

OFFICE OF THE CHIEF CIRCUIT JUDGE
FOURTH JUDICIAL CIRCUIT
FORT LEWIS, WA 98433

UNITED STATES

V.

WELSHOFER, Lewis CW3
66th MI Company,
3d Squadron,
3d Armored Cavalry Regiment (Rear),
Fort Carson, CO 80913

) RULING ON
) DEFENSE MOTION TO
) COMPEL PRODUCTION
) OF WITNESSES
)
)
)

29 December 2005

The Court has considered the defense motion to compel production of witnesses, the supporting documents provided thereto, the government response to the defense motion, and the defense reply to the government response.

In accordance with R.C.M. 703(c)(2), the defense has requested the Court order the production of nine witnesses denied by the government. As to each of the witnesses, the Court finds and rules:

CPT Derik Timmerman – the defense has failed to sufficiently establish relevance and necessity for the testimony of this witness, accordingly, the defense motion to produce is denied.

MAJ Paul Hussein – the defense has failed to sufficiently establish relevance and necessity for the testimony of this witness, accordingly, the defense motion to produce is denied.

Mr. James Reese – the defense has sufficiently established relevance and necessity for the testimony of this witness, accordingly, the defense motion to produce is granted.

CPT Brian Baldrate – the defense has failed to sufficiently establish relevance and necessity for the testimony of this witness, accordingly, the defense motion to produce is denied.

MSG George Kurban – the defense has failed to sufficiently establish relevance and necessity for the testimony of this witness, accordingly, the defense motion to produce is denied.

p. 102
Appellate Exhibit

XVII

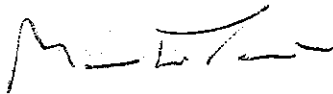
Ms. Marielena Marlow – the defense has sufficiently established relevance and necessity for the testimony of this witness, accordingly, the defense motion to produce is granted.

CPT Burton Glover – the defense has failed to sufficiently establish relevance and necessity for the testimony of this witness, accordingly, the defense motion to produce is denied.

Mr. Ray Gleaton – the defense has sufficiently established relevance and necessity for the testimony of this witness, accordingly, the defense motion to produce is granted.

SSG Paul Olsen – the defense has failed to sufficiently establish relevance and necessity for the testimony of this witness, accordingly, the defense motion to produce is denied.

Ruling: The defense motion as it relates to Mr. Reese, Ms. Marlow, and Mr. Gleaton is granted, it is otherwise denied.



MARK L. TOOLE
COL, JA
Military Judge

OFFICE OF THE CHIEF CIRCUIT JUDGE
FOURTH JUDICIAL CIRCUIT
FORT LEWIS, WA 98433

UNITED STATES

V.

WELSHOFER, Lewis CW3
66th MI Company,
3d Squadron,
3d Armored Cavalry Regiment (Rear),
Fort Carson, CO 80913

ORDER TO CLOSE
CERTAIN PROCEEDINGS

1. In a document entitled "MRE 505 Disclosure," classified as Secret and dated 3 Nov 2005, the government requested the court order the trial proceedings closed to the public only while certain classified information is being introduced and during the examination of witnesses whose identity is classified, or when such information or evidence is the subject of argument to ensure that the information specified by the government is not disclosed to the public. A session under Art. 39(a) UCMJ was held on 16 November 2005. The session was closed. The defense has objected to the closing of the trial proceedings. The parties were given the opportunity to present evidence and make argument.

2. Findings of Fact:

- a. The government intends to introduce into evidence certain items of evidence that have been deemed classified. Some of this evidence will be introduced thru the testimony of two witnesses whose identity has been deemed classified. This information is not within the public domain.
- b. As the detailed military judge, the undersigned considered *in camera* the substance of the evidence, made primarily through a proffer by counsel at the 16 November 2005 Art. 39(a) session, as well as the classification certification for the evidence, and a verbatim transcript of the security specialist's testimony at the Art. 32 investigation in U.S. v. Williams; U.S. v. Sommer; and, U.S. v. Loper (originally co-accused's with CW3 Welshoffer). I also considered a classified transcript of a deposition of one of the specified witnesses.
- c. My consideration of the evidence and review of documents relating to the security classification declarations by a security specialist who holds

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11353

Appellate Exhibit

XVIII

classification authority under Executive Order 12958 as amended by Executive Order 13292 (March 25, 2003) for information and evidence relevant in this case shows that the government proved by a preponderance of the evidence that the evidence in the form of testimony from witnesses – particularly the two specified by the government as possessing and maintaining a classified identity and, potentially portions of the testimony of CW2 Sonnek and SSG Dodds, sought to be introduced by the government does involve matters classified at the “Secret” level, and was properly classified by an authorized original classification authority applying the standards of Executive Order 12958, as amended by Executive Order 13292.

- d. Public disclosure of the classified evidence and the classified identity of the two specified witnesses in this case would harm the national security of the United States.
- e. The classified information sought to be introduced is critical to the government’s prosecution of this case and directly relates to circumstances and the underlying basis of the charges in this case.

3. Discussion: The accused enjoys the right to a public trial under the Sixth Amendment. The general public, including the media, has a qualified right under the First Amendment to attend criminal trials (Richmond Newspapers v. Virginia, 448 U.S. 555 (1980)). The right to a public trial is included in the Manual for Courts-Martial at Rule for Courts-Martial (RCM) 806. Case law interpreting the First and Sixth Amendments, and RCM 806, show that neither the accused’s nor the public’s right is absolute. A military judge may, if necessary, close portions of the trial proceedings to the public provided the government makes an adequate showing of necessity and the closing is tailored to minimize the closed sessions to the absolute minimum extent necessary (United States v. Grunden, 2 M.J. 116 (C.M.A. 1977), and Rule for Courts-Martial 801).

To support a closed proceeding, the government must first make a compelling showing that closure is necessary to prevent dissemination of information which must be protected from public disclosure. Closure is only necessary when alternative means of presenting evidence are not available. The court has considered the use of screens in the courtroom to prevent spectators from seeing the two specified witnesses as they testify but finds this impracticable as employment of screens in the courtroom would not provide adequate protection for the identity of the witnesses and, as proffered, almost the entirety of the testimony of these witnesses involves classified information. There are no practicable alternatives to protecting the classified information from public disclosure during trial except by excluding the public for limited periods during the trial.

The court has carefully applied the balancing test described in Grunden and later military and federal cases in analyzing the government’s request.

4. Conclusions of Law: Based on the foregoing, I hereby conclude:

- a. The government has met its burden of proving that evidence in the form of testimony – and the very identity of specified witnesses – has been properly classified and will be introduced at trial as evidence critical to the government's case-in-chief.
- b. The government has proven by a preponderance that there is a reasonable danger that presentation of this evidence before the public will expose military and intelligence matters which in the interest of national security should not be divulged (Grunden, 2 M.J. 122).
- c. The government has delineated those portions of its case that involve these matters. Review of the transcript of the deposition of one of the witnesses whose identity is classified reveals that not all of that witnesses testimony is classified, however, the court does conclude that even that that is not classified is so inextricably linked to classified matters as to permit it all to be received in a closed session.

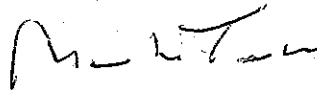
5. Order of the Court: The trial proceedings in the above-captioned case will be closed to spectators during the introduction of classified evidence. Closure will occur only during the testimony of witnesses particularly specified in the government's 3 Nov 2005 submission and the 16 Nov 2005 Art. 39(a) session, and during portions of a witnesses testimony during which it is reasonably expected that a classified exhibit or classified testimony will be displayed or adduced (CW2 Sonnek and SSG Dodds), when counsel will make direct reference to the contents of a classified exhibit or testimony during argument or in questioning any witness and cannot do so without discussing the testimony or evidence in open court, or when the military judge must discuss the exhibit or testimony on the record and cannot do so without disclosing the protected contents in open court. The proceedings will be reopened to the public at the earliest opportunity. Therefore, if a witness, one other than the two particularly specified witnesses whose identity is classified, is to testify on both matters in which the public must be excluded and matters during which the public may be present, counsel will conduct direct examination in a closed session on only the matters in which the public must be excluded, followed by cross-examination on those matters only in the closed session. Counsel will then conduct direct examination in open court of that witness on matters that are not subject to closure, followed by cross-examination in open court on the same matters. While this procedure may require counsel to depart from normal practice of complete direct examination of a witness prior to cross-examination, the manner directed in this order will not impede the fair administration of justice and will ensure that the proceedings are closed only as absolutely required. Counsel are further directed to notify the judge in advance before eliciting classified evidence in open court, or discussing same.

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APPELLATE EXHIBIT

XVIII

DONE THIS 5TH DAY OF JANUARY 2006 AT THE FOURTH JUDICIAL CIRCUIT,
FORT LEWIS, WA.



MARK L. TOOLE
COL, JA
Military Judge

p. 4 of 4

APPELLATE EXHIBIT XVII

The court will go into a closed session where classified information will be discussed and it will not be open to the public.

- Only personnel with a valid security clearance will remain that have a need to know.
- Guards will be posted at strategic locations to enforce/safeguard the closed session this includes removal/disconnecting of any recording devices except for the court reporter's equipment.
- Yellow colored notepads will be distributed for individuals to take classified notes (I plan on putting each person's name on the cover of the notepad).
- Prior to re-opening the courtroom to the public, I will collect the classified notepads and secure them. Basically, the courtroom needs to be scrubbed of classified information before it is re-opened.
- Classified notepads will be available to panel members during the closed sessions and during deliberations.
- At the end of the day; notepads will be stored in a classified container overnight and will be made available the next day.

