offered by CPT Cunningham concerning events at the mission briefing is being offered merely to lessen the credibility of other witnesses, i.e. 1LT Nelson, 1LT Saville, who will testify that CPT Cunningham did give an illegal order. See US v. Rath, 2001 CCA LEXIS 55 (upholding the military judge's refusal to abate the proceedings because the witness' testimony would "do little more than affect the credibility of other witnesses.").

CONCLUSION

12. In light of the above facts and the law applied to those the facts, the Government submits the Defense motion should be denied in its entirety. Based upon the limited

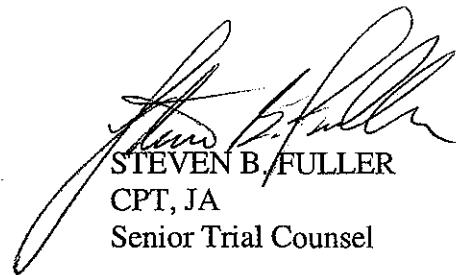
United States v. SSG Werst – Response to Defense Motion to Abate

benefit, if any, of the testimony offered by CPT Cunningham, the court should not resort to such a drastic remedy as abating the proceedings.



STEVEN B. FULLER
CPT, JA
Senior Trial Counsel

I certify that I have served or caused to be served a true copy of the above on the Trial Defense Counsel on 5 May 2005.



STEVEN B. FULLER
CPT, JA
Senior Trial Counsel

UNITED STATES)
)
 v.) DEFENSE REQUEST FOR
)
 WERST, Shane,) WITNESSES
 SSG, U.S. Army, ()
 Headquarters and Headquarters Company,)
 4th Infantry Division,)
 Fort Hood, Texas 76544)

Merits Witnesses

1. IAW Rule for Court-Martial (R.C.M.) 701(b)(1)(A), 703(a), 703(b)(1) and 703(c)(2), the Defense both notifies the Government that it intends to call during its case in chief and requests that the Government produce the following witnesses at the above trial:

a. LTC Nathan Sassman, 1/8 Infantry, Fort Carson, CO, (719) 526-8917.

Synopsis: LTC Sassman was the battalion commander for 1/8 Infantry at the time of the alleged misconduct. He will testify that the mission the unit conducted on 3 January 2004 was planned for weeks prior to that date. The mission contained a list of several Iraqi insurgents known to have been involved in attacks against US forces. He will testify that no illegal orders were given to his knowledge to unlawfully kill any Iraqi insurgents. LTC Sassman was present on 3 January 2004 during the mission. He will testify that he heard gun shots from the direction of SSG Werst's squad and there could not have been more than 5 shots discharged. His live testimony is necessary to give the finder of fact an accurate portrayal regarding the facts of the alleged offenses as well as to allow his veracity and truthfulness to be evaluated.

b. CPT Matthew Cunningham, Currently Represented by Legal Counsel, Mr. Richard D. Stevens, P.O. Box 31553, Alexandria, VA 22310(703) 798-3064 fax (703) 997-1367.

Synopsis: CPT Cunningham was the company commander for Alpha Company, 1/8 Infantry at the time of the alleged misconduct. He was present at the mission on 3 January 2004. He will testify that the mission was planned for weeks prior to that date. He gave the operations order to the platoon's leadership and told that leadership to abide by the rules of engagement. There were no orders given to unlawfully kill any Iraqi insurgents. His live testimony is necessary to give the finder of fact an accurate portrayal regarding the facts of the alleged offenses as well as to allow his veracity and truthfulness to be evaluated.

c. SSG Bryon Hillis, 1/8 Infantry, Fort Carson, CO, (719) 210-4958.

Synopsis: SSG Bryon Hillis was one of the Accused's team leaders during the mission on 3 January 2004. He will testify that one of the insurgents that the squad captured during the mission escaped briefly and was captured by another squad. He will also testify that SSG Werst discussed the death of CPT Eric Paliwada with the squad. He will testify that SSG Werst assured the chain of command that the squad would be professional on the mission. He will also provide testimony about statements made by SSG Werst after the death of Mr. Nasser Ismail. He will testify that SSG Werst suggested that PFC Pannell get credit for the shooting. His live testimony is necessary to give the finder of fact an accurate portrayal regarding the facts of the alleged offenses as well as to allow his veracity and truthfulness to be evaluated.

Defense Request for Witnesses -- U.S. v. Werst

d. SSG Mathew P. Salinas, Alpha Company, 4th Ranger Training Battalion, Fort Benning, GA No telephone number available the time of this request.

Synopsis: SSG Salinas will testify regarding the operations order that was given for the mission on 3 January 2004. He will testify regarding the substance of the operations order as it was related down the chain of command. He will testify that CPT Cunningham reiterated the importance of abiding by the rules of engagement. He will testify that no illegal order to kill Iraqi insurgents was given. His live testimony is necessary to give the finder of fact an accurate portrayal regarding the facts of the alleged offenses as well as to allow his veracity and truthfulness to be evaluated.

e. SPC John Plato, Echo Company, 1/8 Infantry, Fort Carson, CO 80913, Currently Represented by Legal Counsel, CPT Robin K. Bunch, Senior Defense Counsel, Fort Leavenworth, KS, (913) 684-1860, (913) 683-3219.

