

1 On 25 November I do not remember being visited by anyone who
2 discussed with me the authorized Rules of Engagement. I do not
3 recall any individual discussing with me LTG Sanchez' memorandum
4 of October 2003. I do not recall making any sort of statement
5 to the effect of, "They are breaking rules," or "We are breaking
6 rules," or words to that effect. I believed that we were in
7 full compliance with the guidelines set forth. I did believe
8 that on 24 November, some rules might have been broken by some
9 individuals, but not by me.

10
11 On 25 November, one day before the general's death, I would have
12 to classify the general's physical condition as unremarkable.
13 He did not give me any indication that he was having trouble
14 breathing or walking. He was very excited upon seeing his son.
15 He came to tears. During none of my interactions with the
16 general had he expressed a desire for any kind of medical
17 treatment.

18
19 On 26 November 2003, I wanted to do another interrogation of
20 MG Mowhosh. I really did not have a different mindset from the
21 previous interrogations. There was still that tactical quest
22 for information. Releasing him was really not an option at that
23 point, not a consideration. I had gone through just about all
24 of my experience and all of my techniques that I thought might
25 be applicable except for the sleeping-bag technique. I had not
26 resolved to use that technique before the general even showed
27 up. Again, everything is based on assessment of what's going on
28 at the time. Had the general come in the morning of the 26th and
29 started answering direct questions, we'd have not had any
30 problems at all.

31
32 SPC Loper and I met the general and escorted him into the
33 interrogation room at about 0800 hours. I don't go into an
34 interrogation allotting a certain amount of time. An
35 interrogation may take an extended period of time if the source
36 starts to cooperate and give information.

37
38 I'm trained in resistance techniques, and my assessment of the
39 general's physical condition was that he was employing
40 resistance techniques. He looked unshaven, tired. I was not
41 monitoring his food intake. He had been put on sleep
42 management. I don't recall if SPC Loper physically had to
43 assist the general or not. There was no indication to me, based
44 on what I observed, that I needed to send him to the medical
45 tent, nor did he request that.

1
2 The resistance technique that I identified immediately was that
3 he was acting excessively fatigued. In terms of the idea of him
4 "playing possum," I don't really know that I can address that he
5 did that because I did not see that. The previous evening, I
6 had given the general 10 seconds to get up off the ground in
7 order to go see his son, and he was able to do so within that
8 10-second period. As he walked, while he was visible to the
9 other detainees, he tried to make it look like he was very
10 tired, needed assistance, things like that. But once he got
11 into an interrogation room outside of the visibility of the
12 other detainees, he was able to stand erect and to make clear,
13 coherent sentences. He did not give me the impression that he
14 was nearly as fatigued as he led people to believe.
15

16 The interrogation on 26 November started at approximately 0800
17 hours, and about 0900 hours or a little after that, he had
18 expired.
19

20 I started the interrogation by myself with direct questioning
21 because the general spoke English. Probably 20 minutes or so
22 into the interrogation, I requested an interpreter because the
23 general, in my assessment, was using a resistance technique of
24 stopping trying to answer in English and resorting to needing to
25 speak Arabic. SFC Sommer came into the room. I know that
26 Mr. Williams entered the room at some point, but I don't recall
27 at what stage he entered the room. SPC Loper was in the room
28 when I began the interrogation. I said "by myself" because I
29 was the only one doing the interrogation. SPC Loper, a guard,
30 and I were in the room at the beginning. I don't recall anyone
31 else coming into the room after SPC Loper, SFC Sommer,
32 Chief Williams, and I were in the room with the general.
33

34 The general's continual denial of the allegations against him
35 triggered my decision to employ the sleeping-bag technique. I
36 pursued a line of questioning, trying to identify him as the
37 snake's head, the central figure, in the insurgency, and he kept
38 saying in English things like, "I am innocent. That is not me."
39 When he started speaking in his native tongue, the line of
40 questioning involved Saddam Hussein, weapons of mass
41 destruction, things like that. That particular line of
42 questioning required the interpreter because he would not answer
43 those questions in English. I might have asked, "Where is
44 Saddam?" and the translated response from the interpreter might
45 have been along the lines of, "He may be in Syria. He may be in

1 Jordan. He may be in Russia." I don't know if he was speaking
2 in complete sentences in his native tongue. SFC Sommer's
3 translation of the general's responses was in complete
4 sentences.
5

6 About halfway through this interrogation, the general was still
7 standing. As we moved from a certain topic; for instance, the
8 Saddam questioning, he tried to act like he was a little more
9 tired, which I interpreted as his utilizing resistance
10 techniques. The general was able to stand erect when I was
11 asking him questions that were not of a military nature. It
12 wasn't until I got into an area that might involve intelligence-
13 gathering that he would maybe start to sway a little bit, things
14 of that nature.
15

16 There was no one thing that precipitated my getting out the
17 sleeping bag. I had run out of approaches with him. The
18 general stood in the middle of the room. The bag slides over
19 the top of the head with the broken zipper to the back. You
20 take the electrical cord across about mid-chest and put a little
21 square knot in it so it doesn't slide down. Then you coil it
22 around in kind of corkscrew fashion from mid-chest down. I
23 don't recall who wound the cord around the general. It's very
24 possible that SPC Loper is the one who did it, as he said.
25 There was nothing different about the way the sleeping-bag
26 technique was used on this occasion from any other time.
27

28 I know that at least two people got behind the general and just
29 lowered him gently to the ground on his back. I straddled him.
30 I had one leg on each side of him, and I went to my knees. I am
31 6'2" tall. I was able to straddle him, even though he was a
32 large man, by positioning myself closer to his head area. I did
33 not place my full weight on him at any time. Straddling him, I
34 continued to question him. The general was speaking in some
35 English but predominantly in Arabic. The interpreter,
36 SFC Sommer, was to my left, squatting probably just behind my
37 left shoulder. SFC Sommer could hear the general, and the
38 general could hear SFC Sommer.
39

40 I recall testimony that the sleeping bag was damp. Initially,
41 the sleeping bag was completely dry. When we removed the
42 general from the bag, when we pulled it back down over his head,
43 the general had a smile on his face. I thought the general was
44 messing with me, so I poured a little bit of water onto his face
45 to see what kind of effect it had. So, I'm sure that the

1 sleeping bag got a little wet in the process. I did not pour
2 water on the sleeping bag while I was interrogating him, not
3 that I recall. The general was in the sleeping bag 20 minutes.
4 We'd been interrogating without the use of the sleeping bag
5 about 45 minutes. About 0845 is when I introduced him into the
6 bag, and about 0905 is about when we realized that there was a
7 problem.

8
9 I placed my right hand over the general's mouth while he was in
10 the sleeping bag but not over his nose. I have a rule with
11 detainees. I do not want them to say the word "Wallah." You
12 know, "Wallah, I didn't shoot the RPG. Wallah. Wallah.
13 Wallah." I forbid them from using that word. When I heard the
14 word "Wallah" with any detainee, I took appropriate action. In
15 this case, the action was to cover the general's mouth. I
16 covered it for maybe 3 to 10 seconds. The idea was to stop him
17 from saying "Wallah."

18
19 As I recall, during the interrogation, I removed the sleeping
20 bag from over the general's head just at the end of the
21 interrogation. I did not realize that there was a problem until
22 we had terminated the interrogation and were in the process of
23 removing him from the sleeping bag. During the course of the
24 interrogation, while the general was in the sleeping bag, there
25 were no occasions when I removed the sleeping bag to examine him
26 or talk to him and then put the bag back over his head. There's
27 been testimony that there was a period of time where the general
28 was unresponsive, tensions rose, and then there was an
29 expression of relief on my part after the general took a big
30 breath. I recall the testimony, but I have no recollection of
31 that at all. I only remember one time that we rolled the
32 general over from his back to his stomach. At no time while the
33 general was in the sleeping bag did he express any words to the
34 effect of, "I can't breathe," in English, nor was there any
35 translation to that effect.

36
37 I've heard the testimony about broken ribs. At no point when I
38 straddled the general did he complain or express pain or cry out
39 or anything of that sort. I did not perceive or see any
40 indications of the general being in physical distress while he
41 was in the sleeping bag.

42
43 The sleeping bag was not pulled back from the general's head
44 until the interrogation was over. The bag was not difficult to
45 remove. It was not tight at all. Despite SPC Loper's testimony

1 that I held the sleeping bag tight to the general's face, I
2 don't recall that happening at all. At no time did I do
3 anything intentionally to impair the general's ability to
4 breathe. Having thought about the interrogation, I don't recall
5 doing anything that may have impaired the general's breathing
6 whether I intended it or not. When I pulled the bag from his
7 face, he had a smile on his face. Almost immediately after I
8 poured the water on him and there was no reaction, I realized
9 there was a problem. I know that at that time, SFC Sommer was
10 in the room. I believe SPC Loper was in the room, standing to
11 my right. And I don't know about Mr. Williams. I don't recall
12 anyone saying anything to me to alert me to the fact there was a
13 problem. After I poured water on the general's face and got no
14 response, I sent SFC Sommer to get the medics. I tried to do
15 CPR with chest compressions.
16

17 From 10 to 26 November 2003, I never denied MG Mowhosh water,
18 food, shelter, or medical care. I used the sleeping-bag
19 technique only as a claustrophobic technique. I felt it was
20 safely employed. I did not murder MG Mowhosh.
21

22 There was testimony by Mr. Pratt concerning an individual named
23 Kaleed, who, presumably, is the individual referred to as "a
24 detainee whose name is unknown" in the Specification of the
25 Additional Charge. I do recall interrogating a detainee that
26 pinched me. I don't know what his name was. I have learned
27 that witnesses say it was Kaleed the Claw. I have a picture of
28 the detainee who pinched me. He was in a sleeping bag. I
29 punched him in the chest after he pinched me. I do not recall
30 placing that individual in a sleeping bag. I was summoned to an
31 interrogation room because another interrogator was having
32 difficulty with a detainee. It's my understanding that the
33 detainee was belligerent, almost to the point of being violent.
34 I got into the room, and, as I recall, the detainee was already
35 in the sleeping bag. I did not throw him to the ground. As he
36 became violent, I may have subdued him with my body weight to
37 control him, but I did not make any type of World Wrestling
38 Federation move. The detainee that pinched me is the detainee
39 that became violent, and that is the detainee that I tried to
40 subdue with my body weight. But I don't know what the
41 detainee's name is. The Specification of the Additional Charge
42 lists "on or about 19 November 2003" as the date of the offense
43 involving an unknown detainee. There were a number of detainees
44 that I interrogated in that time frame. The sleeping-bag
45 technique may have been used by someone else, such as SGT Lamb,

1 during that time. I cannot think of any other incident with a
2 detainee that fits within the description of the Specification
3 of the Additional Charge.

4
5 I pled not guilty to the charges and specifications because I
6 didn't do it.

7
8 CROSS-EXAMINATION
9

10 (under questioning by the assistant trial counsel)

11
12 I don't recall using the sleeping-bag technique other than the
13 26th of November during Rifles Blitz. I did use it multiple
14 times outside of Rifles Blitz.

15
16 Prosecution Exhibit 32 for ID was marked and handed to the witness.

17
18 (further testimony on cross-examination of the accused)

19
20 Prosecution Exhibit 32 for ID is a fair and accurate depiction
21 of MG Mowhosh's smile when I removed the sleeping bag from his
22 head.

23
24 Prosecution Exhibit 32 for ID was offered and received into evidence
25 without objection as Prosecution Exhibit 32.

26
27 (further testimony on cross-examination of the accused)

28
29 The general did not die at my hands. What I did did not kill
30 the general.

31
32 I was not told by my commander not to use the slap technique. I
33 do not remember having a conversation with her early in the
34 deployment after she had witnessed my using the technique. I
35 don't believe it's possible that the conversation occurred and
36 that I have failed to remember it. I believe she is mistaken.

37
38 I'm not familiar with specifically which e-mail you're referring
39 to as Prosecution Exhibit 23. Having had it handed to me, I do
40 recall having received this e-mail from CPT Ponce. According to
41 the address bar and the content of the e-mail response, I
42 apparently replied to "reply all." Another message came in from
43 MAJ Hoepner. I received that e-mail. I don't remember
44 discussing it with MAJ Voss. I do not remember forwarding the
45 e-mail to MAJ Voss. It is possible that I discussed it with her

1 and don't remember it. I do have reason to doubt her
2 recollection of the conversation she testified about having with
3 me. I do not remember being cautioned at all from MAJ Voss
4 about using the slap technique. Certainly, I do not remember
5 being ordered not to use the technique. I believe MAJ Voss is
6 mistaken about ordering me not to use the slap technique. I'm
7 not going to say with absolute certainty that she did not, but
8 I'm telling you that I believe she did not. She may have said
9 it and I don't remember.