Appellate Exhibit XIX

Cox, Brian D SGT USA OSJA

From: Cox, Brian D SGT USA OSJA
Sent: Friday, January 06, 2006 12:36 PM
To: Saffold, David G COL USA 7ID; Burger, John R LTC USA DOIM
Subject: GCM Panel, 16-20 Jan 06
Attachments: Panel Member C-M Excusal Form.doc; Directions to PAFB Courtroom.doc; Memo to Panel Member.pdf

Tracking: **Recipient** **Read**
Saffold, David G COL USA 7ID
Burger, John R LTC USA DOIM Read: 1/6/2006 12:49 PM

ALCON,

You have been selected to sit on a General Court-Martial Panel, **U.S. v. WELSHOFFER**, scheduled for **16 - 20 January 2006**. Please be at the **Peterson Air Force Base Courtroom, Building 350** (see attached directions), **Room #2068**, at **0815** on each day. The uniform is Class A's. If you are unable to serve on the Court-Martial, please see the attached memo and reply as soon as possible to this email with the reason you will not be able to attend. Thank you for your help and cooperation in this matter. If you have any questions, please contact us by replying to this e-mail or by calling 526-1390 or 524-0564.

Please respond to this email as soon as possible with either a positive or negative response.

V/R

SGT Cox
CG Actions

Appellate Exhibit XX

11358

1/15/2006

DEPARTMENT OF THE ARMY
Headquarters, 7th Infantry Division and Fort Carson
Fort Carson, Colorado 80913

COURT-MARTIAL CONVENING ORDER
NUMBER 10

12 July 2005

Pursuant to authority contained in General Order Number 10, Department of the Army,
9 April 1981, a general court-martial is convened with the following members:

COL SCOTT A. LANG, QM, 43d ASG
COL JOHN M. CHO, MC, USA MEDDAC
LTC THERESA S. LEVER, AG, HHC, 7ID
LTC THOMAS C. POWELL, 2/362d, 2/91st DIV
LTC NORMAN E. BRUBAKER, TC, HHC, 7ID
MAJ JOHN M. CREAN, HHC, 7ID
MAJ MAURICE L. MCDUGALD, CM, HQ, 10th SFG
MAJ ROSS C. POPPENBERGER, AC, USAG
CPT LYNNE A. MOREHOUSE, QM, HHC, 43d ASG
1LT CARRIE A. BRUNNER, QM, HHC, 7ID


In the case where an enlisted panel is requested, the following members will be detailed:

COL JOHN M. CHO, MC, USA MEDDAC
LTC THERESA S. LEVER, AG, HHC, 7ID
LTC NORMAN E. BRUBAKER, TC, HHC, 7ID
MAJ JOHN M. CREAN, HHC, 7ID
1LT CARRIE A. BRUNNER, QM, HHC, 7ID
SGM CARLOS R. BASSATTORRES, HHC, 7ID
SGM MARCUS E. MARKHAM, USAG
SFC EMILY C. KENT, HHC, 7ID
SFC MIGUEL A. CALZADILLA, HHD, 3/10th SFG
SGT JILL M. BERGERON, USAG

All cases referred to the general court-martial convened by order Number 4, this headquarters,
dated 8 July 2004, in which the court has not been assembled in accordance with R.C.M. 911,
will be brought to trial before the court-martial hereby convened.

BY COMMAND OF MAJOR GENERAL MIXON:

DISTRIBUTION:
Ea indiv indic (1)
Cdr, 7th IN Div (SJA) (1)
Record of Trial (1)
Record Set (1)
Reference Set (1)


TIERNAN DOLAN
MAJ, JA
Chief, Criminal Law Division

Appellate Exhibit XXXI

FLYER

Charge I:

The Specification: In that Chief Warrant Officer Three Lewis E. Welshofer Jr., U.S. Army, who knew or should have known of his duties at or near Al Qaim, Iraq, on or about 26 November 2003, was derelict in the performance of those duties in that he willfully failed to properly safeguard the physical health, welfare, and treatment of Major General Abid Mowhosh, as it was his duty to do.

Charge II:

The Specification: In that Chief Warrant Officer Three Lewis E. Welshofer Jr., U.S. Army, did, at or near Al Qaim, Iraq, on or about 26 November 2003, murder Major General Abid Mowhosh by means of suffocating him with the use of a sleeping bag and electrical cord.

The Additional Charge:

The Specification: In that Chief Warrant Officer Three Lewis E. Welshofer Jr., U.S. Army, did, at or near Al Qaim, Iraq, on or about 19 November 2003, unlawfully strike an Iraqi detainee, whose name is unknown, by slapping and punching the detainee, throwing the detainee to the ground, by wrapping the detainee in a sleeping bag, and by throwing the weight of his body onto the detainee's torso.

Appellate Exhibit

XXII

QUESTION(S) BY COURT MEMBERS

I. My question is directed to Prosecution
(Name of Witness)

II. My question is:

what is sleeping bag made of (material?)

CPT Morchauer
(Name of Court Member)

III. Objection(s) to the question:

Trial Counsel: (YES) ☒ (NO)

Defense Counsel: (YES) ☒ (NO) 7

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit XXIII

QUESTION(S) BY COURT MEMBERS

I. My question is directed to CWZ Williams
(Name of Witness)

II. My question is:

is the sleeping bag portion over the
head area tight around the head?

LTZ Thomas Powell
(Name of Court Member)

III. Objection(s) to the question:

Trial Counsel: (YES) ☒ (NO)

Defense Counsel: (YES) ☒ (NO)

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit XXIV

QUESTION(S) BY COURT MEMBERS

I. My question is directed to _____
(Name of Witness)

II. My question is:

Who made sleeping bag technique off-limits
to anyone but accused and yourself?

CPT Morahan
(Name of Court Member)

III. Objection(s) to the question:

Trial Counsel: (YES) ☒ (NO)

Defense Counsel: (YES) ☒ (NO)

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit XXV

QUESTION(S) BY COURT MEMBERS

I. My question is directed to MAJ Voss
(Name of Witness)

II. My question is:

You stated you were disgusted by CWS DeBaker
slapping a detainee ^(in tone). Did you order it stopped from
that point on? If so, did he acknowledge?

Col Powell

(Name of Court Member)

III. Objection(s) to the question:

Trial Counsel: (YES) ☒ (NO)

Defense Counsel: (YES) ☒ (NO) 75

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit XXVI

Appellate Exhibits XXVII and XXVIII are classified and are located in Volume 3 of 3 of the record of trial.

QUESTION(S) BY COURT MEMBERS

I. My question is directed to Mr. Pratt
(Name of Witness)

II. My question is:
How many detainees were at Blacksmith
Hotel during the 24-26 Nov period?

MATBYRUM
(Name of Court Member)

III. Objection(s) to the question:

Trial Counsel: (YES) (NO)

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

Defense Counsel: (YES) (NO) 75

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit XXIX

Appellate Exhibits XXX, XXXI, and XXXII are classified and are located in Volume 3 of 3 of the record of trial.

QUESTION(S) BY COURT MEMBERS

I. My question is directed to _____
(Name of Witness)

II. My question is:

If 12 OCT memo superseded 14 Sep memo
would CW3 Walshofer not need both memos
to know what was and was not authorized
if indeed stress positions were not specifically
addressed on 12 OCT

MAT BYUM
(Name of Court Member)

III. Objection(s) to the question:

Trial Counsel: (YES) ☒ (NO)

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

Defense Counsel: (YES) ☒ (NO)

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit XXXIII

QUESTION(S) BY COURT MEMBERS

I. My question is directed to _____
(Name of Witness)

II. My question is:

HAD you seen the 12 Oct memo yourself
before you asked CW3 Welshofer for a
copy of his?

MAT BYRUM

(Name of Court Member)

III. Objection(s) to the question:

Trial Counsel: (YES) ☒ (NO)

Defense Counsel: (YES) ☒ (NO) 75

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit XXXIV

QUESTION(S) BY COURT MEMBERS

I. My question is directed to Mr. Nodatkron
(Name of Witness)

II. My question is:

Which part of sleeping bag technique
specifically crosses the line of Geneva
Convention - cord wrapping or covering
mouth or straddling chest?

CPT Morehouse
(Name of Court Member)

III. Objection(s) to the question:

Trial Counsel: (YES) (NO)

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

Defense Counsel: (YES) (NO)

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit XXXIV

QUESTION(S) BY COURT MEMBERS

I. My question is directed to SPC Lopez
(Name of Witness)

II. My question is:

In your opinion, what was the purpose
of ^{placed} using his hands to make the sleeping bag
tout (as opposed to covering the general's
mouth)? (In other words - why did
he stop using the hand over mouth
technique?)

CPT Morchoue
(Name of Court Member)

III. Objection(s) to the question:

Trial Counsel: ☒ (YES) (NO)

☐ Hearsay
☐ Irrelevant
☒ Assumes Facts Not in Evidence
☒ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

Defense Counsel: ☒ (YES) (NO)

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☒ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit XXXVI

QUESTION(S) BY COURT MEMBERS

I. My question is directed to SBC Lopez
(Name of Witness)

II. My question is:
You testified CW2 Williams told the General
"you're NOT GONN LIKE WHATS COMING."

① What did that mean to you?

② Did that mean the sleeping bag?

③ How many times, if ever, had you seen
the sleeping bag used?

④ Did it always involve use of the cord?

MAT SYRUM
(Name of Court Member)

III. Objection(s) to the question:

Trial Counsel: (YES) (NO)

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

Defense Counsel:

(YES) (NO) 75
☐ Hearsay
☐ Irrelevant ① { ② { ③ { ④
☐ Assumes Facts Not in Evidence
☒ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit XXXVIII

QUESTION(S) BY COURT MEMBERS

I. My question is directed to Dr Week
(Name of Witness)

II. My question is:

① What ARE THE OBSERVABLE SYMPTOMS
A PERSON SUFFERING AN ARYTUMIA WOULD
EXHIBIT /

② APPROX. HOW MUCH TIME WOULD THE OBSERVER
HAVE TO REACT TO ASSIST AND PREVENT DEATH

MAT BYRUM
(Name of Court Member)

III. Objection(s) to the question:

(Print Legibly)

Trial Counsel: (YES) (NO)

Defense Counsel: (YES) (NO) 75

____ Hearsay
____ Irrelevant
____ Assumes Facts Not in Evidence
____ Calls for an Opinion
____ Privileged Communication
____ Product of an Illegal Search
____ Other (Specify) _____

____ Hearsay
____ Irrelevant
____ Assumes Facts Not in Evidence
____ Calls for an Opinion
____ Privileged Communication
____ Product of an Illegal Search
____ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit XXXVIII

QUESTION(S) BY COURT MEMBERS

I. My question is directed to CW23 Welshover
(Name of Witness)

II. My question is:

1. How does your experience ~~in~~ in Afghanistan relate to your experience in Iraq in terms of training, SOPs, policy ~~etc.~~ and ROE. for interrogators. What techniques were used?