Synopsis: SPC Plato was one of SSG Werst's squad members on 3 January 2004 and was present during the mission. SPC Plato will testify about the operation order that SSG Werst gave his squad prior to the mission. SPC Plato will testify that during the mission one of the insurgents that the squad had captured that night escaped briefly. He will testify to certain statements made by PFC Stewart immediately following the mission to the effect that PFC Stewart related that he was scared at first and didn't know what was going on. PFC Stewart made these statements in reference to the events that led to the alleged shooting of Mr. Nasir Ismail. His live testimony is necessary to give the finder of fact an accurate portrayal regarding the facts of the alleged offenses as well as to allow his veracity and truthfulness to be evaluated

f. 1LT David Nelson, Headquarters and Headquarters Company, 5th Ranger Training Battalion, Camp Merrill, Dahlonega, GA, (706) 864-3327 ext. 276.

Synopsis: 1LT David Nelson will testify that during the unit's mission on 3 January 2004 the unit was attempting to capture members of an insurgent cell and that the insurgent cell contained several high value targets (HVT's). The leader of the insurgent cell that the unit was attempting to capture was an individual by the name of Fowze Younes. Intelligence suggested that this individual was highly dangerous and that if captured he might be wearing a suicide bomber's vest. Nasir Ismail was also a member of this insurgent cell. 1LT Nelson participated in the raid on 3 January 2004 and the squad he was with was responsible for searching for Fowze Younes. His squad captured several targets that night. His live testimony is necessary to give the finder of fact an accurate portrayal regarding the facts of the alleged offenses as well as to allow his veracity and truthfulness to be evaluated.

g. CPT Louis Guarda, Headquarters and Headquarters Company, 4th Infantry Division, Fort Hood, TX (407)782-9414.

Synopsis: CPT Guarda was the Accused company commander at Fort Hood from December 2004 through May 2005. He interacted extensively with the Accused on a daily basis and will testify about the Accused's good military bearing and character for purposes of good soldier defense. His live testimony is necessary to give the finder of fact an accurate portrayal regarding the facts of the alleged offenses as well as to allow his veracity and truthfulness to be evaluated.

h. SGM Teddy Blevins, 4th Infantry Division, Fort Hood, TX (254) 371-5983.

Synopsis: SGM Blevins directly supervised the Accused from December 2004 to Present. He interacts extensively with the Accused on a daily basis and will testify about the Accused's good military bearing and character for purposes of a good soldier defense. His live testimony is necessary to give the finder of fact an accurate portrayal

regarding the facts of the alleged offenses as well as to allow his veracity and truthfulness to be evaluated.

i. SFC John Staples, 1/310 Infantry Battalion, Fort Bragg, NC 28310, 396-3704.
Synopsis: SFC Staples was a platoon sergeant in Alpha Company, 1/8 Infantry Battalion. He was present at the operations order prior to the unit's mission on 3 January 2004. He will testify that there was no illegal order to unlawfully kill Iraqi insurgents. He will testify about the seizing and disposition of enemy force's weapons during the course of a mission. He will testify that CPT Cunningham emphasized the applications of the rules of engagement for the mission on 3 January 2004. His live testimony is necessary to give the finder of fact an accurate portrayal regarding the facts of the alleged offenses as well as to allow his veracity and truthfulness to be evaluated

j. Colonel Laura Carew, Fort Rucker, Alabama, (719)314-9494 (cell).
Synopsis: Colonel Carew took command of the 4th Engineer Battalion on 30 June 2003 in Iraq while the Accused was serving as a Squad Leader in Bravo Company, 4th Engineer Battalion. The Accused and his company were attached to 1-8 Infantry Battalion throughout Colonel Carew's tour of duty in Iraq, however she usually visited his company once a week. The Accused was one of her top squad leaders in the battalion; she had complete faith in his ability to lead the Soldiers in combat. She will testify about the Accused's good military bearing and character for purposes of a good soldier defense. Additionally, she will testify that she never had any reason to doubt his veracity or truthfulness. Her live testimony is necessary to give the finder of fact an accurate portrayal regarding the facts of the alleged offenses as well as to allow her veracity and truthfulness to be evaluated.

Sentencing Witnesses

2. IAW R.C.M. 701(b)(1)(B), 703(a), 703(b)(2), 703(c)(2) and 1001(e), the Defense both notifies the Government that it intends to call during presentencing proceedings and requests that the Government produce the following witnesses at the above trial:

a. Mr. Wright Walker, SGM USMC (Ret.),
(915) 835-0000.

Synopsis: Mr. Walker is the father-in-law of SSG Werst. He will testify about SSG Werst's background, character and family. His live testimony is necessary to give the finder of fact an accurate portrayal regarding extenuation and mitigation as well as to allow his veracity and truthfulness to be evaluated.

b. Doris H. Werst,
Synopsis: Ms. Werst is the Accused's mother. She will testify about SSG Werst's background, character and rehabilitative potential. Her live testimony is necessary to give the finder of fact an accurate portrayal regarding extenuation and mitigation as well as to allow her veracity and truthfulness to be evaluated.

c. Ms. Stacey Werst,
Synopsis: Ms. Werst is the Accused's wife. She will testify about SSG Werst's background, character and rehabilitative potential. Her live testimony is necessary to give the finder of fact an accurate portrayal regarding extenuation and mitigation as well as to allow her veracity and truthfulness to be evaluated.

Defense Request for Witnesses -- U.S. v. Werst

3. The defense reserves the right to request additional witnesses should the need arise prior to trial. The defense will supplement this request immediately if such a need should rise.

MARK A. SANTOS
CPT, JA
Defense Counsel

UNITED STATES)
v.)
Shane A. Werst)
SSG, U.S. ARMY,)
Headquarters and Headquarters Company,)
Special Troops Battalion,)
Support Brigade, 4th Infantry Division (Mechanized),)
Fort Hood, Texas 76544)

FLYER

23 May 2005

CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 118

SPECIFICATION: In that SSG (E6) Shane A. Werst, U.S. Army, did, at or near Balad, Iraq, on or about 3 January 2004, with premeditation, murder Naser Ismail by means of shooting him with a rifle.

CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 134

SPECIFICATION: In that SSG (E6) Shane A. Werst, U.S. Army, did, at or near Balad, Iraq, on or about 3 January 2004, wrongfully endeavor to impede an investigation and influence the actions of PFC Nathan Stewart and SPC Charles Pannell, by directing them to alter their statements regarding the murder of Naser Ismail.

APPELLATE EXHIBIT VII

RECOGNIZED R. _____

DEPARTMENT OF THE ARMY
GENERAL COURT-MARTIAL
UNITED STATES ARMY TRIAL JUDICIARY
THIRD JUDICIAL CIRCUIT

UNITED STATES)
)
 v.) MOTION *IN LIMINE* & REPLY TO
 WERST, Shane,) GOVERNMENT BRIEF
)
 SSG, U.S. Army,)
 Headquarters and Headquarters Company,)
 4th Infantry Division,) 20 May 2005
 Fort Hood, Texas 76544)

1. Nature of Pleading. In response to the Court's Order and in response to the government's brief in response thereto, the defense submits this Motion *In Limine*. The government seeks permission to introduce evidence regarding statements and a list of names made by Captain Cunningham. This evidence is inadmissible pursuant to Military Rules of Evidence 402 and 403.
2. Summary of Facts. Defendant is charged, *inter alia*, with the 3 January 2004 premeditated murder of Naser Ismail in Iraq.

The government seeks to admit evidence regarding CPT Cunningham highlighting five names out of a list of 18 and saying those five people "were not to come back alive."

3. Discussion. The defense believes that the proffered evidence is irrelevant. Further, even if the evidence is relevant the probative value of such evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members.

Questions of admissibility are left to the sound discretion of the court; and a judge's determination will not be reversed absent a clear abuse of discretion.

APPELLATE EXHIBIT

VIII

RECOGNIZED R. _____

M.R.E 402 states “[e]vidence which is not relevant is not admissible.” Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable.” M.R.E. 401.

The government argues that the proffered evidence is relevant to the issue of premeditation. There is nothing about the evidence, however, that makes it more or less probable that Defendant premeditated the shooting of Naser Ismail. On the issue of premeditation the members will likely be provided an instruction along the lines of: “[a] ‘premeditated design to kill’ means the formation of a specific intent to kill and consideration of the act intended to bring about death.” DA PAM 27-9 at 3-43-1(d) (Benchbook). With this instruction or one like it as guidance, even if the members believe that CPT Cunningham did highlight names on a list, that Naser Ismail’s was one of those names, and that CPT Cunningham opined that the persons named “were not to come back alive” they should be no further along in determining whether Defendant is guilty of premeditated murder (or any lesser offense). The proffered actions of CPT Cunningham are irrelevant to the question of whether Defendant formed a specific intent to kill and thought about the actions which brought about a death. Whether or not CPT Cunningham said certain people “were not to come back alive” reveals nothing about what Defendant thought, when he thought it or what he did.

The government hopes that the members will believe that the statement is evidence of Defendant’s premeditation. Given that it was not Defendant’s statement, however, nor was it even made in a conversation with Defendant or in response to anything Defendant was saying or doing, it is unclear how CPT Cunningham’s statement of his own belief is relevant to anything Defendant did or didn’t do at some later time and place. The statement was not made by Defendant, it was not made directly to Defendant, it was not made in a conversation in which

Defendant was participating, and it is not clear that Defendant either heard or understood it. The statement is so far removed from the facts of consequence in this case that it is irrelevant.

In support of its claim of relevance the government relies on several cases; unfortunately, none of those cases provides the support the government seeks. The government cites *United States v. Davis*, 49 M.J. 79 (C.A.A.F. 1998), for the proposition "Premeditation is a concept that is judged according to different types of inquiries." However, the government's belief that *Davis*' citing of *State v. MLO*,¹ 440 S.E.2d 98, 106 (N.C. 1994) means that the *Davis* court agreed with *MLO*'s "recogn[ition of] at least seven separate indicators of premeditation" is questionable. Neither *Davis* nor *MLO* dealt with a question of admissibility. Rather, both were addressing the issue of the sufficiency of the evidence. Further, each was doing so for a different offense. While *MLO* did recognize at least seven indicators of premeditation, it is far from clear that *Davis*' cite to it was intended to signal the court's adoption of *MLO*'s list of indicators of premeditation. Indeed, it would make no sense for the admissibility of premeditation evidence to have been the significance of the holding in *MLO* given the fact that *Davis* was an arson case while *MLO* was a murder case. In reviewing a conviction for arson the *Davis* court was interested in proof of willfulness, while the *MLO* court's review of a murder conviction focused on evidence of premeditation. Since willfulness and premeditation are not the same adoption of a standard of admissibility for evidence of premeditation would not have been germane to the analysis in *Davis*. Compare Benchbook at 3-16-4(d) with 3-43-1(d).