10
11 I did have a discussion with her about a sleeping-bag technique
12 in terms of a close-confinement technique. Even the memo from
13 10 September does not refer to a close-confinement technique by
14 name. I interpreted the close-confinement technique as a stress
15 position. Defense Exhibit A does list "stress positions, etc."
16 In Defense Exhibit A, the only guidance I received, there is no
17 mention of close confinement. I interpreted that memo to be
18 that my close-confinement recommendation qualified as a stress
19 position. In Defense Exhibit A there is no mention of close
20 confinement by name. It does, however, mention stress
21 positions, which are defined as "Use of physical postures
22 (sitting, standing, kneeling, prone, etc.) for no more than
23 1 hour per use." It does not mention the use of any implements,
24 such as water or a sleeping bag. It merely mentions physical
25 postures, etc: sitting, standing, kneeling, prone, etc. I
26 interpreted "etc." to include close confinement.

27
28 When I talked to MAJ Voss about a sleeping-bag technique, I
29 omitted some pertinent details. For instance, I omitted the
30 straddling. I omitted the sitting on the chest. I omitted the
31 covering of the mouth. I omitted these details that I used with
32 the general. Whatever authority I received from MAJ Voss did
33 not include the techniques I used with the general. I do not
34 agree that had I included those details, I would not have
35 received authority to use the technique. The technique is not
36 designed to induce more than a fear of claustrophobia. The
37 technique is not designed to make the detainee fear that he will
38 be killed because he will not be able to breathe. I did not
39 make the general rely upon me for the very air he breathed. I
40 did use the sleeping-bag technique multiple times. I did pour
41 water over the mouth of someone in a sleeping bag. I am telling
42 these members that that was not in any way designed to affect
43 the ability of those detainees to breathe. It was not designed
44 to make them have a fear of water.
45

1 I was not conducting the interrogation when COL Teeple arrived.
2 I heard COL Teeple testify on my behalf. He held me in high
3 esteem. The face I showed him was no different from the face I
4 showed others. I am not familiar with which interrogation
5 COL Teeple saw. I did multiple interrogations where I sat on
6 one MRE box and the detainee sat on another. I have received
7 training in the Reid interrogation technique. The curriculum
8 for the warrant officer certification was more generic as
9 opposed to interrogation-specific. Certainly, I had some
10 training highly-focused and specific to interrogation in the AIT
11 course. My duty title is "interrogation technician." The whole
12 point of interrogation is to gain information. It is not always
13 necessary to absolutely and utterly psychologically control the
14 detainee. If a detainee is unwilling to give information, you
15 exercise psychological ploys to ensure that they understand
16 you're in control. I would not characterize what I did as
17 crossing the line from psychological ploys to physical ploys.

18
19 The assistant trial counsel suddenly slapped the paper on the easel
20 next to the witness in what he termed to be demonstrative evidence.

21
22 (further testimony on cross-examination of the accused)

23
24 What you just did was physical control.

25
26 The military judge overruled the defense's objection to the
27 demonstration performed by the assistant trial counsel.

28
29 (further testimony on cross-examination of the accused)

30
31 I am about 6'2" tall and weigh about 205 pounds. Then, I
32 weighed probably in the mid-180's.

33
34 I am familiar with FM 34-52, not necessarily verbatim. It is a
35 guide to Army interrogation techniques. I would not classify it
36 as the bible of Army interrogation techniques. I find the
37 guidance in that to be outmoded and outdated. I don't believe
38 it anticipates the nature of the enemy we are currently
39 fighting. I believe it deals with people that are more
40 industrial-based and Christian-based as opposed to what we are
41 currently experiencing in Iraq. I am not offended by someone
42 who is not Christian. I think the field manual needs to be
43 amended to meet the emerging times. I think it needs to be
44 updated. But as of November 2003, it had not been. I responded
45 to a quest for ideas that might be used to facilitate

1 intelligence-gathering that might therefore lead to improved
2 offensive operations and save soldiers' lives.

3
4 I incorporated techniques from an already-existing foundation
5 and transferred them to a theater that I thought might be
6 beneficial to soldiers on the ground. I am talking about the
7 SERE school. Before soldiers enter SERE school, they sign a
8 waiver, indicating they could be injured, could get beat up. I
9 don't know that I would classify it as signing away their right
10 to be treated humanely. They are given food, water, shelter,
11 the same types of things that I provided to the detainees in
12 Iraq. Beatings are part of the curriculum of SERE school. I
13 think if you prepare a soldier for what they might encounter on
14 a battlefield, thereby increasing their chance of survival, I
15 think you're doing that soldier a favor. I would not classify
16 what goes on in the SERE course as inhumane. Students who
17 attend SERE school receive facial slaps and body blows to the
18 torso. If it means saving that soldier's life in a faraway
19 battle somewhere, I consider that humane treatment. The purpose
20 of sending these soldiers to SERE school is to prepare them for
21 the inhumane treatment our enemies might impose on them so that
22 they may better survive. The techniques taught are not
23 necessarily designed to fight off beatings and things like that.
24 I think, as soldiers, we all understand that should we become
25 prisoners of war of a foreign power, we may possibly be
26 subjected to that kind of treatment. I did not say "inhumane."
27 Not all treatment at the hands of our enemies is inhumane.
28 Sometimes it is. The purpose of SERE school is to teach
29 soldiers how to survive in a possibly hostile scenario. It is
30 not part of the purpose of the SERE training to prepare U.S.
31 service members for the inhumane treatment they might receive at
32 our enemies' hands. If you're going to characterize it as
33 "inhumane," my response is no. At the SERE school, they do not
34 deliver beatings; therefore, it is not inhumane treatment. They
35 receive body blows and facial slaps, not beatings.

36
37 I incorporated techniques used at the SERE school in
38 interrogating detainees because I found those techniques to be
39 effective. I felt they might therefore also be effective in
40 dealing with the insurgents. I made the suggestion. I was not
41 the approval on that. I began using the facial-slap technique
42 on my own. I incorporated what I'd been taught at the SERE
43 school into our interrogation operations. I am not aware that
44 detainees signed any waiver such as soldiers at the SERE school
45 did. For detainees to sign a waiver would mean that they would

1 have had to remove themselves from the treaty of the Geneva
2 Conventions.

3
4 SGT Lamb and I discussed whether or not the insurgents that we
5 were encountering on the battlefield qualified for Geneva
6 Conventions protection based on the e-mail that came out from
7 CJTF-7 C2X. The e-mail said that they were not aware of any ROE
8 that addressed the insurgents, and the e-mail also said that
9 they were having difficulty defining what those insurgents were
10 classified as. In the absence of guidance, I would refer to
11 guidance contained in FM 34-52, a copy of which was at
12 Blacksmith Hotel. At Blacksmith Hotel, the 10 September memo
13 had already come out, and we had the guidance to conduct
14 operations. In my conversation with SGT Lamb, I do not recall
15 the two of us concluding that detainees would be given, at
16 minimum, the protections afforded civilians under the Geneva
17 Conventions. That is something else I don't recall.

18
19 Even if it worked and was effective, I would not use electrodes
20 on a detainee. I consider that to be unlawful. I withheld the
21 information about the sitting, the straddling, and the covering
22 of the mouth when I asked for permission to use the sleeping-bag
23 technique because I did not consider that to be unlawful. I
24 made the call myself. I didn't think my commander needed that
25 information. I described the technique to her. I told her that
26 I thought it would be beneficial. She approved the technique.

27
28 I do not recall MAJ Voss giving me specific guidance, an order,
29 that I was not authorized to use the slap technique. I
30 possessed a copy of the memo, Defense Exhibit A, the
31 10 September memo, at Blacksmith Hotel. It refers to two
32 enclosures. Enclosure 2 states, "The purpose of all interviews
33 and interrogations is to get the most information from a
34 detainee with the least intrusive method, always applied in a
35 humane and lawful manner with sufficient oversight by trained
36 investigators or interrogators." I am the "trained
37 interrogator" that's being talked about in this. At Blacksmith
38 Hotel, I was the subject-matter expert on interrogations. I was
39 not the highest-ranking officer in that facility. No one had
40 reason to doubt my knowledge on interrogations. I presented
41 myself as an expert. I talked about my 17 years' experience. I
42 don't know if I used the water technique in front of one of my
43 superiors.

1 The fear-up (harsh) technique is one of three or four approaches
2 that have the potential to violate Geneva Conventions. I don't
3 recall if the field manual states that that technique has the
4 most potential to do so. Having been shown Prosecution Exhibit
5 17, I see that the first full paragraph in the left-hand column
6 on page 3-16 of FM 34-52 does state that the technique has the
7 greatest potential to violate the law of war. It also says,
8 "Great care must be taken to avoid threatening or coercing a
9 source, which is in violation of the GPW, Article 17."
10

11 I met Mr. Sonnek outside the interrogation room on or about
12 24 November 2003. I don't know what his job is. I did not
13 approach him and say I wanted to conduct a fear-up approach. I
14 did not say I wanted to bring the crowd of people he was with
15 into the room to frighten the general with the crowd of people.
16 Mr. Sonnek is mistaken. I don't know where he got the term
17 "fear-up approach." He did not get it from me. The Iraqi
18 people in the room did not ask questions that I had them ask.
19 There was a beating of the general. I was the highest-ranking
20 person in the room. The general was not answering their
21 questions. They hit him, slapped him. It was violent.
22 Ultimately, he walked out of the room. Mr. Williams is mistaken
23 when he says he was carried out. I don't recall if SPC Loper
24 talked about leaving the room or leaving the building or the
25 entire walk down to the holding area. I'm only aware that the
26 general left the room under his own power. He could have
27 collapsed right outside the room. I wouldn't have known. The
28 general did not show in any demonstrative way that he was
29 injured. He did not ask for any type of medical care. If he
30 had, I wouldn't have thought he was playing possum. If he had
31 requested medical care, it would have been given to him.
32

33 I believe MAJ Voss approved the slap technique. She was aware
34 of it, and she did not have problems with it. She approved it.
35 She did not tell me that I was not allowed to use the technique.
36 In her testimony, she said that she ordered me not to use the
37 slap technique. That did not happen. I do not recall any kind
38 of conversation where she said I was allowed to use it, but she
39 did not tell me that I could not use it. In my mind, she was
40 silent on the issue. Based on her silence, I told SGT Lamb that
41 the technique had been approved.
42

43 SGT Lamb and I were the only ones authorized to use the
44 sleeping-bag technique because we were the only ones trained to
45 use it. I would not say that I recognized that there was a

1 potential for its abuse. SGT Lamb and I were the only ones that
2 I felt were trained in its use. Its use required training. To
3 mitigate the risk of abuse, you don't let untrained people use
4 it because unforeseen results could follow. If you wrap
5 somebody in a sleeping bag who's got a couple of broken ribs and
6 can't really breathe well, it's pretty obvious they might have
7 trouble breathing. I did not have any idea that the general had
8 broken ribs. I did not perceive that the general was injured
9 after the 24th. On the night of the 25th, the general made a long
10 walk from his holding pen to room 6. I don't remember seeing
11 him come up or where I met the general that evening. I don't
12 recall if he was walking quickly, slowly, or anything. I don't
13 recall how he was breathing. I don't know if it was labored or
14 not. My assessment of the general on that evening was that he
15 was employing resistance techniques, feigning being out of
16 breath. He probably was tired, but he was employing resistance
17 techniques. I did see that he was out of breath. Before, I
18 said that I didn't recall; now I say he was out of breath.
19 Ultimately, what I'm saying is that he was employing resistance
20 techniques; i.e., faking it. From my position, I could not see
21 that he may have had broken ribs. I was not aware that he had
22 broken ribs until the autopsy results.

23
24 I knew that Mowhosh was a former general officer. Initially, I
25 referred to him by his former rank, but then I referred to him
26 strictly by his first name. I put him on his knees in front of
27 a crowd of people and slapped him to demonstrate to him that I
28 was in control. Once I slapped him, I got his respect and his
29 undivided attention. His hands were bound. He was on his
30 knees. I slapped him in front of a crowd of detainees. Their
31 reaction told me that he was somebody important. It was not my
32 assessment that the crowd of detainees was embarrassed and
33 ashamed to be seeing a detainee being treated this way in
34 public.

35
36 Mr. Williams and I do have a disagreement about what happened on
37 the rooftop on 25 November. The general was on the ground, but
38 I don't remember the stick which was demonstrated in the
39 courtroom. I poured water on the general's face, using a
40 fear-up technique, fear-of-water technique. I don't know what
41 the book definition of "fear-up" is. There was no cause for
42 concern for drowning. The detainee had full movement of his
43 head. Mr. Williams' recollection was that he had his foot on
44 the general's neck. Mr. Williams introduced the sticks to tap
45 the general's elbows. I judged that technique and likened it to

1 the white noise that we used at our SERE course in Hawaii, and I
2 deemed it acceptable.

3
4 I don't recall a meeting with a civilian on the 25th of November
5 or saying, "I don't have that memo. I'm aware of its existence,
6 and we're breaking those rules every day." I had the
7 10 September memo. I did not have the 12 October memo, the memo
8 signed by LTG Sanchez, the memo that very clearly prohibits
9 stress positions or close-confinement positions or anything else
10 that's not mentioned in it. The only memo I had was the
11 10 September memo.

12
13 On the morning of the 26th, if MG Mowhosh had answered direct
14 questioning, the interrogation would not have gone in the
15 direction that it did. I decided to step up the interrogation
16 techniques. He was wrapped in the sleeping bag and had the
17 electrical cord tied around him. I said I was in the room and
18 SPC Loper was in the room. I was the only interrogator in the
19 room. I do not recall telling SPC Loper to make sure the cord
20 was wrapped tightly around the general.