2. ~~Reference SERE school: Aren't techniques used at SERE school designed to teach US forces how to escape/evade/resist/survive on enemy capture and not designed techniques often violated by the Geneva Convention but allowed for use in training situations?~~

CPT Morehouse
(Name of Court Member)

III. Objection(s) to the question:

(Print Legibly)

Trial Counsel:

(YES)

(NO)

Defense Counsel:

(YES)

(NO)

☐ Hearsay

☒ Irrelevant

☐ Assumes Facts Not in Evidence

☐ Calls for an Opinion

☐ Privileged Communication

☐ Product of an Illegal Search

☐ Other (Specify) _____

☐ Hearsay

☐ Irrelevant

☐ Assumes Facts Not in Evidence

☐ Calls for an Opinion

☐ Privileged Communication

☐ Product of an Illegal Search

☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit

XXXIX

p. 1 of 3

QUESTION(S) BY COURT MEMBERS

I. My question is directed to CW3 Welshover
(Name of Witness)

II. My question is:

3. Were you ever briefed as a SFRE cadre member that techniques used for training ~~that~~ may violate the Geneva Convention ie such as breaking a bone or otherwise causing physical harm?

4. ~~Did~~ Did you perform a risk assessment on any techniques you used? Verbal? Written?

5. What was the General wearing ^{on 26 Nov} ~~24 Nov~~?
Did you see bruises? CPT Morehouse
(Name of Court Member)

III. Objection(s) to the question:

(Print Legibly)

Trial Counsel: (YES) (NO)

Defense Counsel: (YES) (NO) 75

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit XXXIX

p 2 of 3

QUESTION(S) BY COURT MEMBERS

I. My question is directed to CW3 Welshove
(Name of Witness)

II. My question is:

6. Ret CPR: Are you trained in CPR?

If so, did you ~~use~~ clear airway
and attempt to get air into lungs
using mouth-mouth w/ compressions?

7. Did the 10 SEP memo have the words
" // Original Signed // " ?

8. Have you ever seen a memo sent via
internet or LAN in this format during
your career and do you know what
it means?

CPT Morehouse
(Name of Court Member)

III. Objection(s) to the question:

(Print Legibly)

Trial Counsel: (YES) (NO)

Defense Counsel: (YES) (NO)

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit XXXXIX

p. 383

QUESTION(S) BY COURT MEMBERS

I. My question is directed to CW3 Welshofer
 (Name of Witness)

II. My question is:

Why did MAJ Voss & you discuss stepping?
What started the discussion?

LTC Powell

(Name of Court Member)

III. Objection(s) to the question:

Trial Counsel: (YES) ☒ (NO)

Defense Counsel: (YES) ☒ (NO) 78

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit XL

QUESTION(S) BY COURT MEMBERS

I. My question is directed to CPT Folk
(Name of Witness)

II. My question is:

Why would you be in CWT Welsh's
rating scheme if unable to assess
interrogation techniques?

III. Objection(s) to the question:

CPT Morahan
(Name of Court Member)

(Print Legibly)

Trial Counsel: (YES) (NO)

Defense Counsel: (YES) (NO) 75

 Hearsay
 Irrelevant
 Assumes Facts Not in Evidence
 Calls for an Opinion
 Privileged Communication
 Product of an Illegal Search
 Other (Specify) _____

 Hearsay
 Irrelevant
 Assumes Facts Not in Evidence
 Calls for an Opinion
 Privileged Communication
 Product of an Illegal Search
 Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit XLT

QUESTION(S) BY COURT MEMBERS

I. My question is directed to Mr. Reece
(Name of Witness)

II. My question is:

1. How do you know that torture was
not authorized?

2. Was MG Mohoruk's detainee status
certain in NOV 08? (POW vs. civilian
vs. 'detainee')]

CPT Morehouse
(Name of Court Member)

III. Objection(s) to the question:

(Print Legibly)

Trial Counsel: (YES) (NO)

Defense Counsel: (YES) (NO) 75

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit X41

QUESTION(S) BY COURT MEMBERS

I. My question is directed to _____

Mr Reese

(Name of Witness)

II. My question is:

Did you share the 10 Sep
or any other interrogation guidance
you had received w/ CWS Welschler?

CPT Mader

(Name of Court Member)

III. Objection(s) to the question:

Trial Counsel: (YES) ☒ (NO)Defense Counsel: (YES) ☒ (NO) JP

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit X411

QUESTION(S) BY COURT MEMBERS

I. My question is directed to MR ROOSE
(Name of Witness)

II. My question is:

① IS STRIKING OF U.S. TRAINEES AT
SERF SCHOOL AUTHORIZED?

② If yes, by what authority?

③ Does that same authority then authorize
STRIKING OF DETAINEES?

MAT BYRUM

(Name of Court Member)

III. Objection(s) to the question:

(Print Legibly)

Trial Counsel: (YES) ☒ (NO)

Defense Counsel: (YES) ☒ (NO) 7

☐ Hearsay

☐ Hearsay

☐ Irrelevant

☐ Irrelevant

☐ Assumes Facts Not in Evidence

☐ Assumes Facts Not in Evidence

☐ Calls for an Opinion

☐ Calls for an Opinion

☐ Privileged Communication

☐ Privileged Communication

☐ Product of an Illegal Search

☐ Product of an Illegal Search

☐ Other (Specify) _____

☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit XLIV

QUESTION(S) BY COURT MEMBERS

I. My question is directed to ~~MASSIMO~~ Mr Reese
(Name of Witness)

II. My question is:
WAS the BZ^D TOC / ACE THE RECEIVING
AGENCY FOR SACR reports?

If yes, would you (BZ^D TOC / ACE) THEN
NOT PROVIDE MEMOS, reports, guidance down
to them (SACR ACE)?

Would it then have been your responsibility
to provide any memos / guidance down to
SACR & CWT Welshofer?

MASSIMO BYRUM
(Name of Court Member)

III. Objection(s) to the question:

(Print Legibly)

Trial Counsel: (YES) (NO)

Defense Counsel: (YES) (NO) *JS*

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit XLV

QUESTION(S) BY COURT MEMBERS

I. My question is directed to Mr. Bee
(Name of Witness)

II. My question is:

As an interrogator, instructor at Ft. Huachuca
~~are you trained~~
~~do~~ you train US soldiers to
differentiate between ~~the~~ personnel in
Geneva Convention status and those
undetermined or classified as
"detainee"?

CPT Morehouse
(Name of Court Member)

III. Objection(s) to the question:

(Print Legibly)

Trial Counsel: (YES) (NO)

Defense Counsel: (YES) (NO) 75

☐ Hearsay

☐ Hearsay

☐ Irrelevant

☐ Irrelevant

☐ Assumes Facts Not in Evidence

☐ Assumes Facts Not in Evidence

☐ Calls for an Opinion

☐ Calls for an Opinion

☐ Privileged Communication

☐ Privileged Communication

☐ Product of an Illegal Search

☐ Product of an Illegal Search

☐ Other (Specify) _____

☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit XLVI

QUESTION(S) BY COURT MEMBERS

I. My question is directed to MAT Short
(Name of Witness)

II. My question is:

~~the~~

Would it have been proper to utilize interrogation
ROE, used in Afghanistan due to the lack
of guidance and the fact that both
Iraq & Afghanistan fall under CENTOM
(CFMCC) AOR?

CPT Marchoux

(Name of Court Member)

III. Objection(s) to the question:

(Print Legibly)

Trial Counsel: (YES) (NO)

Defense Counsel: (YES) (NO)

☐ Hearsay

☐ Hearsay

☒ Irrelevant

☐ Irrelevant

☐ Assumes Facts Not in Evidence

☐ Assumes Facts Not in Evidence

☐ Calls for an Opinion

☐ Calls for an Opinion

☐ Privileged Communication

☐ Privileged Communication

☐ Product of an Illegal Search

☐ Product of an Illegal Search

☐ Other (Specify)

☐ Other (Specify)

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit

XLVII

QUESTION(S) BY COURT MEMBERS

I. My question is directed to MAS Short
(Name of Witness)

II. My question is:

IS A WARRANT OFFICER AUTHORIZED TO
INSTITUTE / EXECUTE PERSONALLY DEVELOPED
TTPs NOT IN THE CURRENT FM WITH
NO APPROVAL OUTSIDE HIS OWN CHAIN OF COMMAND?

MAT BYRUM
(Name of Court Member)

III. Objection(s) to the question:

(Print Legibly)

Trial Counsel: (YES) (NO)

Defense Counsel: (YES) (NO)

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit XLVIII

QUESTION(S) BY COURT MEMBERS

I. My question is directed to MAJ Smith
(Name of Witness)

II. My question is:

Can stress bring on a heart attack
as DOC Wett described?

CTC Powell

(Name of Court Member)

III. Objection(s) to the question:

Trial Counsel: (YES) (NO)

Defense Counsel: (YES) (NO) 75

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit XLIX

QUESTION(S) BY COURT MEMBERS

I. My question is directed to MAT Smith
(Name of Witness)

II. My question is:

1. How do you relate an incident of manslaughter (accidental homicide) in medical terminology - does it fall under accident or homicide in forensic pathology?