The government also relies on *United States v. Goodman*, 2 C.M.R. 76 (C.M.A. 1952) and *United States v. Redmond*, 21 M.J. 319, 325 (C.M.A. 1986) for the proposition that it is "for the members to consider *all* the evidence, including opinion and circumstantial evidence, in determining whether appellant had premeditated [the victim's] death." Since the *Goodman*

¹ The government references a slightly different cite from that which actually appears in *Davis*.

decision predates the Military Rules of Evidence by almost three decades, and indeed the effective date of the Uniform Code of Military Justice, Defendant does not believe it is of any value. While *Redmond* is a case that was decided under the UCMJ and does discuss admissibility under the Military Rules of Evidence, contrary to the interpretation advocated by the government it is not a case promoting the concept that members should be allowed to hear any evidence a party chooses to present. In stating that members should be allowed to consider “*all* the evidence” the court is talking about all admissible evidence. This is no more than a recognition that the Military Rules of Evidence favor admissibility (*see generally* Manual for Courts-Martial at A22-34 (Analysis of the Military Rules of Evidence, Rule 402)). Despite this relative liberality, however, evidence must still be relevant, a trial court is still responsible for making that determination, and *Redmond* is not advocating an open-door policy. Since the proffered evidence is irrelevant *Redmond* does not make it admissible.

Even if evidence of CPT Cunningham’s statement is relevant the defense believes that it should nonetheless be excluded as unfairly prejudicial and likely to confuse or mislead.

M.R.E 403 allows the exclusion of relevant evidence if its probative value “is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members.” “‘Unfair prejudice’ exists if the evidence is used in something other than its logical, probative, force. The possibility that the fact finders might dramatically over estimate the value of the evidence or be confused as to its probative meaning, often will result in prejudice to an accused.” *United States v. Owens*, 16 M.J. 999, 1002 (A.C.M.R. 1983).

In this case the danger of unfair prejudice if the evidence is admitted is high. Any relevance that CPT Cunningham’s statement may have to the issues in the case is substantially outweighed by the risk that the evidence will be given too much weight by the members.

If the members believe that such a statement was made there is a substantial risk that they will draw adverse inferences regarding the character of the participants in the operation, including Defendant. Evidence that CPT Cunningham said certain people were "not to come back alive" creates a risk that the members will judge Defendant based on emotion rather than the facts of the case. Given that the probative impact of CPT Cunningham's statement is at best extremely limited, the risk that Defendant's right to a fair trial will be compromised substantially outweighs any argument in favor or admitting the evidence.

Further, admission of evidence that CPT Cunningham made the statement risks confusing the members. If such evidence is admitted then presumably defense evidence regarding the statement -- whether it was made, what it meant, whether Defendant heard and understood it, etc., will also be admissible. The result will be a mini-trial within a trial, with witnesses on both sides called to testify about CPT Cunningham's statement. A significant amount of evidence on what is in effect a collateral matter will be presented, inevitably distracting the members from the evidence that is more directly relevant to issues of guilt and innocence. There is a substantial risk that litigation about the statement itself will confuse the members regarding its relevance, the use to which it can be put, and its proper place in the facts at issue.

Finally, there is also the risk that having a trial within a trial on CPT Cunningham's statement will mislead the members. Trial testimony surrounding the statement could lead the members to conclude that the statement, in and of itself, is a deciding factor – if they believe the statement was made then it is more likely that Defendant committed the crime. Such a conclusion would be wrong because it fails to include a necessary intermediate step: even if the statement was made what, if anything, does that tell the members about whether Defendant committed a crime? The risk to Defendant is great that conflicting testimony about the statement

will mislead the members into thinking that the statement alone can tell them whether Defendant premeditated a killing.

Significantly, the government's own brief highlights the limited value of the proffered evidence. The government writes that its position "is not that the list or commentary of CPT Cunningham was the causal link to the death of Mr. Ismail Without any consideration of the list of names or the directives of CPT Cunningham, the accused's comments, "We're going to kill this mother fucker," and "there's about to be contact," both of which occurred while the accused was at the house of Mr. Ismail, and before the shooting, show his plan to unlawfully kill." If CPT Cunningham's statements are not the causal link, however, and the government points to other evidence of Defendant's "plan to unlawfully kill," then what exactly is the significance of the proffered evidence? Further, even if the government believes that the proffered evidence does somehow go to show something how probative can it possibly be to the government's case?

Finally, the government also highlights one of the ways in which admission of this evidence can easily lead to confusion or waste of time – litigation over the nature of the statement that people "were not to come back alive." The government proposes that there may be a need to determine "whether CPT Cunningham's guidance constituted a patently illegal order." This simple proposal, however, foreshadows significant litigation: was the statement made; how was it phrased; who heard it; how was it understood; was it intended to be an order; was it taken as an order; was it a legal order; etc? While the government may not realize the import of its proposition the fact is that it shows how likely it will be that the admission of the proffered evidence will lead to extensive litigation on a collateral issue with resulting confusion and misunderstanding.

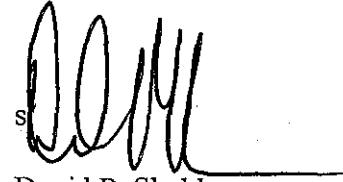
The probative value of the proffered evidence, which the government claims is of only limited value is significantly outweighed by the risk of unfair prejudice, confusion and misunderstanding.

4. Conclusion. For the above reasons, the defense respectfully requests the court deny the government's Motion *In Limine* and exclude the proffered evidence.

Respectfully submitted,



Mark Santos
CAPT, JA, USA
Detailed Defense Counsel



David P. Sheldon
Civilian Defense Counsel

UNITED STATES)
v.) GOVERNMENT MOTION *IN LIMINE*:
WERST, Shane A.) CPT CUNNINGHAM'S LIST OF
SSG, U.S. Army,) TARGETS, ACCENTUATION OF
Headquarters and Headquarters Company) NAMES, AND VERBAL GUIDANCE
4th Infantry Division) 19 May 2005
Fort Hood, Texas 76544)

RELIEF SOUGHT

1. The Government in the above case requests that this Honorable Court permit the Government to introduce evidence of a list of 18 names of Iraqi targets provided by CPT Matthew Cunningham, his highlighting of approximately five of those names, and his guidance regarding the highlighted individuals that they "were not to come back alive" on the basis that these evidentiary facts are relevant to the accused's premeditated design to unlawfully kill the victim, Naser Ismail, and that they are not confusing or unduly prejudicial to the panel.