21
22 The general was standing erect, able to answer questions. If he
23 had fallen down, I would have ordered him to stand up. Based on
24 my previous interrogations of the general, it's fair to conclude
25 he knew I would force him to stand.

26
27 I put some weight on the general's chest when I straddled him.
28 I would not characterize what I did as "sat" on him. I didn't
29 put my full weight on him, but I had to put some weight on him.
30 It would be unavoidable. He was a big guy; I had to straddle
31 him. Squatting down, I can't go very far before I'm effectively
32 putting some weight on his chest. I can't say that the weight
33 was on his sternum.

34
35 At the SERE school, you tried to identify something to take away
36 from the individual to take them out of their comfort zone. I
37 took away his ability to say "Wallah," which means basically, "I
38 swear to God." We say similar things in our own vernacular, but
39 that does not necessarily mean that that individual was praying.
40 I took away what I identified as a comfort item. The voice
41 inside the sleeping bag was muffled, and I could not see the
42 detainee's face. I couldn't tell if he was grimacing in pain
43 when I put some of my weight on him. It could have been that
44 what he was saying was, "By God!" "Allah!" It could have been
45 he was in fact saying, "I am in pain," and calling out to his

1 god. I was consistent with my behavior with all detainees by
2 not letting them say that. I would not characterize placing my
3 hand over his mouth as cutting off his ability to breathe. It
4 depends on how much pressure is put on the mouth. Detainees
5 were able to talk even with my hand over their mouth.
6

7 There was no point where the general stopped talking; not that I
8 recall. I heard SPC Loper and Mr. Williams describe it, and
9 they both testified that I stood up after a period of 2 to
10 3 minutes of the general's being unresponsive. I do not recall
11 that happening. They testified that I stood up and said, "I
12 thought I'd killed him," "I thought he was dead," or, "Thank
13 God, I thought he'd stopped breathing." I don't recall making
14 those statements.
15

16 I turned him over onto his stomach and straddled him, putting
17 some of my weight on his back. I do not recall that he was dead
18 within minutes. It was probably closer to 5 minutes.
19

20 EXAMINATION BY THE COURT-MARTIAL

21
22 (under questioning by the military judge based upon Appellate
23 Exhibits XXXIX and XL)
24

25 I approached MAJ Voss with ideas on interrogation techniques in
26 response to the memo that came out from CJTF-7, asking for
27 suggestions. I explained to her what my background was, my
28 training, and that I thought those would be useful techniques.
29

30 As an interrogator, I understand that the techniques that you
31 use at the SERE course in a peacetime environment are only
32 designed to be used on the students that go through the course.
33 I took my experience from that course and thought, "Well, if it
34 worked on our guys, who are some of the toughest SOBs that I
35 know, it might work on the Iraqis."
36

37 There was no written risk assessment done on any of the
38 techniques I used. During the course of the interrogations,
39 especially in which I was using the sleeping-bag technique, I
40 was very cognizant of what was going on underneath the sleeping
41 bag, particularly when I put my hand over the detainee's mouth.
42 I was very aware that the detainee was able to breathe. We made
43 a conscious effort, when we decided to start using the cord,
44 that it not go up any higher than mid-chest, to absolutely

1 preclude any possibility that it might get wrapped around the
2 neck.

3
4 On the morning of 26 November, the general was wearing his man-
5 dress, the long Iraqi garment with long sleeves. I did not see
6 any bruises on his body.

7
8 I am familiar with CPR. We went through medical training prior
9 to our deployment, but it was not a CPR-specific block of
10 instruction, just basic medical instruction. I don't think I
11 attempted to clear the general's airway or attempted to get air
12 into his lungs using mouth-to-mouth resuscitation with
13 compressions.

14
15 I do not remember if the 10 September memo, which was unsigned,
16 had the words "original signed." I am familiar with a memo
17 being sent via Internet or LAN in that format with that at the
18 end. It means that whoever originated the memo had in fact
19 signed it and retained the original copy.

20
21 The military judge informed CPT Morehouse that the rules of evidence
22 prevented him from asking the first question of Appellate
23 Exhibit XXXIX.

24
25 **REDIRECT EXAMINATION**

26
27 (under questioning by the civilian defense counsel)

28
29 I had received FRAGOs, like the 10 September memo, that did not
30 have "original signed" at the bottom.

31
32 **RECROSS-EXAMINATION**

33
34 (under questioning by the assistant trial counsel)

35
36 There is a large difference between a FRAGO and a memo written
37 on letterhead.

38
39 The court recessed at 1958 hours and reconvened at 2010 hours,
40 19 January 2006, all parties again present except the members.

41
42 The government asked the military judge to prevent the defense from
43 asking the next witness about the level of insurgent activity. The
44 defense stated it did not intend to open that line of questioning.

1 The Article 39(a) session was concluded, and the court members
2 returned to the courtroom at 2011 hours, 19 January 2006.

3
4 LTC Antonio Aguto, U.S. Army, was called as a witness by the defense
5 on the merits, was sworn, and testified in substance as follows:
6

7 DIRECT EXAMINATION
8

9 (under questioning by the military defense counsel)
10

11 I am the commander for 2/14th Cavalry, Fort Lewis, Washington.
12

13 I know CW3 Welshofer. He was in the 66th MI Company when I was
14 the squadron and regimental executive officer for 3d ACR.
15

16 I came in the Army in 1988. I've been in a little over
17 18 years. My commission was from the United States Military
18 Academy. I have no prior enlisted time. My first assignment
19 was in Schweinfurt, Germany, armor platoon leader with the
20 3d Armored Division. I was there for 2½ years and deployed with
21 them as part of Desert Storm. I came back, served a year and a
22 half in basic training at Fort Knox, Kentucky, then went back to
23 Germany and served there for 4 years. I did a Bosnia rotation
24 with 3d ID, then 1 ID. I was selected for and did a joint
25 internship in the Pentagon for 2 years, also working on DA
26 staff, and then came to Fort Carson and was with the regiment
27 for 4 years and then served 1 year in 7th ID before my present
28 duty assignment.
29

30 I have a Bronze Star with a cluster. I got the first one for
31 Desert Storm; the second one was Operation Iraqi Freedom I.
32

33 I knew Chief Welshofer when I was the squadron executive officer
34 with the 1st Squadron. I never really got to work with him at
35 great length while we were at Fort Carson. When we deployed to
36 Iraq, I got to work with him rather closely on a few occasions
37 in Al Qaim. And then as I moved up to the regimental XO
38 position, I got to work with him again. The 66th MI Company was
39 really working for the regimental TOC.
40

41 I redeployed in February 2004. We had our normal social events,
42 coming back from the deployment, where I would see Chief
43 Welshofer. Shortly thereafter, I went up to 7th ID staff, and I
44 saw him on a few occasions at work when he was working with the

1 division. I had interaction with him up until I PCS'd to Fort
2 Lewis in September of 2005.

3
4 When I was the executive officer in 1st Squadron in the Al Qaim
5 area, that was my first opportunity of working with
6 Chief Welshofer on a pretty regular basis. In our operations in
7 Al Qaim, we had to establish a temporary detainee facility
8 before we could move detainees forward up to the regiment and
9 wherever they went from there, corps or release. On occasion,
10 we had need to gather intelligence from them, and Mr. Welshofer
11 also had the responsibility from the regiment at the time to
12 come out and check our detainee facilities. So, on certain
13 operations, when we did have a large number of detainees or we
14 had a significant reason to keep one or two of them for a period
15 of days, Mr. Welshofer would come down and help us gain that
16 human intelligence prior to moving them out to regiment. During
17 that time, I had an opportunity to observe and evaluate his duty
18 performance. When I became the regimental executive officer,
19 the interaction I had with Chief Welshofer at that time was less
20 of a one-on-one. I didn't leave the regimental TOC area as much
21 as when I was in the squadron and was able to get out into the
22 AO. I did see Lew's reports. Lew did help us in planning,
23 particularly detainee operations, either at the squadron level
24 or at the regimental level. I did get his analysis of some of
25 the intelligence that we received and help with where that
26 intelligence really led us to other areas that we needed to get
27 to, actionable intelligence.

28
29 During that time period as the regimental XO, I had the
30 opportunity to observe and evaluate Chief Welshofer's duty
31 performance. Based on my interaction with him, I have an
32 opinion about his military character. Chief is a tireless,
33 dedicated absolute professional in every sense of the word. He
34 was dedicated to our mission, our unit, and our soldiers. His
35 military character, in some of the most demanding times, some of
36 the most emotional times that I had as the squadron XO, was
37 outstanding. He was very professional. He was very even-
38 keeled. He was very to-the-point. And he kept me and a lot of
39 our command on even keel as to what intelligence could be
40 gathered and the usefulness of that intelligence in our
41 operations.

42
43 I have an opinion about Chief Welshofer's character for honesty
44 and truthfulness. He is very honest, absolutely truthful.
45 Never would I question his word.

1
2 CROSS-EXAMINATION
3

4 (under questioning by the assistant trial counsel)
5

6 I have seen Mr. Welshofer conduct an investigation. It was
7 actually one of the first interrogations after Mr. Welshofer had
8 come up to Al Qaim, if I remember correctly. I believe we had
9 one or two detainees. We had one in a small room. I witnessed
10 his interrogation for about 15 minutes, and the detainee, along
11 with the guard, was in this room. While I was in the room, I
12 just witnessed Mr. Welshofer questioning the detainee. There
13 was no physical touching whatsoever.
14

15 The witness was permanently excused, was duly warned, and departed
16 the courtroom.
17

18 The court adjourned at 2023 hours, 19 January 2006.

1 The court reconvened at 1020 hours, 20 January 2006, all parties
2 again present, including the members.

3
4 Marielena R. Marlow, a civilian, was called as a witness by the
5 defense on the merits, was sworn, and testified in substance as
6 follows:

7
8 DIRECT EXAMINATION

9
10 (under questioning by the military defense counsel)

11
12 I am a retired captain from

13
14 I was deployed with the 3d ACR to Iraq. I am familiar with
15 MG Mowhosh. I was with the mission Rifles Blitz up on the
16 Syrian border in Al Qaim during November when he was captured
17 and interrogated.

18
19 I was in the Army 22 years, 7 months, and 12 days. I started
20 off as a medic, and then I became a physician assistant, and
21 then I went to the fellowship and did emergency medicine. In
22 Iraq, I was an emergency medicine physician assistant, working
23 with Dr. Rossignol.

24
25 I first saw MG Mowhosh in the area referred to as the cages.
26 Dr. Rossignol and the medics and I would go over there every day
27 and do sick call or medical screenings. The general died in
28 November. He had never made any complaints to me about having
29 medical problems. I was accessible to him every day.

30
31 My medics would be there all the time during daylight hours.
32 Dr. Rossignol or I would be there most of the time, since we had
33 nothing else to do. But we would go through the cages twice a
34 day, walking up and down with an interpreter, and asking them if
35 they had any medical issues. Detainees were not at all
36 reluctant to come to us with medical issues. They would call to
37 us as we walked through, "Doctor, doctor, give me a tablet."
38 They all wanted something from us.

39
40 MG Mowhosh never grabbed our attention, that I saw.

41
42 I responded to the call for medics when the general was being
43 interrogated the day he died. When I walked into the room, the
44 general was lying on the ground on his back. I think my medics
45 may have gotten there a minute before me. We all got there

1 within a couple minutes of one another. When we got there, we
2 checked for a pulse and breathing, and there weren't any, so we
3 started CPR. There was a very young medic doing CPR. I don't
4 think he'd ever done CPR before. I remember specifically when
5 he was doing the chest compressions, I heard a crunch, and he
6 had fractured some of the general's ribs. And I know he looked
7 up and me, and I told him he was doing it absolutely right, that
8 that happened, and to keep going.

9
10 I observed MG Mowhosh in the detainee cages every day. He
11 didn't appear acutely ill. He never asked for any medical
12 attention. I did not see his health deteriorate, but I had not
13 physically gone up to him and examined him.

14
15 MG Mowhosh's detainee cage was less than 100 meters from my tent
16 office. He was closer to me than the other detainees. They
17 kept him up front.

18
19 The witness was permanently excused, was duly warned, and departed
20 the courtroom.

21
22 **Raymond L. Gleaton III**, a civilian, was called as a witness by the
23 defense on the merits, was sworn, and testified in substance as
24 follows:

25
26 **DIRECT EXAMINATION**

27
28 (under questioning by the military defense counsel)

29
30 I am from

31
32 I am currently employed at Fort Huachuca, Arizona, 304th MI
33 Battalion. I am an intelligence instructor at the Captain's
34 Career Course.

35
36 I know Chief Welshofer from our work together in Iraq. At that
37 time, I was in the Army. I first came into the Army in April of
38 1990. I started out enlisted as an 11-Bravo, infantryman. I
39 later went on to get my commission. I was an infantry officer
40 and then later transitioned to the MI Corps.