~~2. Do you believe that MG Mohosh died face down or face up? This~~

2. In reference to the smile on the MG Mohosh's face. What does the smile in the picture indicate medically?

(ie marks on lower lip) CPT Morehouse
(Name of Court Member)

III. Objection(s) to the question:

(Print Legibly)

Trial Counsel: (YES) (NO)

Defense Counsel: (YES) (NO) 75

- ☐ Hearsay
- ☐ Irrelevant
- ☐ Assumes Facts Not in Evidence
- ☐ Calls for an Opinion
- ☐ Privileged Communication
- ☐ Product of an Illegal Search
- ☐ Other (Specify) _____

- ☐ Hearsay
- ☐ Irrelevant
- ☐ Assumes Facts Not in Evidence
- ☐ Calls for an Opinion
- ☐ Privileged Communication
- ☐ Product of an Illegal Search
- ☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit L

UNITED STATES)

v.)

FINDINGS WORKSHEET

Welshofer, Lewis E., Jr.
Chief Warrant Officer Three (CW3)
U.S. Army,
66th Military Intelligence Company,
3d Squadron, 3d Armored Cavalry Regiment
Fort Carson, Colorado 80913)

21 January 2006

NOTE: After the members have reached their findings the President shall strike all inapplicable language and announce the findings by reading the remaining language. (Do not read the bold-faced print).

Chief Warrant Officer Three Lewis E. Welshofer, this court-martial finds you:

I. IN CASE OF COMPLETE ACQUITTAL, ANNOUNCE:

Of the Charges and their Specifications: Not Guilty

II. IN CASE OF CONVICTION OF ALL CHARGES AND SPECIFICATIONS, ANNOUNCE:

Of the Charges and their Specifications: Guilty.

III. IN CASE OF CONVICTION OF SOME BUT NOT ALL CHARGES AND SPECIFICATIONS, ANNOUNCE: (Note that if the accused is guilty of even one Specification, he is also guilty of the Charge to which that Specification belongs.) You must make a finding in each of subsection A, B, and C.

A. Of Charge I and its Specification: (Not Guilty) ~~(Guilty)~~

OR

Of the Specification of Charge I: ~~Not Guilty~~ ^{Not Guilty} of Willful Dereliction of Duty but Guilty of Negligent Dereliction of Duty. Of Charge I: ~~Guilty~~ ^{Guilty}

B. Of Charge II and its Specification: (Not Guilty) ~~(Guilty)~~

OR

Of the Specification of Charge II: ~~Not Guilty of Murder but Guilty of Involuntary Manslaughter. As to the Specification of Charge II, Not Guilty of a Violation of Article 118, but Guilty of a Violation of Article 119.~~ Of Charge II: ~~Guilty~~

OR

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Appellate Exhibit

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LT

Of the Specification of Charge II: Not Guilty of Murder but Guilty of Negligent Homicide. As to the Specification of Charge II, Not Guilty of a Violation of Article 118, but Guilty of a Violation of Article 134. Of Charge II: Guilty

C. Of the Additional Charge and its Specification: (Not Guilty) ~~(Guilty)~~

OR

Of the Specification of The Additional Charge: Guilty, except the (word(s))(and figure(s))

“ _____
_____”

and substituting therefor the (word(s))(and figure(s)):

“ _____
_____”

Of the excepted (word(s))(and figure(s)): Not Guilty

Of the substituted (word(s))(and figure(s)): Guilty

Of the Additional Charge: Guilty

Appellate Exhibit 41
p. 2 of 2

The evidence has raised the issue of mistake on the part of the accused concerning justification or authorization in relation to the offense of murder by committing an act inherently dangerous to others, involuntary manslaughter, negligent homicide.

Justification. A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful.

Here is how this applies in this case, the evidence has raised the issue of mistake on the accused's part as to whether the interrogation techniques he used on or about 19 Nov 2003 and 26 November 2003, the dates alleged in the specifications, were authorized.

By law, there is no authorization to use interrogation techniques that kill the interrogated individual. In other words, authorization to use certain interrogation techniques does not authorize or justify or make lawful a death. So, even the proper performance of authorized interrogation techniques that lead to a death will not justify or make unlawful the death.

Consequently, in regards to the offense charged in Charge II, murder, and its lesser included offenses of involuntary manslaughter and negligent homicide, if the accused honestly and reasonably believed that the techniques he used were authorized, you will then consider the defense of accident which I will instruct you on shortly.

Applicability of mistake to Additional Charge: In regards to the Additional Charge, mistake is a complete defense and the accused is not guilty if:

(1) he mistakenly believed that the interrogation techniques he employed on or about 19 November 2003 in an interrogation with an Iraqi detainee, whose name is unknown, were authorized and

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

To be reasonable the belief must have been based on information, or lack of it, which would indicate to a reasonable person that all of the techniques were authorized. Additionally, the mistake cannot be based on a negligent failure to discover the true facts.

Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances.

Applicability to the specification of Charge II and its lesser included offenses. Again, how this applies to the murder charge and its lesser included offenses. The killing of a detainee during an interrogation is never justified. The mistake defense if you believe it applies would be considered along with an instruction on the accident defense which I will give you.

In regards to the murder charge and its lesser included offenses, if you believe that the accused:

Pr 184

Appellate Exhibit L11

(1) he mistakenly believed that all of the interrogation techniques he employed on or about 26 November 2003 in an interrogation of MG Abid Mowhosh, were authorized and

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

You should then consider whether the defense of accident applies.

Again, to be reasonable the belief must have been based on information, or lack of it, which would indicate to a reasonable person that all of the techniques were authorized. Additionally, the mistake cannot be based on a negligent failure to discover the true facts.

Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances.

In applying this instruction to Charge II and its lesser included offenses and the Additional Charge, you should consider the accused's age, education, training, and experience along with the other evidence on this issue.

The burden is on the prosecution to establish the accused's guilt. If you are convinced beyond a reasonable doubt that, at the time of the charged offenses, the accused was not under the mistaken belief that the techniques he employed were authorized, the defense of mistake does not exist. Even if you conclude that the accused was under the mistaken belief that the techniques he employed were authorized, if you are convinced beyond a reasonable doubt that, at the time of the charged offenses, the accused's mistake was unreasonable, the defense of mistake does not exist. If the defense of mistake does not exist, the defense of accident to the specification of Charge II and its lesser included offenses does not exist.

In regards to Charge II and its lesser included offenses of involuntary manslaughter and negligent homicide, if you believe that the accused was under the mistaken belief that the interrogation techniques he used with MG Mowhosh were authorized and that his mistake was both honest and reasonable, you should then consider the defense of accident.

The evidence has raised the issue of accident in relationship to the offenses of murder and involuntary manslaughter and negligent homicide. In determining this issue, you must consider all the relevant facts and circumstances.

Accident is a complete defense to the offenses of murder, involuntary manslaughter, and negligent homicide. If the accused was doing a lawful act, or what he honestly and reasonably believed was a lawful act in a lawful manner free of any negligence on his part, and an unexpected death occurs, the accused is not criminally liable. The defense of accident has three parts. First, the accused's act resulting in the death must have been lawful, or he must have honestly and reasonably believed them to be lawful. Second, the accused must not have been negligent. In other words, the accused must have been acting with the amount of care for the safety of others that a reasonably prudent person would

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APPELLATE EXHIBIT 411

have used under the same or similar circumstances. Third, the death must have been unforeseeable and unintentional.

The burden is on the prosecution to establish the guilt of the accused. Consequently, unless you are convinced beyond a reasonable doubt that the death of MG Mowhosh was not the result of an accident, the accused may not be convicted of murder, involuntary manslaughter, or negligent homicide.

If you are satisfied beyond a reasonable doubt that the accused did not act with the amount of care for the safety of others that a reasonably prudent person would have used under the same or similar circumstances, the defense of accident does not exist. However, this does not necessarily mean that the accused is guilty of murder by an act inherently dangerous to others, or involuntary manslaughter. To find the accused guilty of these offenses the accused's conduct must have amounted to more than simple negligence. You will recall that to convict the accused of murder, one of the elements the government must prove beyond a reasonable doubt is that the accused committed an inherently dangerous act evincing a wanton disregard for human life, and to find the accused guilty of the lesser included offense – involuntary manslaughter, one of the elements the government must prove beyond a reasonable doubt is that the accused's act amounted to culpable negligence.

Simple negligence, the standard in the lesser included offense of negligent homicide, is the failure to act with the care for the safety of others that a reasonably prudent person would have used under the same or similar circumstances. Culpable negligence is a negligent act accompanied by a gross, reckless, indifferent, wanton, or deliberate disregard for the foreseeable results to others. An act inherently dangerous to another is one that is characterized by heedlessness of the probable consequences of the act, indifference to the likelihood of death or great bodily harm, and clearly demonstrates a total disregard for the known probable results of death or great bodily harm.

To summarize on this point, a finding of simple negligence will deprive the accused of the accident defense; however, simple negligence is not enough to find the accused guilty of the offenses of murder and the lesser included offense of involuntary manslaughter, but if found beyond a reasonable doubt will support a finding of negligent homicide.

If you find the accused committed an inherently dangerous act evincing a wanton disregard for human life or was culpably negligent or simply negligent and, thus, not protected from criminal liability by the defense of accident, you may not convict unless you find beyond a reasonable doubt that the inherently dangerous act or, in regard to the LIO of involuntary manslaughter, culpably negligent act, or in regards to the LIO of negligent homicide, negligent act, was a proximate cause of the death of MG Mowhosh.

Again, proximate cause means that the death of MG Mowhosh must have been the result of the accused's inherently dangerous or, in regards to the LIO of involuntary manslaughter, culpably negligent, or the LIO of negligent homicide, negligent act. A proximate cause does not have to be the only cause, but it must be a direct or contributing cause which plays a material role in bringing about the death. If some other

APPELLATE EXHIBIT 11

unforeseeable, independent, intervening event, which did not involve the accused, was the only cause which played any important part in bringing about the death, then the accused may not be convicted of the offenses of murder, or the LIO's of involuntary manslaughter, or negligent homicide.