BURDEN OF PROOF

2. Under RCM 905, the Government, as proponent, bears the burden of proving by preponderance of the evidence that the evidence sought to be offered is both relevant under M.R.E. 401 and admissible pursuant to M.R.E. 403.

LAW

3. The Government relies on the following authorities in support of its motion:

M.R.E. 401

M.R.E. 403

United States v. Davis, 49 M.J. 79 (C.A.A.F. 1998)

United States v. Redmond, 21 M.J. 319 (C.M.A. 1986)

United States v. Goodman, 2 C.M.R. 76 (C.M.A. 1952)

North Carolina v. YSUT MLO, 440 S.E.2d 98 (N.C. 1994)

APPELLATE EXHIBIT IX

RECOGNIZED R. _____

WITNESSES

4. The Government will have the following witnesses produced and present for the hearing of this motion.

1LT Daniel Maurer
7ID OSJA
Fort Carson, Colorado

1LT Jack Saville
DECAM
Fort Carson Colorado

PFC Nathan Stewart
2 BCT, FWD, 2ID
Fort Carson, Colorado

5. Approximately a week prior to 3 January 2004, Alpha Company, 1-8 Infantry had been planning to conduct raids in the Balad region of Iraq, which they then occupied pursuant to military orders. This mission was to locate and detain the individuals responsible for recent attacks of the FOB. Shortly before the mission, the Company requested the participation of one squad from the Engineer Company to supplement Alpha Company's mission.

6. A day before the raid was to take place, on approximately 2 January 2004, the Engineer Company's area of operation was attacked by mortars, leading to the death of the Engineer Company Commander, CPT Eric Paliwoda, as well as the injury of a number of company members. Although the chain of command expressed some doubt in the assignment of an Engineer squad to support the mission of Alpha Company, 1-8 Infantry, the accused and his squad volunteered to conduct the mission.

7. The accused went to a briefing in which he was provided a list of approximately 18 names of Iraqi civilians who were believed to be involved in the finance, planning, or facilitation of insurgent activities. CPT Matthew Cunningham provided the initial briefing, and highlighted the fact that approximately five of the 18 names were linked directly to the death of CPT Paliwoda. Witnesses will testify that CPT Cunningham also provided a direction to his subordinates that the five highlighted individuals on the list "were not to come back alive," or words to that effect. One of the names on the list was Naser Ismail.

8. Following the initial briefing, the accused then proceeded to put out information to the members of his own squad, to the effect that there was a list, and that the list contained the names of specific individuals who were not to come back, or words to that effect.

9. The raid proceeded as scheduled in a format in which the squad broke out into various teams and encountered a series of homes in a village in Balad. They would search a house, detain all male adults by placing hand restraints on them, and then process each of these males through a detainee collection point with a translator, situated in an advantageous position near the village square. In this sense, the raid moved from house to house, where the squad would be reformulating at the collection point after each search of a home was complete.

10. Upon arriving at the home of one Naser Ismail, the accused consulted his list of names and used the sole male adult's identification to verify that he was the Naser Ismail who appeared on the list of highlighted individuals. During the operation, the accused directed one PFC Nathan Stewart, "Were going to kill this mother fucker," or words to that effect, after which he communicated over the radio to his platoon leader, 1LT Jack Saville, "there is about to be contact." At all times, the detainee was unarmed, and soon after these epithets, met his demise by numerous bullets to the chest fired from the accused's rifle.

11. Shortly after the shooting, the accused directed his subordinates to fabricate a story that another soldier, PFC Charles Pannell, had killed Mr. Ismail rather than the accused. In support of the misrepresentation, the accused drafted an award recommendation he knew to be false, which assigned responsibility for the death to the subordinate, PFC Pannell.

ARGUMENT

12. This Honorable Court posed the question of whether CPT Cunningham's "order" regarding the list of high value targets was relevant to the charges against the accused, and furthermore, whether this evidence would be admissible under the provisions of M.R.E. 403. For the following reasons, the Government responds that the evidence is not only highly relevant, but perfectly admissible under the balancing test of M.R.E. 403.

The Evidence is Relevant to Show Aspects of the Accused's Premeditation

13. M.R.E. 401 describes relevant evidence as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The Government offers this evidence to explain one of many factors that contributed to the planned death of the Iraqi male who met his demise during the raid. Premeditation is a concept that is judged according to different types of inquiries. *United States v. Davis*, 49 M.J. 79, 83 (C.A.A.F. 1998), *citing with approval*, *North Carolina v. YSUT MLO*, 440 S.E.2d 98, 106 (N.C. 1994) (recognizing at least seven separate indicators of premeditation). While the existence of the list of names and the verbal directive of CPT Cunningham point toward premeditation of Mr. Ismail's murder, they are not the exclusive sources of premeditation that the Government will offer in the case, nor should they be viewed in a vacuum.

14. In accordance with M.R.E. 401, the list is relevant because it permitted the accused to selectively target specific Iraqis as high value targets. Furthermore, the very same list linked these select targets to the killing of the accused's company commander, a person who was sorely missed by all who knew him in that theatre.