41
42 I first arrived at the 3d ACR in March of 2003. When I came to
43 the regiment, I was to replace their analysis and control
44 element (ACE) chief in 66 MI. I was the ACE chief from March
45 until October of 2003. My primary responsibility as the ACE

1 chief was to ensure that the fusion of all raw intelligence was
2 put together in an intelligence product for ground commanders.
3 Basically, every intelligence discipline, SIGINT, HUMINT,
4 counterintelligence, were sources for our intelligence.
5

6 Between March and redeployment in October of 2003, I do not
7 remember receiving any guidance coming through me as the ACE
8 chief regarding interrogation approaches.
9

10 I first met Chief Welshofer right before we deployed in March
11 2003. I worked with him until the day I redeployed. We
12 primarily worked mission-dependent but almost daily throughout
13 my time in Iraq. I believe I've had the opportunity to observe
14 and evaluate Chief Welshofer's duty performance. Based on my
15 observations, I have an opinion about his military character.
16 Chief Welshofer is probably one of the most dedicated, selfless-
17 serving warrant officers I've worked with in my 15-year career
18 in the Army. I have an opinion about his character for honesty
19 and truthfulness. I trusted him implicitly, and I felt he was
20 probably one of the most honest individuals I'd ever dealt with.
21

22 CROSS-EXAMINATION

23
24 (under questioning by the trial counsel)
25

26 I was the ACE chief until October of 2003. As the ACE chief, it
27 was my responsibility to fuse intelligence, not collect it. I
28 had no need to know intelligence guidance.
29

30 In the time that I've known Mr. Welshofer, I've only seen one
31 initial-screen interview of his of a detainee. I've never seen
32 an interrogation by him.
33

34 The witness was temporarily excused, was duly warned, and departed
35 the courtroom.
36

37 CPT Jesse L. Falk, U.S. Army, was called as a witness by the defense
38 on the merits, was sworn, and testified in substance as follows:
39

40 DIRECT EXAMINATION

41
42 (under questioning by the military defense counsel)
43

44 My unit is Headquarters, Headquarters Troop, 2d Squadron,
45 3d ACR, Fort Carson, Colorado.

1 My unit is currently deployed to Iraq. I anticipate redeploying
2 when this trial concludes. My squadron is currently redeploying
3 back from Iraq now.
4

5 I know Chief Welshofer. In 2002 when I was in Support Squadron,
6 I just knew his name. Whenever I went up to regiment, I was in
7 the RS-2 shop and became a little bit more familiar with
8 Chief Welshofer. And then as I became the ACE chief, I
9 obviously worked much more closely with him.
10

11 I've been in the Army approximately 5½ years. I received my
12 commission from the Academy. I was in the protocol office at
13 West Point. I had an injured shoulder, so I stayed behind. I
14 then went to the Basic Course at Fort Huachuca. From there I
15 was deployed to Egypt, working with DMFO, and I was there for
16 1 year. I then joined the 3d ACR, where I was the Support
17 Squadron S-2, and then worked up at the RS-2 shop and then moved
18 over to the ACE chief, and I am currently now the S-2 for Saber
19 Squadron.
20

21 I was the ACE chief at the beginning of November of 2003 until
22 approximately September of 2004. I redeployed back to the U.S.
23 after my first deployment to Iraq in March of 2004. From the
24 time that I became the ACE chief until the death of MG Mowhosh,
25 I do not remember any guidance coming down about interrogation
26 approaches or anything similar to that. After the death of
27 MG Mowhosh, I don't remember specifically receiving any kind of
28 interrogation guidance from a higher headquarters. After
29 Abu Ghraib occurred, there was a lot more focus on interrogation
30 and techniques and what was allowed and what was not. But I
31 don't recall ever seeing anything specific to interrogation
32 techniques.
33

34 The first I started to actually get to know Chief Welshofer was
35 when I was the ACE chief. A lot of our intel reports were
36 coming up through the ACE, where we fused the intelligence
37 together. And with that, a lot of times he would stop up at the
38 ACE, and we had quite a bit of interaction. From that point as
39 well as once we redeployed back here to Fort Carson, he worked
40 out of the ACE quite a bit. Based on my interaction with
41 Chief Welshofer, I had an opportunity to observe and evaluate
42 his duty performance. I was his supervisor. Based on my
43 observations and evaluations, I have an opinion about
44 Chief Welshofer's military character. He was one of the most
45 professional, dedicated, hardworking individuals that I have

1 encountered while I've been in the military. I have an opinion
2 about his character for truthfulness and honesty. In my
3 opinion, he is a truthful and honest person.
4

5 **CROSS-EXAMINATION**
6

7 (under questioning by the trial counsel)
8

9 I do not recognize Defense Exhibit A. I was not aware that the
10 unit had that document when I was the ACE chief.
11

12 As the ACE chief, my job was to essentially put together
13 intelligence products. The intelligence products were things
14 like slides, reports. For the most part, my role was to compile
15 intelligence. I was not a collector of intelligence. I have no
16 knowledge of interrogation techniques. I have never seen an
17 interrogation and have never watched Mr. Welshofer perform an
18 interrogation. In my role as ACE chief, I would have no need to
19 know anything about interrogation guidance.
20

21 **EXAMINATION BY THE COURT-MARTIAL**
22

23 (under questioning by the military judge based upon Appellate
24 Exhibits XLI)
25

26 I was in Chief Welshofer's rating chain because administratively
27 it's usual in garrison that, for example, you'll fall under the
28 same platoon under the ACE. Whenever we're in a combat zone,
29 the ACE stays together with the THT teams, as well as
30 interrogation going off separately. So, they will go off, and,
31 then, for the most part, most of the direction was coming from
32 MAJ Voss, I believe, who worked more specifically with
33 Chief Welshofer. I didn't get too much into that. For example,
34 this time, in OIF-III, Chief Fisher is now the interrogator, and
35 the ACE continues to work right beside the regimental TOC and is
36 actually part of it.
37

38 **RECROSS-EXAMINATION**
39

40 (under questioning by the trial counsel)
41

42 Even though I had no knowledge of interrogation techniques,
43 Mr. Welshofer was the subject-matter expert in that area.
44

1 The witness was temporarily excused, was duly warned, and departed
2 the courtroom.

3
4 James B. Reese, a civilian, was called as a witness by the defense on
5 the merits, was sworn, and testified in substance as follows:

6
7 DIRECT EXAMINATION

8
9 (under questioning by the military defense counsel)

10
11 I am from

12
13 I know Chief Welshofer. He and I met at the Basic
14 Noncommissioned Officer Course in Fort Huachuca about 12 years
15 ago. I didn't see Lew again until a conference in Wiesbaden,
16 Germany, at the 205th MI, just before the ground war kicked off.
17 I didn't see Lew, but I was in the 82d Airborne, and I spoke
18 with Lew at least once a week while I was deployed there.

19
20 I am retired from the Army. I am now an instructor for the
21 Defense Enhanced Analysis and Interrogation Training Course at
22 Fort Huachuca.

23
24 I came into the Army in July of 1974. While I was in the Army,
25 I was an interrogator for 14 years. Initially, I served in
26 Hawaii doing SERE training. I got out of the Army, came back
27 in, went to Panama for Just Cause, was in the 7th Special Forces
28 Group in the HUMINT detachment there. I became a warrant
29 officer and worked for the 202d MI Battalion as the head
30 interrogator there; 1st Armored Division as the senior
31 interrogator and senior counterintelligence agent; and then the
32 82d as the G2X and the HOC chief; and then I retired.

33
34 The last two jobs I mentioned, when I was working in the 82d,
35 were the jobs in which I was working with Chief Welshofer in
36 Iraq. I received all interrogation reports from all the
37 subordinate units, looked through them for clarity of
38 information, asked questions back to the people who were running
39 the operations in different areas. In that respect, I talked to
40 Lew at least once a week in reference to his tactical HUMINT
41 teams that he had and his interrogation operations.

42
43 I am aware that MG Mowhosh died in November of 2003. Leading up
44 to November, I did not receive any interrogation guidance at all
45 while I was in theater regarding approaches or guidance of any

1 type. You didn't receive it; you had to go look for it. I did
2 attempt to look for it. The guidance was posted on the SIPRNet.
3 You just had to know where it was. It was up to you to figure
4 out where it was. I can't remember exactly when I saw the
5 guidance from LTG Sanchez. I got into country in September. I
6 know I was looking for it through October and into November
7 because we were in the process of trying to set up a detention
8 facility. I went to JAG and received no guidance.
9

10 I was working for approximately 7 months in my capacity in the
11 82d Airborne while Chief Welshofer was in 3d ACR in Iraq. I had
12 an opportunity to observe the quality of reporting that we got
13 from Chief Welshofer. His reports were good reports and very
14 clear and concise.
15

16 CROSS-EXAMINATION

17
18 (under questioning by the trial counsel)
19

20 I have seen the 10 September CJTF-7 memo which is Defense
21 Exhibit A. On the Internet I found this one or the one that
22 replaced it. I haven't read the memo recently, but I read it at
23 the time and was familiar with it. I assumed that prior to the
24 general's death, Mr. Welshofer possessed this memo. Having
25 reviewed it, in my opinion, based on the guidance in the
26 10 September memo, it is not necessarily true that use of a
27 sleeping bag in interrogations would not be authorized. It was
28 nonphysical and didn't inflict any physical pain, but it did
29 induce great fear, which was authorized with the fear-up
30 technique.
31

32 I remember talking to you about a week ago on the phone. When
33 we talked, I told you the truth, and I was honest and candid
34 with you. I do not remember in that conversation telling you
35 that use of a sleeping bag in interrogations would be considered
36 torture. I know that torture was not authorized.
37

38 REDIRECT EXAMINATION

39
40 (under questioning by the military defense counsel)
41

42 In my phone interview with the trial counsel, what I remember
43 was being asked if I had ever seen guidance that would authorize
44 a sleeping bag, and I said I didn't know that it had been used
45 and did not know if it or a wall locker was something that I

1 would use myself, but in SERE training, I had seen similar
2 methods used for training U.S. troops for resistance.

3
4 **EXAMINATION BY THE COURT-MARTIAL**

5
6 (under questioning by the military judge based upon Appellate
7 Exhibits XLII, XLIII, and XLIV)

8
9 I know that torture was not authorized because torture is
10 prohibited by Geneva Conventions. Other than that, I believe
11 the memos stated that we weren't to use torture. Geneva
12 Conventions is taught throughout our career.

13
14 I do not remember if MG Mowhosh's detainee status was
15 ascertained in November of 2003.

16
17 I did not send the interrogation guidance I found to
18 Mr. Welshofer. He had been in theater for longer than I had,
19 and I assumed that he had it or that he had whatever guidance
20 had been put out.

21
22 Striking a trainee at SERE school is authorized. I don't know
23 the specific authority that would grant that, but that has been
24 a tactic that has been used in SERE school for as long as the
25 Army SERE school has been at Fort Bragg. Striking of detainees
26 would be a different authority, from the Commander in Chief
27 down.

28
29 **RECROSS-EXAMINATION**

30
31 (under questioning by the trial counsel)

32
33 Attendees at the SERE school sign a waiver allowing cadre to
34 strike them. The purpose of SERE training is to essentially
35 train a U.S. soldier to withstand treatment by an enemy who
36 doesn't follow the Geneva Conventions.

37
38 **REDIRECT EXAMINATION**

39
40 (under questioning by the military defense counsel)

41
42 U.S. soldiers did not sign a waiver to be tortured at the SERE
43 course.

44
45 **EXAMINATION BY THE COURT-MARTIAL**

1
2 (questions by the military judge based upon Appellate Exhibits XLV
3 and XLVI)
4

5 As an interrogator instructor at Fort Huachuca, I train soldiers
6 to treat personnel under Geneva Conventions status and those
7 "undetermined" or classified as a "detainee" as falling under
8 the Geneva Conventions.
9

10 The 82d TOC/ACE was the receiving agency for 3d ACR reports. I
11 would not provide memos, reports, guidance down to the 3d ACR
12 ACE. I would call and talk to Mr. Welshofer. I believe it
13 would have been my responsibility to provide any memos or
14 guidance down to the 3d ACR to Chief Welshofer or going through
15 the G-2.
16

17 The witness was temporarily excused, was duly warned, and departed
18 the courtroom.
19

20 SGT Justin A. Lamb, U.S. Army, was recalled as a witness by the
21 defense on the merits, was reminded he was still under oath, and
22 testified in substance as follows:
23

24 DIRECT EXAMINATION
25

26 (under questioning by the military defense counsel)
27

28 I was present at a conversation where the slap technique came up
29 with Chief Welshofer and MAJ Voss in late August or early
30 September of 2003. Mr. Welshofer asked me to come out. He and
31 MAJ Voss were there.
32

33 The members departed the courtroom at 1113 hours, 20 January 2006, at
34 which time the military judge held an Article 39(a) session.
35

36 Out of the presence of the panel, the military defense counsel asked
37 the witness to tell the military judge what he had heard in the
38 conversation in question. The witness stated that although he did
39 not remember the exact words, Mr. Welshofer had said something to the
40 effect of, "I'm reminding you that you are not allowed to use this
41 technique," or "I'm the only one allowed to use this technique."
42

43 The military defense counsel argued that MAJ Voss had testified that
44 in approximately June of 2003, she was disgusted by the slap
45 technique and told Chief Welshofer not to use it. The defense was

1 calling SGT Lamb to state that some months later, there was a
2 conversation at which she was present with Chief Welshofer.
3 Chief Welshofer had told SGT Lamb that only Chief was allowed to use
4 the slap technique. MAJ Voss had been there and said nothing. The
5 testimony by SGT Lamb would therefore rebut the evidence that Chief
6 Welshofer was ever told not to use the slap technique.