The burden is on the prosecution to establish the guilt of the accused. Before the accused can be convicted of murder, or the LIO's of involuntary manslaughter, or negligent homicide you must be convinced beyond a reasonable doubt that the defense of accident either does not exist or has been disproved, and that the accused's inherently dangerous act, or in regards to the LIO of involuntary manslaughter, culpably negligent conduct, or in regards to the LIO of negligent homicide, negligent conduct was a proximate cause of the death of MG Mowhosh.

Again, if you do not believe that the accused honestly and reasonably believed the interrogation techniques he used were authorized, the defense of accident is not applicable in this case.

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APPELLATE EXHIBIT 411

In order for the death of the victim to have resulted from an act of the Accused, the act committed by the Accused must either directly cause the death or contribute to the death.

United States v. Nichols, 46 C.M.R. 1316, 1318 (A.C.M.R. 1973).

In the case of United States v Houghton, 13 USCMA 3, 32 CMR 3 (1962), the court found that criminal responsibility for unpremeditated murder exists if "... the accused's act directly causes death or contributes to death. United States v Schreiber, 5 USCMA 602, 607, 18 CMR 226; 40 CJS, Homicide, § 11d, pages 855, 856. When [**5] the act charged is a contributing cause of death, it may, in point of time, either precede the infliction of other injuries or come after them" Furthermore, "... one who inflicts an injury on another is deemed by the law to be guilty of homicide if the injury mediately or immediately contributes to the death of such other" Hicks v State, 213 Ind 277, 11 NE2d 171, cert denied, 304 US 564, 82 L Ed 1531. See also Wyrick v State, 102 SE2d 53 (1958); United States v Hamilton, 182 F Supp 548 (1959).

See also United States v. Tavalacci, 42 C.M.R. 711 (A.C.M.R. 1970).

Appellate Exhibit LIII

Ignorance of the law is no defense.

United States v. Mance, 24 M.J. 244, 254 (C.M.A. 1988).

With respect to the charge of dereliction of duty, ignorance of the law is no defense. Specifically, the law requires humane treatment of detainees. The accused's ignorance, if any, of his obligation to treat detainees humanely is not a defense.

Appellate Exhibit LV

1 **Findings Instructions: U.S. v. Welshofer**

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

8 I remind you that you may not infer that the accused is guilty of any offense from the use
9 of any classified evidence, security precautions, or the presentation of evidence in closed
10 trial sessions. You must evaluate open and closed session evidence and witnesses using
11 the same standards. Classified evidence also does not permit any inference as to the guilt
12 of the accused. Again, a closed trial session to consider classified evidence is the most
13 satisfactory method for resolving the competing needs of the government for protection
14 of the information and the rights of the accused and the public to a public trial. You may
15 not hold the fact that there have been closed trial sessions in any way against the accused.
16 Closed trial sessions do not erode the presumption of innocence which the law guarantees
17 the accused.

18 You've heard exposition of the facts by counsel for both sides as they view them. Bear in
19 mind that the arguments of counsel are not evidence. Argument is made by counsel in
20 order to assist you in understanding and evaluating the evidence, but you must base the
21 determination of the issues in the case on the evidence as you remember it and apply the
22 law as I instruct you.

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

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

26 **Charge I: Dereliction in Duty**

27 In the specification of Charge I, the accused is charged with the offense of dereliction of
28 duty, in violation of Art. 92, UCMJ. In order to find the accused guilty of this offense,
29 you must be convinced by legal and competent evidence beyond a reasonable doubt of
30 the following elements:

31 (1) That the accused had certain prescribed duties, that is: he was to safeguard the
32 physical health, welfare, and treatment of Major General Abid Mowhosh;

33 (2) That the accused actually knew of the assigned duties; and

34 (3) That on or about 26 November 2003, at or near Al Qaim, Iraq, the accused was
35 derelict in the performance of those duties, by willfully failing to properly safeguard the
36 physical health, welfare, and treatment of Major General Abid Mowhosh.

37 In considering these elements, you should apply the following definitions.

10. 1 8/15 **Appellate Exhibit** LV1

1 A duty may be imposed by regulation, lawful order or custom of the service. A person is
2 "derelict" in the performance of duty when he willfully fails to perform them. Dereliction
3 is defined as a failure in duty, a shortcoming, or delinquency.

4 "Willfully" means intentionally. It refers to the doing of an act knowingly and purposely,
5 specifically intending the natural and probable consequences of the act.

6 **Lesser Included Offense to Charge I and its specification: Negligent Dereliction in**
7 **Duty**

8 The court is further advised that the offense of negligent dereliction of duty is a lesser
9 included offense of the offense set forth in the specification of Charge I. When you vote,
10 if you find the accused not guilty of the offense charged, that is willful dereliction of
11 duty, then you should consider the lesser included offense of negligent dereliction of
12 duty, also in violation of Article 92, UCMJ. In order to find the accused guilty of this
13 lesser offense, you must be convinced by legal and competent evidence beyond
14 reasonable doubt:

15 (1) That the accused had certain prescribed duties, that is: he was to safeguard the
16 physical health, welfare, and treatment of Major General Abid Mowhosh;

17 (2) That the accused knew or reasonably should have known of the assigned duties; and

18 (3) That on or about 26 November 2003, at or near Al Qaim, Iraq, the accused was
19 derelict in the performance of those duties, by negligently failing to properly safeguard
20 the physical health, welfare, and treatment of Major General Abid Mowhosh.

21 The following definitions apply to these elements. A duty may be imposed by regulation,
22 lawful order, or, custom of the service. A person is "derelict" in the performance of duty
23 when he willfully or negligently fails to perform them. Again, dereliction is defined as a
24 failure in duty, a shortcoming, or delinquency.

25 "Negligently" means an act or failure to act by a person under a duty to use due care
26 which demonstrates a lack of care which a reasonably prudent person would have used
27 under the same or similar circumstances.

28 That an individual reasonably should have known of duties may be demonstrated by
29 regulations, manuals, customs, academic literature, and or testimony of persons who have
30 held similar or related positions, or similar evidence.

31 The offense charged in the specification of Charge I, differs from the lesser included
32 offense of negligent dereliction of duty, in that the offense charged requires as an
33 essential element that you be convinced beyond reasonable doubt that the accused knew
34 of the duties whereas the lesser offense of negligent dereliction of duty requires as an
35 essential element that you be convinced beyond a reasonable doubt that he knew or
36 should have known of the duties; and, willful dereliction in duty requires a finding
37 beyond a reasonable doubt that the accused was intentionally derelict in the performance

p. 2 of 15

APPELLATE EXHIBIT LVI

1 of his duties whereas negligent dereliction requires a finding beyond a reasonable doubt
2 that he was negligently derelict.

3 **Charge II: Murder While Engaging in an Act Inherently Dangerous to Another**

4 In the specification of Charge II, the accused is charged with the offense of murder while
5 engaging in an act inherently dangerous to another. In order to find the accused guilty of
6 this offense, you must be convinced by legal and competent evidence beyond reasonable
7 doubt:

8 (1) That MG Abid Mowhosh is dead;

9 (2) That his death resulted from the act of the accused in suffocating him with the use of a
10 sleeping bag and electrical cord, on or about 26 Nov 2003, at or near Al Qaim, Iraq;

11 (3) That this act was inherently dangerous to another and evinced a wanton disregard for
12 human life;

13 (4) That the accused knew that death or great bodily harm was a probable consequence of
14 the act; and

15 (5) That the killing of MG Abid Mowhosh by the accused was unlawful.

16 The following definitions apply to these elements.

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

18 The act must be intentional but death or great bodily harm does not have to be the
19 intended result.

20 The act may even be accompanied by a wish that death will not be caused.

21 An act evinces a wanton disregard for human life when it is characterized by
22 heedlessness of the probable consequences of the act and indifference to the likelihood of
23 death or great bodily harm, and demonstrates a total disregard for the known probable
24 results of death or great bodily harm. "Evince" means to "clearly demonstrate."

25 If you find the accused committed an inherently dangerous act evincing a wanton
26 disregard for human life, you may not convict unless you find beyond a reasonable doubt
27 that the inherently dangerous act was a proximate cause of the death.

28 Proximate cause means that the death must have been the result of the accused's
29 inherently dangerous act. A proximate cause does not have to be the only cause, but it
30 must be a direct or contributing cause which plays a material role in bringing about the
31 death. If some other unforeseeable, independent, intervening event, which did not involve
32 the accused, was the only cause which played any important part in bringing about the
33 death, then the accused may not be convicted of the offense of murder by an inherently
34 dangerous act to another.

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APPELLATE EXHIBIT LVI

1 The burden is on the prosecution to establish the guilt of the accused. Before the accused
2 can be convicted of murder by an inherently dangerous act to another, you must be
3 convinced beyond a reasonable doubt that that the accused's inherently dangerous
4 conduct was a proximate cause of the death.

5 **Lesser Included Offense: Involuntary Manslaughter**

6 The court is further advised that the offense of involuntary manslaughter is a lesser
7 included offense of the offense set forth in the specification of Charge II. When you
8 vote, if you find the accused not guilty of the offense charged, that is murder, then you
9 should next consider the lesser included offense of involuntary manslaughter, in violation
10 of Article 119. In order to find the accused guilty of this lesser offense, you must be
11 convinced by legal and competent evidence beyond a reasonable doubt of the following
12 elements:

13 (1) That MG Abid Mowhosh is dead;

14 (2) That his death resulted from the act of the accused in suffocating him with the use of a
15 sleeping bag and electrical cord, on or about 26 Nov 2003, at or near Al Qaim, Iraq;

16 (3) That this act amounted to culpable negligence; and

17 (4) That the killing of MG Abid Mowhosh by the accused was unlawful.