15. The military courts have evaluated premeditation from an evidentiary standpoint, and have clearly concluded that a panel should examine "all the facts of the case, and should carefully consider all the evidence, in reaching a determination as to whether or not premeditation existed." *United States v. Goodman*, 2 C.M.R. 76, 80 (C.M.A. 1952); *United States v. Redmond*, 21 M.J. 319, 325 (C.M.A. 1986) ("[I]t was for the members to consider *all* the evidence, including opinion and circumstantial evidence, in determining whether appellant had premeditated Ilona's death.") (emphasis added). In this sense, because the proffered evidence shows a tendency to make the existence of premeditation more probable, the panel should have the opportunity to consider the evidence and attach the amount of weight to it that they believe necessary under the circumstances after evaluating other factors.

The Evidence is Not Offensive to M.R.E. 403

16. M.R.E. 403 prohibits the introduction of evidence on the grounds that it would cause undue prejudice to the accused, that it would be confusing to the panel, or that the consideration of such evidence would cause time to be wasted by the court. In this instance, the proffered evidence would be admissible under all of the rationales in the Rule.

17. First, the evidence would not be unduly prejudicial because it is offered as merely one of multiple factors that independently reveal premeditation by evincing a design, preparation, and plan of the accused to unlawfully kill Mr. Ismail. As stated in the R.C.M. 802 conference, the Government's position is not that the list or commentary of CPT Cunningham was the causal link to the death of Mr. Ismail. Were the Government arguing that by virtue of being a Squad Leader and receiving an order, the accused was merely an automaton who then obeyed the order without question, this might prejudice the accused. Clearly this is not the Government's theory. Without any consideration of the list of names or the directives of CPT Cunningham, the accused's comments, "We're going to kill this mother fucker," and "there's about to be contact," both of which occurred while the accused was at the house of Mr. Ismail, and before the shooting, show his plan to unlawfully kill. So does the accused's effort to conceal the true facts surrounding the shooting by attributing the death to a soldier who was not responsible for it.

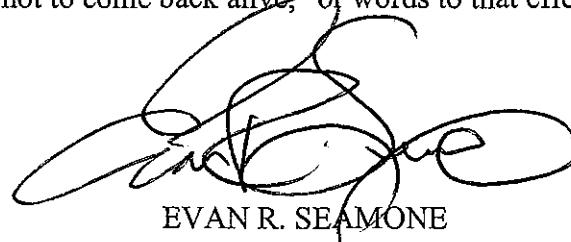
18. Second, the issues which the panel must decide will not be confused by consideration of the proffered evidence. In the courts' analysis of the numerous factors that show premeditation, there is an evident tolerance, and, in actuality, a mandate that the panel expand its frame of reference to consider independent if not contradictory or otherwise disjointed facts all of which indicate the same conclusion that the accused has premeditated a killing. *Davis*, 49 M.J. at 83. As important, the role of limiting

instructions surely offers a framework on which the panel may reach justified and permissible inferences. The Government would not be opposed to the instruction that the legality of the order given, if it was an order, is not an issue for the panel to decide.¹ At this point, however, because the proffered evidence is not dispositive on the issue of premeditation and is at best circumstantially relevant, the Government will be pleased with any instruction that this Honorable Court should offer.

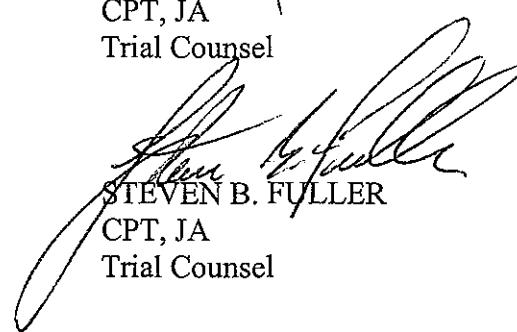
19. Third, based on the precedents which support the relevance of the proffered evidence, its evaluation is in no way a waste of time.

CONCLUSION

20. Based on the above, the Government requests that this Honorable Court allow the panel to consider the existence of the list of high value targets, the highlighting of approximately five names on the list including Naser Ismail, and CPT Cunningham's directive, "these five targets are not to come back alive," or words to that effect.



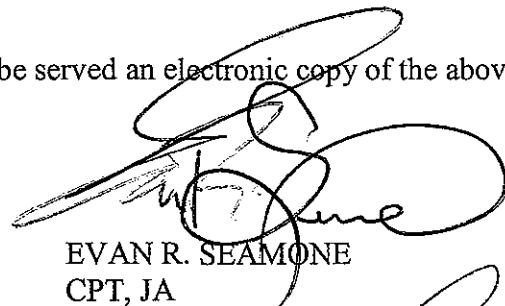
EVAN R. SEAMONE
CPT, JA
Trial Counsel



STEVEN B. FULLER
CPT, JA
Trial Counsel

¹ However, it may be relevant to the accused's premeditation to determine whether CPT Cunningham's guidance constituted a patently illegal order, since the conscious decision to abide by an order that is unlawful on its face would be evidence of the accused's intent to kill.

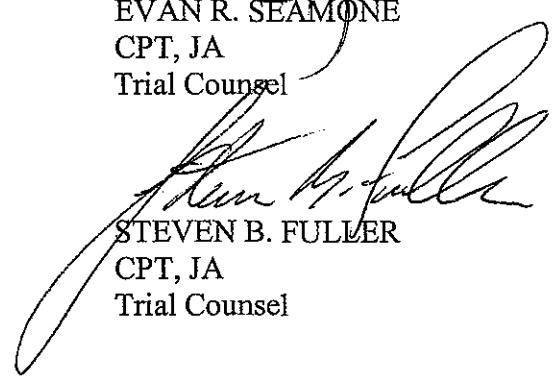
I certify that I have served or caused to be served an electronic copy of the above on the Defense Counsel on 19 May 2005.