7
8 The prosecution argued that the testimony was hearsay and
9 inadmissible under MRE 803. The prosecution believed the testimony
10 was being offered to show that Mr. Welshofer thought he was
11 authorized to use the technique.

12
13 The witness departed the courtroom.

14
15 The prosecution stated that the testimony being offered by SGT Lamb
16 did not make clear what technique was being discussed. The
17 prosecution considered the testimony confusing under MRE 403.

18
19 The defense argued under MRE 803(3), *Then existing mental, emotional,*
20 *or physical condition*, not only included medical but also included
21 such things as intent, plan, motive, design. The government had
22 alleged through its evidence that the accused had a plan or design to
23 violate MAJ Voss's order, and the evidence being offered by the
24 defense showed that the accused did not have that plan or design
25 because he had never heard MAJ Voss ever giving that order. It also
26 showed the state of mind of MAJ Voss. The defense argued that the
27 government was free to argue MAJ Voss's intent.

28
29 The government argued that MRE 803(3) was not applicable.

30
31 The defense argued that Chief Welshofer's state of mind at that time
32 was relevant, in that the government had put into evidence that Chief
33 Welshofer knowingly and purposefully violated an order. The defense
34 was trying to demonstrate to the panel that Chief Welshofer not only
35 did not receive that order but didn't intentionally do anything to
36 violate MAJ Voss's orders regarding the slap technique. A
37 conversation in which the slap technique had been mentioned in front
38 of MAJ Voss where she had made no response made it more likely than
39 not that MAJ Voss had never actually given an order not to use the
40 technique. As to hearsay, the testimony was not being offered to
41 prove the truth of the matter asserted but simply went to
42 Chief Welshofer's state of mind at the time. The conversation had
43 taken place, according to SGT Lamb, in late August or in early
44 September. MAJ Voss had testified that her order to Chief Welshofer
45 had occurred in June or July.

1
2 The defense quoted MRE 806 that when a hearsay statement had been
3 admitted in evidence, the credibility of the declarant could be
4 attacked and, if attacked, could be supported by any evidence which
5 would be admissible if the declarant had testified as a witness.
6 MAJ Voss could have been asked about this conversation. Once the
7 hearsay statement came in that MAJ Voss made, then that statement
8 could be attacked, the defense believed, with other hearsay.
9 However, the defense believed the evidence being offered was an
10 exception to hearsay under MRE 803 because it showed the state of
11 mind of Chief Welshofer at the time. The defense argued that the
12 state of mind was the only thing that would be relevant for admitting
13 MAJ Voss's testimony to begin with regarding the order. The
14 government had been trying to show that Chief Welshofer was out on
15 his own, doing his own thing. That was a state of mind, and the
16 defense was trying to rebut that. Otherwise, MAJ Voss's order would
17 be irrelevant. The government had not charged a violation of an
18 order, so the only reason that the order would have been relevant
19 would have been to show Chief Welshofer's state of mind after he
20 received the order and his apparent willingness to violate the order.
21 The defense was attempting to show that Chief Welshofer did not have
22 that state of mind but believed that he was authorized to use the
23 slap technique and that conversations such as the one in question
24 caused him to believe that. The defense found the testimony relevant
25 to the Additional Charge.

26
27 The government argued that when state of mind was at issue, the state
28 of mind had to be something that was going to occur in the future.

29
30 The defense noted that the charged misconduct had occurred after the
31 conversation. Therefore, in accordance with the government's
32 argument, the testimony would be admissible under that argument.

33
34 The government said that the statement was not being offered for an
35 indication of what the accused intended to do in the future but was
36 being offered to show what he thought he was authorized to do in the
37 past.

38
39 The defense stated that apparently there had been only one order
40 given, if one had been given at all. MAJ Voss had said the order was
41 given in June or July, not October. So, if some months later there
42 was a conversation where she was present and the slap technique was
43 brought up and MAJ Voss said nothing, that evidence rebutted
44 MAJ Voss's testimony that she had actually given the order. It also
45 showed Chief Welshofer's state of mind regarding what he thought was

1 the existence of that order and his authorization to use that
2 technique.

3
4 The government reiterated that it believed the testimony was hearsay,
5 irrelevant under MRE 403 in that it would unduly mislead or confuse
6 the members, and inadmissible.

7
8 The military judge ruled that the evidence as offered was hearsay.
9 After listening to the argument of counsel, he did believe MRE 803(3)
10 applied. The evidence did reflect an existing state of mind relevant
11 to a fact in issue. The probative value of the evidence was not
12 substantially outweighed by the danger of unfair prejudice,
13 confusion, or misleading the members. The government objection was
14 overruled.

15
16 The witness returned to the stand and was reminded he was still under
17 oath.

18
19 The Article 39(a) session was concluded, and the members returned to
20 the courtroom at 1145 hours, 20 January 2006.

21
22 (further testimony on direct examination of SGT Lamb by the military
23 defense counsel)

24
25 I was present at a conversation in late August or early
26 September 2003 where Chief Welshofer and MAJ Voss were present
27 and the slap technique was discussed. Mr. Welshofer said to me
28 either, "I want to remind you that you are not allowed to use
29 this slap technique," or he said, "I am the only one allowed to
30 use the slap technique." MAJ Voss had no reaction to that
31 statement.

32
33 **CROSS-EXAMINATION**

34
35 (under questioning by the assistant trial counsel)

36
37 MAJ Voss didn't say anything at all. After that, she just said,
38 "You can go back to work." Her reaction was as though the
39 conversation never took place. I don't remember precisely what
40 Chief Welshofer said. He said either, "I want to remind you
41 that I'm the only one that can use this technique," or he said,
42 "I am the only one allowed to use this technique."

43
44 **REDIRECT EXAMINATION**

1 (under questioning by the military defense counsel)
2

3 MAJ Voss was within 2 or 3 feet, probably, to where
4 Chief Welshofer and I were. I think she heard what was said.
5

6 **RECROSS-EXAMINATION**
7

8 (under questioning by the assistant trial counsel)
9

10 He said something along the lines of, "I want you to know only I
11 am authorized to use this technique."
12

13 The witness was temporarily excused, was duly warned, and departed
14 the courtroom.
15

16 The court recessed at 1148 hours and reconvened at 1327 hours,
17 20 January 2006, all parties again present except the members.
18

19 The military judge noted that during the recess there had been an 802
20 session at which stipulations of expected testimony had been
21 discussed. There were two versions of a stipulation of MAJ Joel
22 Hamilton, one which contained a paragraph which the government
23 believed contained inadmissible evidence. The two versions of the
24 stipulation of expected testimony were marked as Defense Exhibits F
25 and G for Identification. The government objected on the basis of
26 relevance and as to MRE 403 to the last paragraph of Defense Exhibit
27 F for ID, which concerned the status of the victim in the case,
28 MG Mowhosh.
29

30 The defense believed the evidence was important to the elements of
31 subparagraphs (c) and (d) of clause b(3) of Article 118 because in
32 order for the government to prove that Chief Welshofer was guilty of
33 murder, they had to prove beyond a reasonable doubt that he was
34 engaging in an inherently dangerous act to another that showed a
35 wanton disregard for human life. Under subparagraph (d), the
36 government had to prove beyond a reasonable doubt that
37 Chief Welshofer knew that death or great bodily harm was a probable
38 consequence of the act. The reason the testimony in the last
39 paragraph of Defense Exhibit F for ID was relevant to the elements
40 was because the last thing that Chief Welshofer wanted to do was kill
41 this man, understanding that intent was not an element under
42 Article 118. However, the defense argued, defense did play a role in
43 the issue because of some of the 404(b) evidence that had come in,
44 which had been entered partly for intent. Aside from that argument,

1 the defense argued that the last thing the accused wanted to do was
2 engage in an act that he knew was inherently dangerous.

3
4 The military judge recognized that the evidence would be admissible
5 on sentencing, if it should be necessary. The military judge asked
6 the defense for a case cite which supported the admissibility of this
7 kind of victim evidence on the merits.

8
9 The defense stated that they had not been able to find a case on
10 point which had to do with an underlying duty of the accused, which
11 in this case was an interrogation. Therefore, the defense argued, it
12 should be allowed to establish the whole story. The government had
13 to show beyond a reasonable doubt that when Chief Welshofer engaged
14 in the activity the government alleged him to have engaged in on
15 26 November 2003, at the time the accused did it, he knew that death
16 or great bodily harm was a probable consequence of the act. The
17 defense argued that because the general was so important to the
18 insurgency, the last thing the accused would have done would have
19 been to knowingly engage in an act that would have put the general's
20 life in danger. The defense additionally argued that it had to be
21 able to explain to the panel that the accused had the professional
22 purpose of getting information to beat the insurgency, and he
23 therefore was not going to engage in any activities that would
24 endanger the general's life. That information did extenuate and
25 mitigate the offenses, but it also went, the defense argued, to the
26 elements of Article 118 as well as lesser included offenses on which
27 the government might request instructions. The evidence went to the
28 standard of care of a reasonable person on lesser included offenses
29 and argued that a "reasonable person" in theater and in garrison
30 would not be the same.

31
32 The military judge disagreed and stated that he would review any case
33 law to support such a position.

34
35 The defense argued that it was not putting the victim on trial but
36 was trying to show what the accused's state of mind was with regard
37 to the Article 118 charge. It was not an "intent" issue but "wanton
38 disregard," which the government was trying to portray through the
39 series of interrogations.

40
41 The military judge noted that it was the act which evinced the wanton
42 disregard for human life.

43
44 The defense argued that the government was clearly trying to set up
45 the scenario where the interrogations were being ratcheted up. The

1 defense needed to be able to explain why it was being ratcheted up.
2 It was possible that the panel might think, with the current state of
3 the evidence, that the ratcheting up was for some sadistic reason
4 that had absolutely no operational purpose.

5
6 The defense viewed the evidence as relevant to elements three and
7 four of Article 118, clause b(3). The defense stated that the
8 evidence was relevant to the "wanton disregard" element.

9
10 The military judge stated it was the act which evinced the wanton
11 disregard and it was not a "knowledge" element. The fourth element
12 was a "knowledge" element.

13
14 The defense argued that one could not look at the third element
15 without looking also at all 404(b) evidence that had come in. One
16 had to look at the evidence in total. "Wanton disregard" was
17 characterized by heedlessness of the probable consequences. So, the
18 government had to show beyond a reasonable doubt that Chief Welshofer
19 was heedless of the probable consequences.

20
21 The military judge opined that the act evinced that and that the
22 defense seemed to be focusing on a "knowledge" element for element
23 three, not that the act evinced it but that it had to be the
24 knowledge that showed the wanton disregard. The military judge asked
25 the defense to tell him how the evidence about the victim was
26 relevant to the fourth element. He stated that he believed the
27 defense's argument to be that the evidence was relevant because it
28 suggested that since MG Mowhosh was a valuable intelligence asset,
29 who potentially could provide significant intelligence, it would be
30 unlikely that the accused would know that his death was a probable
31 consequence of his acts. It made it less likely that the accused
32 would know that death or great bodily harm was a probable consequence
33 of the acts he allegedly engaged in. The defense concurred that that
34 was its argument. The military judge asked the defense to explain
35 how the fact that the general was suspected of massacring Shiite
36 civilians had anything to do with his being a high-value intelligence
37 asset.

38
39 The defense argued that the intelligence would include numbers, grave
40 sites, what happened. In 2003, the U.S. was still looking for
41 weapons of mass destruction and for Saddam Hussein. Another aspect
42 would be that the evidence could go to whether or not continued
43 detention was necessary because the general was a potential war
44 criminal.

1 The military judge did not see that evidence as intelligence or
2 having anything to do with knowing whether the acts allegedly used
3 had the probable consequence of death or great bodily harm.

4
5 The defense disagreed, saying that if Chief Welshofer knew that the
6 acts he was doing that day were substantially likely to cause great
7 bodily harm or death, then he would not engage in that act. The
8 defense noted there was no agreement on what specific acts actually
9 occurred that day. The government was saying there was an
10 asphyxiation, which was a substantially different act from wrapping a
11 person in a sleeping bag, putting him down, covering the mouth for 10
12 to 15 seconds, and straddling the chest. That was not asphyxiation.
13 The defense defined "intelligence" as anything that would give
14 American forces a greater awareness of what was going on in Iraq,
15 where human atrocities were occurring. Anything that would give any
16 information on that would be "intelligence," and Chief Welshofer was
17 charged with getting that intelligence.

18
19 The trial counsel argued that the defense was failing to make a
20 distinction between "intentional" and "knowing." The elements of
21 Article 118, subsection (3) made that distinction. One element was
22 "intentional"; namely the act, and in the other, the "knowledge" went
23 only to whether the consequence was probable. Specifically, the
24 bench book stated that the act must be intentional, but death or
25 great bodily harm did not have to be the intended result.