18 In considering these elements, you should apply the following definitions.

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

20 Culpable negligence is a degree of carelessness greater than simple negligence. Simple
21 negligence is the absence of due care. The law requires everyone at all times to
22 demonstrate the care for the safety of others that a reasonably careful person would
23 demonstrate under the same or similar circumstances; this is what "due care" means.

24 Culpable negligence is a negligent act or failure to act accompanied by a gross, reckless,
25 wanton or deliberate disregard for the foreseeable results to others.

26 You may find the accused guilty of involuntary manslaughter, only if you are satisfied
27 beyond a reasonable doubt that the act of the accused which caused the death amounted
28 to "culpable negligence."

29 The act must not only amount to culpable negligence but must also be a proximate cause
30 of death. Proximate cause means that the death must have been the natural and probable
31 result of the accused's culpably negligent act. The proximate cause does not have to be
32 the only cause, but it must be a contributory cause which plays an important part in
33 bringing about the death. If the death occurred only because of some unforeseeable,
34 independent, intervening cause which did not involve the accused, then the accused may
35 not be convicted of involuntary manslaughter. The burden is on the prosecution to prove
36 beyond a reasonable doubt that there was no independent intervening cause and that the
37 accused's culpable negligence was a proximate cause of the victim's death.

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APPELLATE EXHIBIT LVI

1 Charged and lesser included offense differences:

2 The offense charged, murder by committing an act inherently dangerous to another, and
3 the lesser included offense of involuntary manslaughter differ primarily in that the
4 offense charged requires, as essential elements, that you be convinced beyond a
5 reasonable doubt that the act was inherently dangerous to another, and evinced a wanton
6 disregard for human life; and, that the accused knew that death or great bodily harm was
7 a probable consequence of the act; whereas, the lesser offense of involuntary
8 manslaughter does not include such elements but it does require that you be satisfied
9 beyond a reasonable doubt that this act amounted to culpable negligence.

10 **Lesser Included Offense 2: Negligent Homicide.**

11 You are advised another lesser included offense of the offense alleged in the specification
12 of Charge II is the offense of negligent homicide in violation of Article 134, UCMJ. In
13 order to find the accused guilty of this lesser offense, you must be convinced by legal and
14 competent evidence beyond reasonable doubt:

15 (1) That MG Abid Mowhosh is dead;

16 (2) That his death resulted from the act of the accused, to wit: suffocating him with the
17 use of a sleeping bag and electrical cord, on or about 26 Nov 2003, at or near Al Qaim,
18 Iraq;

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

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

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

25 In considering these elements, you should apply the following definitions.

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

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

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

33 The act alleged must not only amount to simple negligence but it must also be a
34 proximate cause of the death. This means that the death of Abid Mowhosh must have

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1 been the natural and probable result of the accused's negligent act. In determining this
2 issue, you must consider all relevant facts and circumstances.

3 This lesser included offense differs primarily from the lesser included offense I discussed
4 with you previously in that this offense does not require as an essential element that the
5 accused's act amounted to culpable negligence, as I defined that term for you, but does
6 require that you be satisfied beyond a reasonable doubt that it amounted to simple
7 negligence and that under the circumstances, the conduct of the accused was to the
8 prejudice of good order and discipline in the armed forces or was of a nature to bring
9 discredit upon the armed forces.

10 **Additional Charge: Assault Consummated By a Battery**

11 In the specification of the Additional Charge, the accused is charged with the offense of
12 assault consummated by a battery, in violation of Art. 128, UCMJ. In order to find the
13 accused guilty of this offense, you must be convinced by legal and competent evidence
14 beyond reasonable doubt:

15 (1) That on or about 19 November 2003, at or near Al Qaim, Iraq, the accused did bodily
16 harm to an Iraqi detainee, whose name is unknown;

17 (2) That the accused did so by slapping and punching the detainee, throwing the detainee
18 to the ground, by wrapping the detainee in a sleeping bag, and by throwing the weight of
19 his body onto the detainee's torso; and

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

21 In considering these elements, you should apply the following definitions.

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

28
29
30 The evidence has raised the issue of mistake on the part of the accused concerning
31 justification or authorization in relation to the offense of murder by committing an act
32 inherently dangerous to another, involuntary manslaughter, negligent homicide, and
33 assault consummated by a battery.

34 Justification. A death, injury, or other act caused or done in the proper performance of a
35 legal duty is justified and not unlawful.

1 Here is how this applies in this case, the evidence has raised the issue of mistake on the
2 accused's part as to whether the interrogation techniques he used on or about 19 Nov
3 2003 and on or about 26 November 2003, the dates alleged in the specifications, were
4 authorized.

5 By law, there is no authorization to use interrogation techniques that kill the interrogated
6 individual. In other words, authorization to use certain interrogation techniques does not
7 authorize or justify or make lawful a death. So, even the proper performance of
8 authorized interrogation techniques that lead to a death will not justify or make lawful the
9 death. In such circumstances, accident may be a defense.

10 So in regards to the offense charged in Charge II, murder, and its lesser included offenses
11 of involuntary manslaughter and negligent homicide, if the accused honestly and
12 reasonably believed that the techniques he used were authorized, you will then consider
13 the defense of accident which I will instruct you on shortly.

14 Applicability of mistake to Additional Charge: In regards to the specification of the
15 Additional Charge, mistake is a complete defense and the accused is not guilty if he::

16 (1) mistakenly believed that all of the interrogation techniques he employed on or about
17 19 November 2003 in an interrogation with an Iraqi detainee, whose name is unknown,
18 were authorized and

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

20 To be reasonable the belief must have been based on information, or lack of it, which
21 would indicate to a reasonable person that all of the techniques were authorized.
22 Additionally, the mistake cannot be based on a negligent failure to discover the true facts.

23 Negligence is the absence of due care. Due care is what a reasonably careful person
24 would do under the same or similar circumstances.

25

26 Applicability to the specification of Charge II and its lesser included offenses. Again,
27 how this applies to the murder charge and its lesser included offenses. The killing of a
28 detainee during an interrogation is never justified. The mistake defense if you believe it
29 applies would be considered along with an instruction on the accident defense which I
30 will give you.

31 In regards to the murder charge and its lesser included offenses, if you believe that the
32 accused:

33 (1) mistakenly believed that all of the interrogation techniques he employed on or about
34 26 November 2003 in an interrogation of MG Abid Mowhosh, were authorized and

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

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1 You should then consider whether the defense of accident applies.

2 Again, to be reasonable the belief must have been based on information, or lack of it,
3 which would indicate to a reasonable person that all of the techniques were authorized.
4 Additionally, the mistake cannot be based on a negligent failure to discover the true facts.

5 Negligence is the absence of due care. Due care is what a reasonably careful person
6 would do under the same or similar circumstances.

7 In applying this instruction to Charge II and its lesser included offenses and the
8 Additional Charge, you should consider the accused's age, education, training, and
9 experience along with the other evidence on this issue.

10 The burden is on the prosecution to establish the accused's guilt. If you are convinced
11 beyond a reasonable doubt that, at the time of the charged offenses, the accused was not
12 under the mistaken belief that the techniques he employed were authorized, the defense
13 of mistake does not exist. Even if you conclude that the accused was under the mistaken
14 belief that the techniques he employed were authorized, if you are convinced beyond a
15 reasonable doubt that, at the time of the charged offenses, the accused's mistake was
16 unreasonable, the defense of mistake does not exist. If the defense of mistake does not
17 exist, the defense of accident to the specification of Charge II and its lesser included
18 offenses does not exist.

19

20 In regards to Charge II and its lesser included offenses of involuntary manslaughter and
21 negligent homicide, if you believe that the accused was under the mistaken belief that the
22 interrogation techniques he used with MG Mowhosh were authorized and that his mistake
23 was both honest and reasonable, you should then consider the defense of accident.

24 The evidence has raised the issue of accident in relationship to the offenses of murder and
25 involuntary manslaughter and negligent homicide. In determining this issue, you must
26 consider all the relevant facts and circumstances.

27 Accident is a complete defense to the offenses of murder, involuntary manslaughter, and
28 negligent homicide.

29 If the accused was doing a lawful act in a lawful manner free of any negligence on his
30 part, and an unexpected death occurs, the accused is not criminally liable. The defense of
31 accident has three parts. First, the accused's act resulting in the death must have been
32 lawful, or he must have honestly and reasonably believed them to be lawful. Second, the
33 accused must not have been negligent. In other words, the accused must have been acting
34 with the amount of care for the safety of others that a reasonably prudent person would
35 have used under the same or similar circumstances. Third, the death must have been
36 unforeseeable and unintentional.

37 The burden is on the prosecution to establish the guilt of the accused. Consequently,
38 unless you are convinced beyond a reasonable doubt that the death of MG Mowhosh was

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APPELLATE EXHIBIT

LVI

1 not the result of an accident, the accused may not be convicted of murder, involuntary
2 manslaughter, or negligent homicide.

3 If you are satisfied beyond a reasonable doubt that the accused did not act with the
4 amount of care for the safety of others that a reasonably prudent person would have used
5 under the same or similar circumstances, the defense of accident does not exist. However,
6 this does not necessarily mean that the accused is guilty of murder by an act inherently
7 dangerous to others, or involuntary manslaughter. To find the accused guilty of these
8 offenses the accused's conduct must have amounted to more than simple negligence. You
9 will recall that to convict the accused of murder, one of the elements the government
10 must prove beyond a reasonable doubt is that the accused committed an inherently
11 dangerous act evincing a wanton disregard for human life, and to find the accused guilty
12 of the lesser included offense – involuntary manslaughter, one of the elements the
13 government must prove beyond a reasonable doubt is that the accused's act amounted to
14 culpable negligence.