EVAN R. SEAMONE

CPT, JA

Trial Counsel



STEVEN B. FULLER

CPT, JA

Trial Counsel

QUESTIONS BY A COURT MEMBER

NAME OF WITNESS: Lt SAVIL

QUESTIONS:

- (1) Was SSG Wurst Platoon size Element ^{Attached} to your company all the time. ^{as a} Engineer Platoon.
- (2) When you went on mission was SSG Wurst saved all day with you or did it very far from Engineer Platoon.
- (3) What was the time line from - ID on Radio to gun fire.
- (4) Why was the Detaining Allowed Back into the House if there weapon there.

SFC STEVENS

Printed Name of Member



Signature of Member

Objection by Trial Counsel: (Initials MM) (No) (Yes)

Basis of Objection: _____

Objection by Defense Counsel: (Initials MM) (No) (Yes)

Basis of Objection: I-3 (4) No Factoring/Speculation

APPELLATE EXHIBIT 

RECOGNIZED R. _____

QUESTIONS BY A COURT MEMBER

NAME OF WITNESS: LT Seville

QUESTIONS:

Was it SOP to send out a squad or individuals after a traumatic event?

Was an AAR conducted on ^{the} Mortar Attack or an outbrief to determine what happened + check everyone's mental outlook?

Who cleared the squad to take part in the mission after the death of the Commander?

BEIGER, WILLIAM A

Printed Name of Member

Wm A Beiger

Signature of Member

Objection by Trial Counsel: (Initials W) (No) (Yes)

Basis of Objection:

Objection by Defense Counsel: (Initials W) (No) (Yes)

Basis of Objection:

APPELLATE EXHIBIT II

QUESTIONS (S) FROM COURT MEMBER

FOR: LT Beville
(NAME OF WITNESS)

When did the other shooting/contact happen in conjunction to Sgt. Werst's contact?

GEIGER, WILLIAM A
(PRINTED NAME OF COURT MEMBER)

(SIGNATURE OF COURT MEMBER)

Objection by TC: (Yes) (No)

Objection by DC: (Yes) (No) APPELLATE EXHIBIT XL

(Yes) (No)

APPELLATE EXHIBIT

RECOGNIZED R.
APP]

QUESTIONS(S) FROM COURT MEMBER

FOR: 1LT SAVILLE
(NAME OF WITNESS)

① Do your squads operate on their own internal nets, or do they only monitor the platoon net? ~~at~~

② Did the "about to take contact" transmission happen before or after you heard the gun shots?

③ Was the target house quiet before you heard the gun shots? Did you hear anything from the target house prior to the gun shots?

MAT Paul Owen

(PRINTED NAME OF COURT MEMBER)

Paul Owen
(SIGNATURE OF COURT MEMBER)

Objection by TC: Sgt (Yes) (No)

Objection by DC: Sgt (Yes) (No)

APPELLATE EXHIBIT

A: RECOGNIZED R. XIII

QUESTIONS (S) FROM COURT MEMBER

FOR: LT 3000
(NAME OF WITNESS)

Do you recall who was in the house from 556/1 Werst's squad when you arrived?

GEIGER, WILLIAM A
(PRINTED NAME OF COURT MEMBER)

(SIGNATURE OF COURT MEMBER)

Objection by TC: BT (Yes) (No)

Objection by DC: (Yes) (No)

A APPELLATE EXHIBIT **XIV**
RECOGNIZED R.

QUESTIONS(S) FROM COURT MEMBER

FOR: LT SAVILLE
(NAME OF WITNESS)

Were you too far from the house
to hear the commotion that the
prosecution claims was taking place -
i.e. kicking and screaming of the defendant
being physically abused?

MAT Owen
(PRINTED NAME OF COURT MEMBER)

De Saville
(SIGNATURE OF COURT MEMBER)

Objection by TC: STH (Yes) (No) no claim made by prosecution.

Objection by DC: DP (Yes) (No)

No objection in rephrased

AP APPELLATE EXHIBIT **XV**
RECOGNIZED R.

QUESTIONS (S) FROM COURT MEMBER

FOR: ILT SIRVILLE
(NAME OF WITNESS)

When was THE HV1 captured after
~~stepping~~ HE GOT AWAY?

RICHARD DWIGHT
(PRINTED NAME OF COURT MEMBER)

Dyett D. R. II
(SIGNATURE OF COURT MEMBER)

Objection by TC: 

(Yes) (No)

Objection by DC: 

(Yes) (No)

z APPELLATE EXHIBIT

RECOGNIZED R.

10574

QUESTIONS(S) FROM COURT MEMBER

FOR: LT Malarv
(NAME OF WITNESS)

Was an out brief/back brief conducted by the
Chain of Command following the mission?

If so what is anything do you recall from
this briefing?

GEIGER, WILLIAM A
(PRINTED NAME OF COURT MEMBER)

Wm A Geiger
(SIGNATURE OF COURT MEMBER)

Objection by TC: JK (Yes) (No)

Objection by DC: WJS (Yes) (No)

APPELLATE EXHIBIT XVII

APPE' RECOGNIZED R.

QUESTIONS (S) FROM COURT MEMBER

FOR: SFC Cabello
(NAME OF WITNESS)

HOW WAS THE squad AFTER THE mission
WAS OVER?

DID you CHECK SSG WERST squad AFTER
SSG WERST DID HIS PCC?

WHAT DID YOU DO TO ENSURE ALL
THE SOLDIER'S WAS ABLE TO pREFORM
THEIR mISSION?

Richard J. Wright
(PRINTED NAME OF COURT MEMBER)

R. J. Wright
(SIGNATURE OF COURT MEMBER)

Objection by TC: SK (Yes) No

Objection by DC: DK (Yes) No

APPELLATE EXHIBIT XVIII

RECOGNIZED R.