26
27 The defense noted that intent was an element of the dereliction
28 charge. So, to the extent that intent was an issue, it did go to
29 Charge I.

30
31 The government argued that based on the instruction from the bench
32 book, the accused could literally have intended to not kill the
33 general.

34
35 The military judge opined that the "knowledge" element went to the
36 probable consequence of the act.

37
38 The defense stated that the accused had to know that the probable
39 consequence of the act was death or great bodily harm.

40
41 The military judge again stated that the focus was on the acts. The
42 "knowledge" element seemed to go to the probable consequence of the
43 act. The defense seemed to want to get the "knowledge" element into
44 another realm which did not seem applicable.

1 The defense stated that everyone agreed on the act. The government
2 had charged the act as asphyxiation. So, it was relevant to whether
3 or not also the act occurred. What the defense heard was that there
4 was no plan, motive, or intent; it was just Article 118 on the face,
5 in which case all the 404(b) evidence should be struck; it was not
6 relevant. The defense argued that the evidence was relevant because
7 it showed the general had intelligence information. It wasn't just
8 some whim of the accused's to engage in this act. This guy wasn't
9 just some rifleman and the accused was just looking for who the boss
10 was. The general was the boss. That's why Chief Welshofer would
11 use the sleeping-bag technique on this detainee and not every
12 detainee. But everybody heard that MAJ Voss said that the sleeping-
13 bag technique, close confinement, were allowed techniques. The panel
14 could not be thinking that this was just some sadistic motive. The
15 defense had an obligation to put on evidence to provide the whole
16 picture.

17
18 Regarding the dereliction charge, however, the defense argued that
19 the government was alleging that the accused had a duty to safeguard
20 the physical health, welfare, and treatment of MG Mowhosh and
21 intentionally did not perform that duty. There, intent was part of
22 the charge, and knowledge about MG Mowhosh would go to the intent
23 aspect of it.

24
25 The defense stated that in evidence was the fact that MG Mowhosh was
26 a general in the Iraqi Army as well as that he was an insurgency
27 ringleader in the Al Qaim, Iraq, area.

28
29 The prosecution also noted that a briefing slide which described the
30 general had been admitted into evidence as Prosecution Exhibit 25.

31
32 The military judge's concern was that, as he had indicated following
33 opening statements, the victim was not on trial. There was no
34 "necessity" defense in the military, and anything that suggested any
35 kind of jury nullification would not be permitted.

36
37 The military judge failed to see relevance of the stipulated
38 testimony in the last paragraph of Defense Exhibit F for ID towards
39 Charge II and was considering its relevance toward Charge I. If it
40 were relevant to Charge II, the military judge believed the probative
41 value of it was substantially outweighed by any danger of unfair
42 confusion or misleading the members.

43
44 The prosecution had the same analysis under the dereliction as it did
45 under the murder charge, arguing that the only thing that was

1 required was that the accused intentionally performed the act. The
2 natural and probable consequences of the act were that the victim
3 would be treated inhumanely.

4
5 The military judge believed the defense's argument in regard to
6 Charge I was that the stipulated testimony in the last paragraph of
7 Defense Exhibit F for ID might have the tendency to negate that
8 intent because the accused understood that MG Mowhosh was a high-
9 value intelligence asset.

10
11 The trial counsel pointed out that the defense argued that the
12 accused had not wanted to kill the general; it had not argued that
13 the accused had not wanted to treat him inhumanely.

14
15 The military judge, having considered the argument of counsel, found
16 that some of the stipulated testimony in the last paragraph in
17 Defense Exhibit F for ID would be relevant to the "willfulness"
18 element of the Specification of Charge I, the suggestion being that
19 the accused would be less likely to fail to provide adequate care,
20 etc., as charged, as was his duty to do, if he believed that the
21 general was a high-value intelligence asset. However, the sentence,
22 "We also discussed that MG Mowhosh was suspected of massacring
23 Shiite civilians" he found to be of very little probative value, if
24 any, in that regard. It might establish that the accused thought the
25 general was a criminal or a war criminal, but it seemed to have very
26 little, if anything, to do with the general's being a high-value
27 intelligence target. The probative value of that testimony was very
28 low. The probative value, he believed, was substantially outweighed
29 by the danger of unfair confusion or misleading of the members. He
30 would not permit that sentence to be presented to the members but
31 would permit the remainder of the paragraph to be presented to the
32 members with a limiting instruction on how they were to use the
33 evidence.

34
35 Counsel for both sides agreed that the language which the military
36 judge had found not admissible would be lined through to ensure that
37 the defense counsel did not read it aloud when reading the
38 stipulation of expected testimony to the panel. The stipulation with
39 the language lined through was marked as Defense Exhibit H for ID.

40
41 The prosecution asked the military judge to reconsider his ruling to
42 the extent that it included the language which followed the deleted
43 language. The government did not believe that language to be
44 relevant to the willful disregard of the accused's duty to provide
45 humane treatment to the general. It did not follow that, merely

1 because the accused suspected that the general was a high-value
2 target, the acts performed by the accused were performed humanely.
3 The focus of a willful dereliction was on the acts performed. The
4 analysis the panel members would be asked to perform was, Were those
5 acts humane or not? The intent behind performing those acts was
6 irrelevant. The intent that was relevant was the intent simply to
7 perform the acts. It was in effect the difference between "intent"
8 and "motive." Here the focus was committing an intentional act;
9 e.g., placing a hand over the mouth. The motive behind doing that
10 was irrelevant. Whether it was to prevent one from crying out to his
11 god or to prevent one from breathing, the probable consequences of
12 that act flowed, either way. Under Charge I, there were the same
13 results. That act, by itself, was either humane or inhumane. And
14 what Mr. Welshofer thought of the subject was irrelevant. The only
15 piece that was relevant was that he intended to perform that act,
16 that he intended to fail to provide due care.

17
18 The military judge adhered to his ruling and stated that he would
19 give a limiting instruction.

20
21 The court recessed at 1412 hours and reconvened at 1439 hours,
22 20 January 2006, all parties again present except the members.

23
24 The military judge instructed the accused with regard to stipulations
25 of expected testimony and ensured that the accused wished to enter
26 into the stipulation.

27
28 Defense Exhibit H for ID was offered and received into evidence as
29 Defense Exhibit H.

30
31 The military judge read to counsel the limiting instruction he
32 intended to give to the members. There were no objections to the
33 instruction by either side.

34
35 The Article 39(a) session was concluded, and the members returned to
36 the courtroom at 1444 hours, 20 January 2006.

37
38 The military defense counsel read aloud Defense Exhibit H, omitting
39 the sentence lined through in that exhibit.

40
41 The military judge instructed the court members that in the last
42 paragraph of the stipulation of expected testimony that had just been
43 read to them, they had heard some information about MG Mowhosh and
44 that he was instructing them that the victim was not on trial in the
45 case. They were to consider that evidence for its tendency, if any,

1 to make more or less likely the "willfulness" element of the
2 Specification of Charge I. The military judge informed the panel
3 members that he would instruct them on all of the elements of the
4 offenses at the close of evidence in the case. The evidence that the
5 members had just heard in the last paragraph of the stipulation of
6 expected testimony was relevant to the Specification of Charge I but
7 not to the other charges and specifications. The members could
8 consider the evidence solely with respect to the Specification of
9 Charge I.

10
11 The military judge received affirmation from the court members that
12 they understood and could follow the instruction.

13
14 MAJ Robert E. Short, U.S. Army, was called as a witness by the
15 defense on the merits, was sworn, and testified in substance as
16 follows:

17
18 DIRECT EXAMINATION

19
20 (under questioning by the military defense counsel)

21
22 I am from HHC, 7th ID, Fort Carson, Colorado.

23
24 I am the Deputy G-2 for 7th ID.

25
26 I know Chief Welshofer. He is working in the 7th ID G-2 office
27 right now. I knew Chief Welshofer, as well, from the 3d ACR
28 when I was the Regimental S-2 for 3d ACR and he was the senior
29 interrogator for 3d ACR.

30
31 I've been in the Army a little over 16 years. I originally came
32 in as an enlisted soldier. I was an 11-Bravo and then went to
33 OCS, receiving my commission in 1989. I was a Field Artillery
34 officer. I was a Fire Support officer, Battalion Motor officer,
35 Battalion S-2, Brigade S-2 for a military police brigade,
36 company commander, worked as an Operations and Research Systems
37 Analysis officer for a few years, and then Regimental S-2 for a
38 while. I deployed to Operation Desert Storm as a field
39 artillery officer, went to Bosnia, to OIF-I and then OIF-III.

40
41 I deployed to Iraq with the 3d ACR in June of 2003. I joined
42 3d ACR as an individual replacement for the previous S-2. I
43 served as the S-2 for the 3d ACR the entire time I was in Iraq.
44 I redeployed in March 2005 and returned in September.
45

1 In the autumn of 2003, I was the S-2 for 3d ACR. I was
2 preparing for Operation Rifles Blitz. We'd realized after
3 operating in the area for multiple months that the Al Qaim
4 region was a source of a lot of problems. In the last month,
5 we'd seen an increase in attacks against our patrols. We'd gone
6 from maybe one a day or less than one a day up to seven a day.
7 We realized that there was a problem in the town. We'd also
8 seen kind of a change in the characterization of the attacks.
9 They weren't just attacking us; they were also attacking the
10 locals, starting to hit the buildings, the mosques, just things
11 we hadn't seen before. It caused the staff to recommend to
12 COL Teeple that we do an operation in Al Qaim. Chief Welshofer
13 was part of that planning as far as how to support with HUMINT
14 intelligence.

15
16 We weren't really clear through September who the leader of the
17 insurgency was. We knew that there was a major general who'd
18 been referred to a few times. We had a link diagram. We'd
19 recognized that there was a guy up there. We didn't have a name
20 on him, and then we realized it was MG Mowhosh. We actually had
21 captured his sons, and he gave himself up, basically, to try to
22 talk us into releasing his sons.

23
24 The court members departed the courtroom at 1457 hours, 20 January
25 2006, at which time the military judge held an Article 39(a) session.

26
27 The prosecution argued that there had been enough testimony about
28 MG Mowhosh to the extent the military judge had found relevant under
29 Charge I, and to get further into what people may or may not have
30 suspected about the general's activities in the Al Qaim area evolved
31 into putting the victim on trial.

32
33 The military defense counsel told the military judge that MAJ Short
34 had been cautioned not to talk about anything that the military judge
35 had determined was inadmissible.

36
37 The military judge discussed with defense counsel what the extent of
38 his questioning would be. The defense counsel made a proffer that
39 the witness would testify that MG Mowhosh was the leader/financier
40 in control of shuttling fighters over the Syrian border to get to
41 different places in Iraq.

42
43 The government argued that the witness should not be allowed to
44 testify that the victim in this case ferried fighters across the
45 Syrian border, as that evidence had no bearing on the treatment he

1 received while detained. The government argued that the inference
2 left with the panel members would be that the victim was a bad guy.

3
4 The military judge stated that he would not allow the point that the
5 victim was a bag guy or an evil man to be argued.

6
7 The government argued that to allow the evidence in would be to allow
8 improper evidence.

9
10 The military judge stated that he had already determined that there
11 was some relevance to the evidence and that the issue appeared to be
12 whether it was cumulative.

13
14 The government opined that testimony that there was importation of
15 foreign fighters from Syria was new evidence that was prejudicial and
16 confusing.

17
18 The military judge found the evidence similar to the last sentence in
19 the stipulation of expected testimony.

20
21 The government argued that there was a difference in the testimony in
22 that the stipulation merely mentioned knowledge regarding the
23 insurgency along the Iraqi-Syrian border whereas the question being
24 posed sought to bring out that the general was himself responsible
25 for the ferrying of fighters across the border.

26
27 The defense felt that the same logic as had been previously argued
28 applied. MAJ Short's testimony was not cumulative in that he gave
29 more information on MG Mowhosh's activities in the Al Qaim area. The
30 defense counsel explained the limited nature of the questions in this
31 regard that he would be posing.

32
33 The military judge stated that he would overrule the objection and
34 again give a limiting instruction after the testimony. The military
35 judge was confident that the members could adhere to his instruction.

36
37 The military judge cautioned the witness not to testify about any
38 knowledge he might have of the massacre of any Shiite civilians.

39
40 The Article 39(a) session was concluded, and the members returned to
41 the courtroom at 1510 hours, 20 January 2006.