15 Simple negligence, the standard in the lesser included offense of negligent homicide, is
16 the failure to act with the care for the safety of others that a reasonably prudent person
17 would have used under the same or similar circumstances. Culpable negligence is a
18 negligent act accompanied by a gross, reckless, indifferent, wanton, or deliberate
19 disregard for the foreseeable results to others. An act inherently dangerous to another is
20 one that is characterized by heedlessness of the probable consequences of the act,
21 indifference to the likelihood of death or great bodily harm, and clearly demonstrates a
22 total disregard for the known probable results of death or great bodily harm.

23 To summarize on this point, a finding of simple negligence will deprive the accused of
24 the accident defense; however, simple negligence is not enough to find the accused guilty
25 of the offenses of murder and the lesser included offense of involuntary manslaughter,
26 but if found beyond a reasonable doubt will support a finding of negligent homicide.

27 If you find the accused committed an inherently dangerous act evincing a wanton
28 disregard for human life or was culpably negligent or simply negligent and, thus, not
29 protected from criminal liability by the defense of accident, you may not convict unless
30 you find beyond a reasonable doubt that the inherently dangerous act or, in regard to the
31 LIO of involuntary manslaughter, culpably negligent act, or in regard to the LIO of
32 negligent homicide, negligent act, was a proximate cause of the death of MG Mowhosh.

33 Again, proximate cause means that the death of MG Mowhosh must have been the result
34 of the accused's inherently dangerous or, in regard to the LIO of involuntary
35 manslaughter, culpably negligent, or in regard to the LIO of negligent homicide,
36 negligent act. A proximate cause does not have to be the only cause, but it must be a
37 direct or contributing cause which plays a material role in bringing about the death. If
38 some other unforeseeable, independent, intervening event, which did not involve the
39 accused, was the only cause which played any important part in bringing about the death,
40 then the accused may not be convicted of the offenses of murder or the lesser included
41 offenses of involuntary manslaughter, or negligent homicide.

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APPELLATE EXHIBIT LVI

1 The burden is on the prosecution to establish the guilt of the accused. Before the accused
2 can be convicted of murder, or the LIO's of involuntary manslaughter, or negligent
3 homicide you must be convinced beyond a reasonable doubt that the defense of accident
4 either does not exist or has been disproved, and that the accused's inherently dangerous
5 act, or in regards to the LIO of involuntary manslaughter, culpably negligent conduct, or
6 in regards to the LIO of negligent homicide, negligent conduct was a proximate cause of
7 the death of MG Mowhosh.

8 Also, in regards to the specification of Charge II, and this applies only to the specification
9 charged, not the lesser included offenses, the evidence has raised the issue of ignorance
10 on the part of the accused concerning whether he knew that death or great bodily harm
11 was a probable consequence of the acts on or about 26 Nov 2003, in relation to the
12 offense of murder by an act inherently dangerous to another.

13 I advised you earlier that to find the accused guilty of the offense of murder by an act
14 inherently dangerous to another, you must find beyond a reasonable doubt that the
15 accused knew that death or great bodily harm was a probable consequence of the act.

16 If the accused at the time of the offense was ignorant of the fact that death or great bodily
17 harm was a probable consequence of the acts, then he cannot be found guilty of the
18 offense of murder by an act inherently dangerous to another.

19 The ignorance, no matter how unreasonable it might have been, is a defense, but it must
20 have been honestly held. In deciding whether the accused was ignorant of the fact that
21 death or great bodily harm was a probable consequence of the act, you should consider
22 the probability or improbability of the evidence presented on the matter.

23 You should consider the accused's age, education, training, and experience along with
24 the other evidence on this issue.

25 The burden is on the prosecution to establish the guilt of the accused. If you are
26 convinced beyond a reasonable doubt that at the time of the alleged offenses the accused
27 was not ignorant of the fact that death or great bodily harm was a probable consequence
28 of the act, then the defense of ignorance or mistake does not exist. Again, this instruction
29 applies to the charged offense of murder by an act inherently dangerous to another, and
30 not to the lesser included offenses of that charge.

31 With respect to the charge of dereliction of duty, Charge I and its specification, you are
32 advised that ignorance of the law is no defense. Specifically, the law requires humane
33 treatment of detainees. The accused's ignorance, if any, of his obligation to treat
34 detainees humanely is not a defense to that charge and specification.

35
36 Evidence may be direct or circumstantial. Direct evidence is evidence which tends
37 directly to prove or disprove a fact in issue. If a fact in issue was whether it rained during

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1 the evening, testimony by a witness that he or she saw it rain would be direct evidence
2 that it rained.

3 On the other hand, circumstantial evidence is evidence which tends to prove some other
4 fact from which, either alone or together with some other facts or circumstances, you may
5 reasonably infer the existence or nonexistence of a fact in issue. If there was evidence the
6 street was wet in the morning, that would be circumstantial evidence from which you
7 might reasonably infer it rained during the night.

8 There is no general rule for determining or comparing the weight to be given to direct or
9 circumstantial evidence. You should give all the evidence the weight and value you
10 believe it deserves.

11 I have instructed you that in regards to willful dereliction of duty, that the accused
12 willfully, that is intentionally, failed to perform his duties, must be proved beyond a
13 reasonable doubt. Direct evidence of intent is often unavailable. The accused's intent,
14 however, may be proved by circumstantial evidence. In deciding this issue, you must
15 consider all relevant facts and circumstances.

16 I have instructed you that you must be satisfied beyond a reasonable doubt that in regards
17 to the 4th element of the specification of Charge II, murder, that the accused knew that
18 death or great bodily harm was a probable consequence of the act, and, that in relation to
19 the specification of Charge I, that the accused knew of his duties. This knowledge, like
20 any other fact, may be proved by circumstantial evidence. In deciding this issue you must
21 consider all relevant facts and circumstances.

22 You have the duty to determine the believability of the witnesses. In performing this duty
23 you must consider each witness' intelligence, ability to observe and accurately remember,
24 sincerity and conduct in court, and character for truthfulness. Consider also the extent to
25 which each witness is either supported or contradicted by other evidence; the relationship
26 each witness may have with either side; and how each witness might be affected by the
27 verdict.

28 In weighing a discrepancy by a witness or between witnesses, you should consider
29 whether it resulted from an innocent mistake or a deliberate lie.

30 Taking all these matters into account, you should then consider the probability of each
31 witness' testimony and the inclination of the witness to tell the truth.

32 The believability of each witness' testimony should be your guide in evaluating
33 testimony and not the number of witnesses called.

34 These rules apply equally to the testimony given by the accused.

35 Chief Williams, SPC Loper, SGT Lamb, MAJ Voss, Chief Sonnek, and the witness
36 whose testimony was not bifurcated testified under grants of immunity. This means that
37 the military witnesses were ordered to testify truthfully by the convening authority.
38 Under this grant of immunity, nothing the witness said, and no evidence derived from

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1 that testimony, can be used against that witness in a criminal trial. Chief Williams, SPC
2 Loper testified after having charges dismissed in their cases.

3 If the witness did not tell the truth, the witness can be prosecuted for perjury. In
4 determining the credibility of these witnesses, you should consider the fact these
5 witnesses testified under grants of immunity along with all the other factors that may
6 affect the witness' believability.

7 A witness is an accomplice if he was criminally involved in an offense with which the
8 accused is charged. The purpose of this advice is to call to your attention a factor
9 specifically affecting the witness' believability, that is, a motive to falsify his testimony
10 in whole or in part, because of an obvious self-interest under the circumstances.

11 In deciding the believability of Chief Williams and SPC Loper, you should consider all
12 the relevant evidence.

13 Whether Chief Williams and SPC Loper, who testified as a witnesses in this case, were
14 accomplices is a question for you to decide. If Chief Williams and SPC Loper shared the
15 criminal intent or purpose of the accused, if any, or aided, encouraged, or in any other
16 way criminally associated or involved themselves with the offense with which the
17 accused is charged, they would be an accomplice.

18 As I indicated previously, it is your function to determine the credibility of all the
19 witnesses, and the weight, if any, you will accord the testimony of each witness.
20 Although you should consider the testimony of an accomplice with caution, you may
21 convict the accused based solely upon the testimony of an accomplice, as long as that
22 testimony was not self contradictory, uncertain, or improbable.

23 You have heard evidence that the witness Mr. Pratt made a statement prior to trial
24 regarding the accused's treatment of a detainee named Khalid that may be inconsistent
25 with his testimony at this trial. If you believe that an inconsistent statement was made,
26 you may consider the inconsistency in evaluating the believability of the testimony of Mr.
27 Pratt.

28 To show the probability of his innocence, the defense has produced evidence of the
29 accused's: Good military character and character for honesty. Evidence of the accused's
30 character for being a good soldier and honesty may be sufficient to cause a reasonable
31 doubt as to his guilt. On the other hand, evidence of the accused's good military
32 character and character for truthfulness may be outweighed by other evidence tending to
33 show the accused's guilt.

34

35 I instruct you again that the victim, MG Mowhosh, is not on trial in this case. There has
36 been evidence about his status. His status cannot be considered by you as legitimizing
37 his treatment if it is otherwise illegitimate. Put another way, the necessity of
38 interrogating him does not make lawful interrogation techniques that are otherwise
39 unlawful.

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1 Justification is a legal term and it is an issue in this case. I've defined that term for you
2 earlier. Necessity is also a legal term. It is traditionally seen as a choice of evils defense.
3 – for instance, it was necessary for me to trespass in order the rescue the person drowning
4 in the adjacent lake. The person is later prosecuted for trespass and claims necessity. To
5 the extent the evidence in this case and referenced in argument suggests that the actions
6 of the accused were necessary in the sense of legal justification as a defense, you are
7 instructed that you may not consider it for that purpose. As a matter of law, the defense
8 of necessity is not applicable in this case. Necessity may not be considered by you as
9 indicating any justification in this case. Pleas to necessity, to the extent they suggest
10 justification for otherwise unlawful acts, have no place in your deliberations.

11 Evidence of MG Mowhosh's status may only be considered by you for its tendency if any
12 to make more or less likely the willfulness element of the specification of Charge I.