QUESTIONS BY A COURT MEMBER

NAME OF WITNESS: SFC Carlson

QUESTIONS:

1. How often when on a mission Does some one talk over the Icom net on mistake or without knowing they are talking on it?
2. Is it possible?
3. with your exspence How would it Happen?

SFC Stevens

Printed Name of Member



Signature of Member

Objection by Trial Counsel: (Initials SFC) (No) (Yes)

Basis of Objection: _____

Objection by Defense Counsel: (Initials JS) (No) (Yes)

Basis of Objection: _____

APPELLATE EXHIBIT

XIX

RECOGNIZED R. _____

QUESTIONS BY A COURT MEMBER

NAME OF WITNESS: SFC Cabello

QUESTIONS:

Do you recall the information given by SFC Worster
at a backbriefing the following day?

LEIBER, WILLIAM A

Printed Name of Member

Willie R. Leiber

Signature of Member

Objection by Trial Counsel: (Initials W) (No) (Yes)

Basis of Objection:

Objection by Defense Counsel: (Initials W) (No) (Yes)

Basis of Objection:

APPELLATE EXHIBIT **XX**

APPELLATE RECOGNIZED R. _____

QUESTIONS(S) FROM COURT MEMBER

FOR: PFC STEWART
(NAME OF WITNESS)

WHAT TYPE OF COMMUNICATION DID THE PLT HAVE WITH THE BRADLEY VEHICLES THAT WAS FIRING?

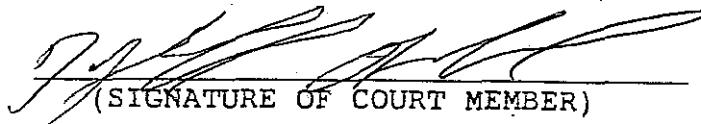
HOW DARK WAS IT IN THE ROOM?

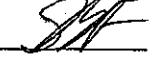
WHERE WAS YOUR FLASHLIGHT WHILE YOU WAS HOLDING MR. ISMAIL?

WHERE WAS YOUR WEAPON?

WHAT TYPE OF WEAPON WAS THE BRADLEY FIRING?

RICHARD DUGHT
(PRINTED NAME OF COURT MEMBER)


(SIGNATURE OF COURT MEMBER)

Objection by TC:  (Yes)  (No)

Objection by DC:  (Yes)  (No)

APPELLATE EXHIBIT **XXI**

RECOGNIZED R. _____

QUESTIONS BY A COURT MEMBER

NAME OF WITNESS: PFC Stewart.

QUESTIONS:

1. why was Naser Ismail not Taken to the D.C.P per sop Like the Rest of the Detainys. -?
2. Did you see or Hear anything That would Have made SSG Werst to Knock Him Down and Attack Him At the Entry of the Room.

SFC STEVENS Warren
Printed Name of Member


Signature of Member

Objection by Trial Counsel: (Initials SJF) (No) (Yes)

Basis of Objection: _____

Objection by Defense Counsel: (Initials WJM) (No) (Yes)

Basis of Objection: _____

APPELLATE EXHIBIT

XXII

RECOGNIZED R. _____

AF

QUESTIONS(S) FROM COURT MEMBER

FOR: JFC Stewart
(NAME OF WITNESS)

What was SSG Wertz demeanor when he said "Stewart get out of the way"? Did he scream it? Was he calm? Was their urgency in his voice?

20

Maj Owen

(PRINTED NAME OF COURT MEMBER)

Rufus Owen
(SIGNATURE OF COURT MEMBER)

Objection by TC: ✓ (Yes) NO

Objection by DC: ✓ (Yes) NO

APPELLEATE EXHIBIT XXIII
AP
RECOGNIZED R.

QUESTIONS BY A COURT MEMBER

NAME OF WITNESS: PFC Stewart

QUESTIONS:

Are you right or left handed?

When you turned away from Nasar Ismail which way did you turn?

What side was your weapon on and how was it secured to yourself or equipment?

When you were holding Nasar were you struggling to hold him up or struggling to maintain control of him?

Why were you making Nasar go to his knees - were you told to put him on his knees?

LEIGER, WILLIAM A

Printed Name of Member

Wm A Leiger

Signature of Member

Objection by Trial Counsel: (Initials WAL) (No) (Yes)

Basis of Objection:

Objection by Defense Counsel: (Initials WAL) (No) (Yes)

Basis of Objection:

APPELLATE EXHIBIT XXIV

AP RECOGNIZED R.

QUESTIONS BY A COURT MEMBER

NAME OF WITNESS:

PFC Stewart

QUESTIONS:

How dark was it in the room of the home?

Was it pitch black except your flash lights? No other light?

GEIGER, WILLIAM A

Printed Name of Member

William A. Geiger

Signature of Member

Objection by Trial Counsel: (Initials SAC) (No) (Yes)

Basis of Objection:

Objection by Defense Counsel: (Initials WJ) (No) (Yes)

Basis of Objection:

APPELLATE EXHIBIT

XXV

QUESTIONS(S) FROM COURT MEMBER

FOR: PFC Stewart
(NAME OF WITNESS)

Please clarify the time between the rounds that were fired. How many bursts? How long between bursts? Was anything said between the bursts?

201

Maj Owen

(PRINTED NAME OF COURT MEMBER)

Pa[]E Owen

(SIGNATURE OF COURT MEMBER)

Objection by TC:

JK

(Yes) (No)

Objection by DC:

JK

(Yes) (No)

APPELLATE EXHIBIT

XXVI

AIR RECOGNIZED R.