42
43 (further testimony on direct examination of MAJ Short by the military
44 defense counsel)

1 MG Mowhosh was the leader of the insurgency in the Al Qaim area.
2 We felt that there were a couple of different insurgency groups.
3 He was basically the senior guy in the area, that everyone else
4 kind of bent to. He was the gate-keeper in Al Qaim into the
5 rest of Iraq. Anything that went through that town ran through
6 him and his gang, and anything that was left over went to the
7 other groups. You could liken him to a mob boss. Foreign
8 fighters were coming in through the Al Qaim region. MG Mowhosh
9 was financing housing, providing safe houses, and directing them
10 down the Euphrates River Valley as they worked their way into
11 Iraq and ultimately into Baghdad or north up to Mosul. This
12 information was shared with Chief Welshofer before MG Mowhosh's
13 death.
14

15 The military judge instructed the members of the court that they had
16 just heard more evidence about the victim in the case, MG Mowhosh.
17 He advised them again that the victim was not on trial in the case.
18 From the evidence they could not assume that the individual,
19 MG Mowhosh was somehow of bad character. The general was not on
20 trial in the case. The military judge instructed the members that
21 they were to consider the evidence for its tendency, if any, to make
22 more or less likely the "willfulness" element of the Specification of
23 Charge I; i.e., willful dereliction of duty. The military judge
24 reminded the members that he would instruct as to the elements of the
25 offenses at the close of the evidence in the case. The testimony the
26 members had just heard was relevant to the Specification of Charge I
27 and not to the other charges and specifications. They could consider
28 the evidence solely with respect to the dereliction-of-duty offense,
29 the Specification of Charge I and not to the other charges and
30 specifications.
31

32 The court members assured the military judge that they understood and
33 could follow the instruction.
34

35 (further testimony on direct examination of MAJ Short by the military
36 defense counsel)
37

38 In the summer and autumn of 2003, we did not receive any
39 interrogation guidance from 3d ACR. We attempted to find
40 guidance during that time period. We got formal guidance out of
41 the 82d Airborne either at the very end of December or in
42 January. We got a comprehensive guide on how to run prisons,
43 detainee operations, and some guidance on interrogations.
44

1 I met Chief Welshofer when I first came into the unit when I
2 went out and inspected and met all the intel soldiers in 3d ACR
3 as I could get to them. In the desert, the distances were so
4 far during part of the deployment that I rarely saw
5 Mr. Welshofer other than once or twice a month. When we all
6 ended up at Al Asad, I saw him probably two or three times a
7 week but not out at his cage, just at lunch or at the ACE or in
8 the regimental headquarters. That kind of interaction lasted
9 until I redeployed. Towards the end, when he'd been relieved of
10 his interrogation duties, I saw him quite a bit. Upon
11 redeployment, Mr. Welshofer was removed from 3d ACR, I believe
12 during the summertime. I really didn't see him until I returned
13 and started working in the 7th Infantry Division.

14
15 I believe that I've had the opportunity to observe and evaluate
16 Chief Welshofer's duty performance. I have an opinion about his
17 military character. Mr. Welshofer is an honest, hardworking
18 professional officer. I have an opinion about his character for
19 honesty and truthfulness. Mr. Welshofer is honest and truthful.

20 21 CROSS-EXAMINATION

22
23 (under questioning by the assistant trial counsel)

24
25 Monitoring the interrogation techniques that Mr. Welshofer and
26 his interrogators used was not my lane. For monitoring, I
27 relied upon MAJ Voss, the commander. I certainly welcomed
28 Chief Welshofer's expertise. I knew he had 17 years' experience
29 as an interrogator, and I was aware of his training. I had a
30 very high opinion of him. It was reasonable for me to trust him
31 to do the right thing. We did not have enough people over
32 there. We all worked hard. I was an O4 doing an O4's job by
33 MTOE. I knew that I would be working hard, with fewer people
34 than I thought I would have. The same was true throughout
35 theater. People had to step up and do the right thing.

36
37 To get interrogation policies is really my job. I do recognize
38 Defense Exhibit A. I believe I saw this in December. I was
39 aware that MAJ Voss and Mr. Welshofer had a back-channel copy of
40 this. I didn't know that it was signed. So, I thought this was
41 the direction the corps commander was leaning. I knew later
42 that Mr. Welshofer had had this memo. It was a struggle to get
43 any kind of guidance out of CJTF-7 at the time. I would expect
44 Chief Welshofer to reach out and get that guidance if he could.
45 It appears he was at least partially successful.

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REDIRECT EXAMINATION

(under questioning by the military defense counsel)

Interrogations were a concern for us. We were getting no guidance. The FM is kind of old and outdated. It wasn't designed for an insurgency but more for Cold War fighting tactics. So, it didn't apply or didn't seem to apply. We were running into difficulties in areas that the FM did not address. One of the questions we were asking CJTF-7 was for interrogation guidance. We knew that guidance had been given in Afghanistan during operations there, and we were looking for something similar.

EXAMINATION BY THE COURT-MARTIAL

(under questioning by the military judge based upon Appellate Exhibits XLVII and XLVIII)

As to whether it would have been proper to utilize interrogation ROE used in Afghanistan, due to the lack of guidance and the fact that both Iraq and Afghanistan fall under CENTCOM area of responsibility, we would have looked at how it was issued from CENTCOM and if it was issued as an AOR guidance or if it was specific to Afghanistan.

TTPs not in the current FM should be approved by a higher authority rather than an individual personally developing his own.

RE CROSS-EXAMINATION

(under questioning by the assistant trial counsel)

In the absence of guidance, it would be fair to fall back on the guidance provided in the field manual. What should have happened is that corps should have issued guidance. If corps did issue guidance, it should have been followed. Prosecution Exhibit 27 is the 12 October memo signed by LTG Sanchez. This is the guidance I discovered in December or January of 2003. There were three memorandums.

The members departed the courtroom at 1530 hours, 20 January 2006, at which time the military judge held an Article 39(a) session.

1
2 The witness departed the courtroom.

3
4 The defense argued that a question posed by the prosecution was based
5 on mischaracterization of prior testimony, since the accused had
6 never acknowledged seeing the 12 October memo and had said, "They are
7 breaking the rules every day," not "We are breaking the rules every
8 day," according to prior testimony.

9
10 The prosecution argued that the defense was free to argue that there
11 was room for confusion in regard to the conversation. The government
12 stated that it was not bound by the defense's confusion. The
13 government witness had been unequivocal in his testimony that he had
14 been referring to the 12 October memo.

15
16 The defense argued that the evidence had to be presented to the
17 witness as it had come out in court. The government witness, the
18 defense argued, had been unequivocal about the fact that he had been
19 referring to the 12 October memo but had been equivocal about whether
20 or not he had specifically stated that he was referring to the
21 12 October memo when questioning the accused.

22
23 The military judge ruled that he would allow the prosecution to ask
24 the witness whether he was aware that the accused had told someone on
25 25 November that he was aware of guidance. The military judge did
26 not believe the witness had been certain that he had mentioned the
27 date of 12 October 2003. The military judge ruled that he would
28 permit the government to ask the current witness if he was aware that
29 the accused had stated that he was aware on 25 November of guidance.

30
31 The witness returned to the witness stand.

32
33 The Article 39(a) session was concluded, and the members returned to
34 the courtroom at 1539 hours, 20 January 2006.

35
36 (further testimony on recross-examination of MAJ Short by the
37 prosecution)

38
39 I am not aware that on 25 November 2003, Mr. Welshofer
40 acknowledged having received guidance from CJTF-7 on
41 interrogation techniques. I am not aware that concerning that
42 guidance, the accused said, "I'm pretty sure we're violating it
43 every day." If I knew that he had said that, it would not
44 change my opinion about his military character because we hadn't
45 received any guidance for quite some time. If he had

1 acknowledged having received the guidance and then said, "But
2 I'm pretty sure we're breaking that guidance every day," I'd be
3 surprised he said that.
4

5 The defense objected to the characterization of the evidence as to
6 what the accused had said in regard to the guidance.
7

8 The military judge overruled the objection.
9

10 (further testimony on cross-examination of MAJ Short by the assistant
11 trial counsel)
12

13 I'd be pretty surprised that he said that.
14

15 The defense objected that the question was beyond the scope of the
16 panel member's question and requested a limiting instruction.
17

18 The objection was overruled, and the military judge stated that he
19 would give a limiting instruction.
20

21 (further testimony on cross-examination of MAJ Short by the assistant
22 trial counsel)
23

24 Had the accused made such a statement, it would change my
25 opinion about his military character.
26

27 The military judge instructed the members that the testimony elicited
28 could be considered by them not for any substantive purpose but only
29 in evaluating the basis of the witness's opinion of the military
30 character of the accused. The members assured the military judge
31 that they understood the instruction.
32

33 REDIRECT EXAMINATION

34
35 (under questioning by the military defense counsel)
36

37 I don't know if Chief Welshofer made any statements anything
38 like what was represented to me by the government counsel. As I
39 said, I would have been surprised if he'd said it, and, yes, it
40 would have changed my opinion.
41

42 The witness was temporarily excused, was duly warned, and departed
43 the courtroom.
44

1 LTC Paul Calvert, U.S. Army, was called as a witness by the defense
2 on the merits, was sworn, and testified in substance as follows:

3
4 DIRECT EXAMINATION

5
6 (under questioning by the military defense counsel)

7
8 I am currently assigned to Northern Command, Colorado Springs,
9 Colorado.

10
11 I know Chief Lewis Welshofer. He was assigned to the 3d ACR to
12 the MI Company at the same time I was assigned to the Regimental
13 Headquarters Troop. I arrived 1 October 2002, and I left in
14 June of 2004. I was the Regimental Operations Officer, S-3.

15
16 I came into the Army 19 May 1988. I attended the Armor Officer
17 Basic Course at Fort Knox, Kentucky. My first assignment was to
18 2d ACR in Germany as a lieutenant. Subsequently, I went to
19 3d ACR as a captain and did two troop commands there, followed
20 by a stint in D.C., then PERSCOM as the armor branch chief on
21 the enlisted side, and then CGSC 11th ACR as an S-3 of an
22 infantry battalion in the OP-4, and then I was the regimental
23 S-3 of the 11th ACR and subsequently the S-3 at 3d ACR. I
24 received my commission from ROTC at North Georgia College. I
25 have been selected for command and will take command of
26 2d Squadron, 3d ACR, in June of this year. I deployed with
27 2d ACR when I was a lieutenant for Operation Desert
28 Shield/Desert Storm, and then I deployed with the regiment for
29 OIF-I.

30
31 I saw Chief Welshofer on the periphery as he did some of his
32 work, not directly as an interrogator, but during the weekly
33 fusion meetings we had in the ACE. He would frequently attend
34 those. I saw him at some of the war-gaming sessions we did
35 prior to deployment, during exercises, as well as preparation
36 for deployment and the war games we did there, and then during
37 some of the MDMP processes we did while we were in country. I
38 was not in Chief Welshofer's chain of command in terms of
39 evaluating him from an OER standpoint, but I had the opportunity
40 to observe and evaluate Chief Welshofer's duty performance and
41 form my personal opinion of how he did his job. My opinion of
42 Chief is simply that he's a quiet professional, competent and
43 skilled in his chosen profession, and that he always tried to do
44 the right thing in every action that I saw him execute in his
45 professional responsibilities. I have an opinion about Chief

1 Welshofer's character for honesty and truthfulness. I believe
2 he is an honest and truthful individual.
3

4 Intelligence-gathering was of such importance to my planning as
5 the operations officer that we lived and died off of
6 intelligence. Intelligence is what drove operations. The lack
7 of intelligence and information significantly impeded our
8 ability to do effective operations within the AO that we were
9 working.
10

11 CROSS-EXAMINATION
12

13 (under questioning by the assistant trial counsel)
14

15 My need for intelligence would not excuse bad behavior. There
16 is a standard that exists. We lived and died by intelligence,
17 but there is a right and wrong way to things.
18

19 I have not seen Mr. Welshofer conduct an interrogation. I
20 worked out of the regimental headquarters predominantly,
21 dependent upon missions that were ongoing within the regiment.
22 Sometimes I'd be forward in the TAC; for example, during
23 Operation Rifles Blitz, I was out on the Syrian border. For the
24 most part, I was out at the regimental headquarters. The S-3
25 shop was set up adjacent to the S-2 shop, or at least the ACE,
26 and most of the time during the course of the day, I was out
27 flying somewhere within the AO with the regimental commander.
28 But most of my evenings were spent there at the headquarters. I
29 didn't see Chief Welshofer every day.
30

31 The witness was temporarily excused, was duly warned, and departed
32 the courtroom.
33

34 The court recessed at 1552 hours and reconvened at 1614 hours,
35 20 January 2006, all parties again present, including the members.
36

37 The defense rested.
38

39 MAJ Michael E. Smith, M.D., U.S. Army, was recalled as a witness by
40 the prosecution in rebuttal, was reminded that he was still under
41 oath, and testified in substance as follows:
42

43 DIRECT EXAMINATION
44

45 (under questioning by the assistant trial counsel)

1
2 I heard the testimony of Dr. Wecht. I am not aware of any
3 circumstances where someone has accidentally died of a heart
4 attack. I listened to the explanations offered by Dr. Wecht. I
5 basically recall Dr. Wecht's saying that the general died of a
6 disrrhythmia, or a heart attack, and that he felt it was an
7 accident because of stress. That does not fit within the
8 definition of "accident" as it's used in the field of forensic
9 pathology. If someone dies of an accident, it's due to a
10 violent or traumatic event that is not purposeful by someone. I
11 gave the example of a car being hit on the side of the road and
12 the occupant dying. For someone to die of a heart attack, that
13 is a natural event; that is, that person has died exclusively of
14 disease. I'm convinced the manner of death was homicide.
15

16 I listened to the testimony of Ms. Marlow, a physician's
17 assistant, who was one of the first responders when CPR was
18 being conducted. I heard the testimony about crunching sounds
19 during the CPR. That is commonly seen if ribs in the front of
20 the chest are broken during CPR, and I believe that is probably
21 what happened. The other possibility is that the ribs that were
22 already broken, if you were to push on the chest, would have a
23 crunching sound. I have personally performed CPR on someone who
24 was in an accident and had broken ribs. When you push on the
25 chest, because the ribs are broken, there is a crunching sound.
26 So, there are two possibilities for that observation. There was
27 hemorrhage surrounding the broken ribs on the side and the back
28 of the chest of the general, indicating that the general was
29 alive when those ribs were broken. I did not see the same sort
30 of hemorrhaging on the broken ribs in the front of the general.
31

32 I examined Prosecution Exhibit 31 for Identification, an autopsy
33 report on a Charles Dixon. The thing that struck me about that
34 autopsy report was the remarkable similarities to the case of
35 MG Mowhosh. Both men were large. I believe Mr. Dixon was
36 around 300 to 330 pounds. MG Mowhosh I estimated to be at least
37 250 pounds, potentially more. I've heard estimates of his
38 weight that exceeded that amount. The other similarities that I
39 immediately noticed were that Dr. Wecht felt that the cause of
40 death in Mr. Dixon's case was asphyxia. I feel the cause of
41 death in MG Mowhosh's case was asphyxia. The other thing that
42 was remarkably similar was that Mr. Dixon had an enlarged heart.
43 His heart was within 10 grams of MG Mowhosh's. It was almost
44 exactly the same size as MG Mowhosh's. The difference is
45 probably about the weight of 10 paperclips. The last thing that

1 was remarkable was that Dr. Wecht thought that Mr. Dixon's death
2 was a homicide, as I feel that MG Mowhosh's death was a
3 homicide.
4

5 Having reviewed the autopsy reports, Prosecution Exhibit 28 and
6 Prosecution Exhibit 31 for ID, I also note that Mr. Dixon had
7 evidence of trauma; that is, he had abrasions of his nose, upper
8 back, etc. The remarkable similarities are there are absolutely
9 no petechiae identified in Dr. Wecht's autopsy report of
10 Mr. Dixon. There were no petechiae identified in my autopsy
11 report of MG Mowhosh. There is no mention of a lacerated
12 frenulum in Mr. Dixon's autopsy report. There is no mention of
13 a lacerated frenulum in MG Mowhosh's autopsy report. There are
14 some other minor similarities. It looks like Mr. Dixon had a
15 fatty liver; MG Mowhosh also had a fatty liver. I ruled
16 MG Mowhosh's case to be a homicide. Dr. Wecht ruled the Dixon
17 case to be a homicide.
18

19 Dr. Wecht included not just that the manner of death was an
20 accident in MG Mowhosh's case but that the cause of death was a
21 heart failure. I disagree with that finding. Just as in the
22 autopsy report for Mr. Dixon, the circumstances were extremely
23 supportive of an asphyxial event. In Mr. Dixon's case, he was
24 apparently arrested by law enforcement, was placed in a position
25 where he was not able to breathe, and may or may not have had
26 someone pressing on his back. There is no mention of anyone
27 pressing on his back in the autopsy report, only from
28 Dr. Wecht's testimony. The report itself, Prosecution
29 Exhibit 31 for ID, does not detail the circumstances in that
30 death, but it does say that it's "positional"; that is, that he
31 was arrested and placed in a face-down position. I believe his
32 hands were handcuffed behind his back.
33

34 Placing a 330-pound man stomach-down on the ground with his
35 hands restrained behind him could be enough to cause asphyxia,
36 in Dr. Wecht's opinion, as well as in my own opinion. That is a
37 common event. Law enforcement within the United States is well
38 aware of this potential complication, and in many jurisdictions
39 they have been advised about the potential for positional
40 asphyxia.
41

42 As I've stated before, the circumstances surrounding
43 MG Mowhosh's death are that someone was sitting on his chest;
44 his breathing was restricted in multiple different manners. His

1 heart was enlarged, but the circumstances surrounding this death
2 do not support that he had a heart attack.
3

4 CROSS-EXAMINATION
5

6 (under questioning by the civilian defense counsel)
7

8 I would agree that the panel in this case does not have all the
9 facts surrounding the death of Mr. Dixon before them. The
10 autopsy report does not say how many police officers were
11 sitting on top of Mr. Dixon or for how long. The autopsy report
12 does not say how long Mr. Dixon had been restrained. So, to be
13 able to compare the Dixon case with this case is really a
14 difficult task. All we're comparing here are autopsy findings.
15 I do not believe you brought up the Dixon case in your direct
16 examination of Dr. Wecht. Dr. Wecht based his decision in this
17 case on the facts of this case, as far as I know. He based his
18 opinion in this case on the autopsy in this case along with the
19 evidence that he had been provided, the circumstances.
20

21 I said that it was well-known within the law enforcement
22 community of the potential for asphyxiation. The medical
23 examiner community has brought it to attention. Whether
24 specific law enforcement agencies have had specific instruction
25 is out of my lane. There's no evidence in this case that
26 Chief Welshofer has been privy to the education provided law
27 enforcement officers. Typically, arrested individuals are
28 cuffed behind their back. In this case, MG Mowhosh had his
29 hands zip-tied in front of him. There is a difference there.
30

31 There is a 13-year difference in age in these two individuals.
32 Age may not necessarily correlate to health.
33

34 We know that MG Mowhosh was in detention the 14 days before he
35 died. We do not know how much or how little he had to eat in
36 those days. We have information about the potential for stress
37 in that environment. We don't know anything about Mr. Dixon the
38 14 days before he died. That's more information that the
39 members don't have in comparing these two cases. We don't know
40 whether Mr. Dixon had four sons in captivity at the time that he
41 was apprehended by the police. There is a tremendous amount of
42 information that the court does not know about the Dixon case.
43

44 When a pathologist comes to a medical opinion, there is a degree
45 of subjectivity involved. I have performed over 500 autopsies.

1 I believe Dr. Wecht said he had performed around 15,000
2 autopsies.

3
4 **REDIRECT EXAMINATION**

5
6 (under questioning by the assistant trial counsel)

7
8 It is possible for a man to die of asphyxia solely by being
9 placed face-down on the ground with his hands restrained behind
10 him.

11
12 **RECROSS-EXAMINATION**

13
14 (under questioning by the civilian defense counsel)

15
16 When I testified previously, I had only heard the government's
17 case. At this point, Chief Welshofer has testified that he did
18 not place his full body weight on MG Mowhosh's body.
19 Ultimately, it is up to the members to decide how much weight
20 was placed on the general. If they determined that Chief
21 Welshofer was truthful about not placing his weight upon
22 MG Mowhosh, that would undermine my opinion.

23
24 **REDIRECT EXAMINATION**

25
26 (under questioning by the assistant trial counsel)

27
28 If I assume that the accused was telling the truth in that he
29 placed some of his weight on the chest and back of the general,
30 it would not change my opinion at all, and I would still rule
31 this as a homicide. There are multiple ways that the general's
32 ability to breathe were interfered with. Number one, he was
33 placed in a sleeping bag. Number two, a hand was placed over
34 his mouth and/or nose. Number three, some, if not all, of the
35 accused's body weight was placed on the general's chest and
36 back. Having previously-broken ribs would make it difficult to
37 take in a good, deep breath.

38
39 **RECROSS-EXAMINATION**

40
41 (under questioning by the civilian defense counsel)

42
43 It is my opinion that the general's ribs were broken prior to
44 this interrogation when he died. I believe that when
45 Chief Welshofer straddled him or placed some of his weight on

1 the general, he cried out "Wallah." I'm not aware that the
2 general ever said, "I am in pain."

3
4 EXAMINATION BY THE COURT-MARTIAL

5
6 (under questioning by the military judge based upon Appellate
7 Exhibits XLIX and L)

8
9 Stress can bring on a heart attack.

10
11 Prosecution Exhibit 32 depicts the expression on the accused's
12 face at death. Medically, it indicates nothing.

13
14 The military judge informed the court member that the rules of
15 evidence prevented him from asking the first question in Appellate
16 Exhibit L.

17
18 The witness was permanently excused, was duly warned, and departed
19 the courtroom.

20
21 The prosecution rested its case in rebuttal.

22
23 There was no surrebuttal.

24
25 The members were released for the evening with an admonition not to
26 read or listen to any accounts of the trial and departed the
27 courtroom at 1641 hours, 20 January 2006, at which time the military
28 judge held an Article 39(a) session.

29
30 The prosecution requested a recess to discuss with defense the
31 findings worksheet.

32
33 The court recessed at 1643 hours and reconvened at 1903 hours,
34 20 January 2006, all parties again present except the members.

35
36 The government saw as lesser included offenses involuntary
37 manslaughter and negligent homicide with respect to the murder charge
38 and negligent dereliction with respect to the dereliction charge.
39 The civilian defense counsel concurred, except that the defense
40 position was that under no circumstance could the accused be
41 convicted of the death of MG Mowhosh under any greater or lesser
42 offense related to homicide if the members were not convinced beyond
43 a reasonable doubt that the general died by suffocation or
44 asphyxiation. Only if they found beyond a reasonable doubt that he
45 died by asphyxiation could they find him guilty of either Article 118

1 or any of the related lesser included offenses. The defense
2 requested that the members be so instructed. Under the same facts
3 and circumstances, if the government had charged the accused with
4 death based on dying of a heart attack or heart failure, then the
5 defense would have made a motion to dismiss the charges for failing
6 to state an offense because it was the defense belief that if a
7 person died of a heart attack from the stress of an interrogation,
8 there would be no way that could be considered a criminal homicide.
9

10 The government countered that for argument's sake, that could be a
11 homicide. Felony murder could be charged where there had been a
12 robbery, a weapon had been fired in an occupant's room where the
13 robbery was taking place, and the occupant died from the shock of
14 hearing the gunshot.
15

16 The defense pointed out that felony murder was a completely different
17 theory from what was being charged in this case. The defense wanted
18 to see some case law that said death by a heart attack could be a
19 homicide.
20

21 The prosecution noted that every death involved heart failure. The
22 heart would fail in every death.
23

24 The military judge declined to give the defense-requested
25 instruction. He believed that that was an overly-constraining
26 instruction and was certainly something that could be reasonable
27 argument but was not something on which he would instruct.
28

29 The defense wished to bring to the court's attention something that
30 was a significant issue in the appellate courts currently. There
31 were some cases in which a person had been charged with divers acts.
32 The problem was when the members decided that the accused was not
33 guilty of one act but guilty of another and they eliminated "divers."
34 The military judge needed to make clear to the members that they
35 needed to be able to articulate the act of which they were finding
36 the accused guilty.
37

38 The military judge was cognizant of the case law.
39

40 The defense argued that if the members were not instructed as the
41 defense requested, there could be some members who believed that the
42 death was due to asphyxiation and others who believed it was due to a
43 stress-related heart attack, and the appellate courts would not be
44 able to determine which theory under which the members had made a
45 decision and therefore upon which the defense could focus an appeal.

1 The defense argued that if the military judge did not intend to give
2 the requested instruction, then he would have to give some
3 instruction that addressed that possibility if it were the court's
4 position that the government did not have to prove death by
5 suffocation.

6
7 The military judge stated that he understood the case law but that
8 "divers occasions" was not at issue in this case. He declined to
9 give the requested instruction.

10
11 The military judge listed the instructions that he intended to give.

12
13 Appellate Exhibit LII was a draft of an instruction the military
14 judge intended to give.

15
16 The defense requested that the instruction in Appellate Exhibit LII
17 be given to the panel members in written form. The instruction
18 appeared to cover all the defense's concerns, and the civilian
19 defense counsel intended to study it more closely overnight and to
20 raise any concerns, other than what he had already articulated at an
21 802 session, the following morning.

22
23 The military judge advised counsel that depending upon the content of
24 their closing arguments, he might feel it necessary to give the
25 members an instruction that "necessity" was not a defense in the
26 military.

27
28 The defense counsel read aloud from a statement that had been made by
29 Mr. Pratt, a government witness, in which there were statements
30 inconsistent with the testimony the witness had given on the stand.
31 When the defense counsel had confronted Mr. Pratt on cross-
32 examination with the statement, the witness had agreed that he had
33 made the inconsistent statement, so the statement had not been marked
34 as an exhibit or shown to the witness to impeach him. The
35 government agreed that what appeared in the statement was
36 inconsistent with the witness's testimony on the stand. The defense
37 asked only for an instruction to the members that Mr. Pratt had given
38 inconsistent statements but not specifics as to what the
39 inconsistencies were.

40
41 The prosecution asked for an instruction as to prior inconsistent
42 statement concerning the accused in regard to whether or not he had a
43 memo on guidelines for interrogation.

1 The military judge declined to give the instruction with regard to
2 the accused but would allow counsel to argue the point.
3
4 The defense asked for an instruction on uncharged misconduct.
5
6 The military judge suggested that an uncharged-misconduct instruction
7 might relate to other interrogations of MG Mowhosh that may tend to
8 show an escalated pattern of interrogation techniques. The defense
9 concurred.
10
11 The military judge agreed to consider giving an instruction as to
12 mistake of fact as it would apply to the Specification of Charge I
13 only.
14
15 The court adjourned at 1937 hours, 20 January 2006.