13 The parties have stipulated or agreed what the testimony of MAJ Joel Hamilton would be
14 if he were present in court and testifying under oath. This stipulation does not admit the
15 truth of such testimony, which may be attacked, contradicted, or explained in the same
16 way as any other testimony. You may consider, along with all other factors affecting
17 believability, the fact that you have not had an opportunity to personally observe this
18 witness.

19 You may consider evidence that the accused may have slapped MG Mowhosh and
20 conducted an interrogation on the roof of Blacksmith Hotel on or about 25 Nov 03 for the
21 limited purpose of its tendency, if any, to: demonstrate the escalation the interrogation
22 techniques he employed with MG Mowhosh.

23 You may not consider this evidence for any other purpose, and you may not conclude
24 from this evidence that the accused is a bad person or has general criminal tendencies and
25 that he, therefore committed the offenses charged.

26 An accused may be convicted based only on evidence before the court. Each offense
27 must stand on its own and you must keep the evidence of each offense separate. Stated
28 differently, if you find or believe that the accused is guilty of one offense, you may not
29 use that finding or belief as a basis for inferring, assuming, or proving that he committed
30 any other offense.

31 If evidence has been presented which is relevant to more than one offense, you may
32 consider that evidence with respect to each offense to which it is relevant. For example, if
33 a person were charged with stealing a knife and later using that knife to commit another
34 offense, evidence concerning the knife, such as that person being in possession of it or
35 that person's fingerprints being found on it, could be considered with regard to both
36 offenses. But, the fact that a person's guilt of stealing the knife may have been proven is
37 not evidence that the person is also guilty of any other offense.

38 The burden is on the prosecution to prove each and every element of each offense beyond
39 a reasonable doubt. Proof of one offense carries with it no inference that the accused is
40 guilty of any other offense.

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1 You have heard the testimony of Mr. Hodgkinson, Dr. Wecht, and MAJ (Dr) Smith.
2 They are known as "expert witnesses" because their knowledge, skill, experience,
3 training, or education may assist you in understanding the evidence or in determining a
4 fact in issue. You are not required to accept the testimony of an expert witness or give it
5 more weight than the testimony of an ordinary witness. You should, however, consider
6 their qualifications as experts.

7 In the specification of the Additional Charge, the date alleged is on or about 19 Nov
8 2003. If you have doubt about the time but you are satisfied beyond a reasonable doubt
9 that the offense was committed as alleged at a time which differs slightly from the exact
10 time in the specification, you may make minor modifications in reaching your findings by
11 changing the time described in the specification, provided that you do not change the
12 nature or identity of the offense. There is a section on the findings worksheet that
13 permits this if you think it is warranted.

14

15 I remind you that you may not infer that the accused is guilty of any offense from the
16 presentation of evidence in closed trial sessions. You also may not infer from the
17 security precautions, or the fact that a session of the trial was closed to the public that the
18 evidence or testimony presented was either true or was in fact classified.

19 You must evaluate open and closed session evidence and witnesses using the same
20 standards.

21 Classified evidence also does not permit any inference as to the guilt of the accused.

22 Again, closed trial sessions to consider purportedly classified evidence are the most
23 satisfactory method for resolving the competing needs of the Government for protection
24 of the purportedly classified information and the rights of the accused to a public trial.
25 You may not hold the fact there have been closed trial sessions in any way against the
26 accused. Closed trial sessions do not erode the presumption of innocence which the law
27 guarantees the accused.

28 **CLOSING SUBSTANTIVE INSTRUCTIONS ON FINDINGS**

29 You are further advised:

30 First, that the accused is presumed to be innocent until his guilt is established by legal
31 and competent evidence beyond a reasonable doubt;

32 Second, if there is reasonable doubt as to the guilt of the accused, that doubt must be
33 resolved in favor of the accused, and he must be acquitted; and

34 Third, if there is a reasonable doubt as to the degree of guilt, that doubt must be resolved
35 in favor of the lower degree of guilt as to which there is no reasonable doubt;

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1 Lastly, the burden of proof to establish the guilt of the accused beyond a reasonable doubt
2 is on the government. The burden never shifts to the accused to establish innocence or to
3 disprove the facts necessary to establish each element of each offense.

4 By "reasonable doubt" is not intended a fanciful or ingenious doubt or conjecture, but an
5 honest, conscientious doubt, suggested by the material evidence, or lack of it, in the case.
6 It is an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a
7 reasonable doubt means proof to an evidentiary certainty, although not necessarily to an
8 absolute or mathematical certainty. The proof must exclude every fair and reasonable
9 hypothesis of the evidence except that of guilt. The rule as to reasonable doubt extends to
10 every element of the offense, although each particular fact advanced by the prosecution,
11 which does not amount to an element, need not be established beyond a reasonable doubt.
12 However, if, on the whole evidence, you are satisfied beyond a reasonable doubt of the
13 truth of each and every element, then you should find the accused guilty.

14 You should bear in mind that only matters properly before the court as a whole should be
15 considered. In weighing and evaluating the evidence you are expected to use your own
16 common sense, your knowledge of human nature and the ways of the world. In light of
17 all the circumstances in the case, you should consider the inherent probability or
18 improbability of the evidence. Bear in mind you may properly believe one witness and
19 disbelieve several other witnesses whose testimony is in conflict with the one. The final
20 determination as to the weight or significance of the evidence and the credibility of the
21 witnesses in this case rests solely upon you.

22 You must disregard any comment or statement or expression made by me during the
23 course of the trial that might seem to indicate any opinion on my part as to whether the
24 accused is guilty or not guilty since you alone have the responsibility to make that
25 determination. Each of you must impartially decide whether the accused is guilty or not
26 guilty in accordance with the law I have given you, the evidence admitted in court, and
27 your own conscience.

15 15/15

APPELLATE EXHIBIT

LV

Appellate Exhibit LVIII is classified and is located in
Volume 3 of 3 of the record of trial.

UNITED STATES)

v.)

SENTENCING WORKSHEET

WELSHOFER, LEWIS E., Jr.
Chief Warrant Officer (CW3)
U.S. Army,
66th Military Intelligence Company,
3d Squadron, 3d Armored Cavalry Regiment
Fort Carson, Colorado 80913)

23 January 2006

Note: After the court has reached a sentence, the President shall circle the punishment(s) selected and accomplish any necessary filling in or crossing out within the punishment(s) selected. Cross out any punishments not selected.

Chief Warrant Officer Three Lewis E. Welshofer, this court-martial sentences you:

NO PUNISHMENT

~~1. To no punishment.~~

REPRIMAND

2. To be reprimanded.

FINE AND FORFEITURES

~~3. To pay the United States a fine of \$ _____, (and to serve (additional) confinement of _____ (days)(months)(years) if the fine is not paid.)~~

4. To forfeit \$ 15.00 pay per month for 4 (months)(years).

~~5. To forfeit all pay and allowances.~~

RESTRAINT

6. To be restricted for 60 (days) (~~months~~) to the limits of:

PLACE OF DUTY, PLACE OF WORSHIP, AND BARRACKS

CONFINEMENT

~~7. To be confined for _____ (days)(months)(years).~~

PUNITIVE DISCHARGE

~~8. To be dismissed from the service.~~

Appellate Exhibit LIX

Note: A court-martial has no authority to suspend a sentence or any part of a sentence.

QUESTION(S) BY COURT MEMBERS

I. My question is directed to LTC Calvert
(Name of Witness)

II. My question is:

~~As a member~~

Do you believe ~~that~~, under the
circumstances of combat, ~~that~~ and
possible command influence, that
CW3 Welshover performed his
duties the best way possible under
the circumstances?

CPT Morchouse

(Name of Court Member)

III. Objection(s) to the question:

(Print Legibly)

Trial Counsel: (YES) (NO)

Defense Counsel: (YES) (NO)

☐ Hearsay

☐ Hearsay

☒ Irrelevant

☐ Irrelevant

☒ Assumes Facts Not in Evidence

☐ Assumes Facts Not in Evidence

☒ Calls for an Opinion

☐ Calls for an Opinion

☐ Privileged Communication

☐ Privileged Communication

☐ Product of an Illegal Search

☐ Product of an Illegal Search

☐ Other (Specify) _____

☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit LX

QUESTION(S) BY COURT MEMBERS

I. My question is directed to _____
(Name of Witness)

II. My question is:

~~The~~ The note was for LT to give to
Judge. I don't think he got it.
Reference re-vote

RE-VOTE OF VERDICT?

Yes, this morning I told her I had
something to give her. She asked
before or after the proceedings.
I didn't have time to explain
anything to her.

Is this something we have to bring to Mr. President? ~~2~~ 20
(Name of Court Member)

III. Objection(s) to the question:

Submit to the judge?
Trial Counsel: (YES) (NO)

(Print Legibly)

Defense Counsel: (YES) (NO)

____ Hearsay
____ Irrelevant
____ Assumes Facts Not in Evidence
____ Calls for an Opinion
____ Privileged Communication
____ Product of an Illegal Search
____ Other (Specify) _____

____ Hearsay
____ Irrelevant
____ Assumes Facts Not in Evidence
____ Calls for an Opinion
____ Privileged Communication
____ Product of an Illegal Search
____ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit

LXI

Yeah. Understood. Well, if we get another break, then
~~we'll~~ we'll have to be more aggressive in speaking
~~to her~~ getting her attention.

FOLD PAPER AND PRINT
CLEARLY "GIVE TO JUDGE"

Appellate Exhibit 2X11

SCOTT B. BROWN, JR.
JULY 19, 1964
100-100-100-100

Defense: Wheeler

Age - 43

Good Military Character

The accused's record & reputation in the service for good conduct & efficiency.

The prior honorable discharge of the accused

The combat record of the accused

The accused's OER's

Lack of previous convictions or Art. 15 punishment

~~Character evidence - testimony of COL Teeple,~~
LTC ~~Agusto~~ Agusto, LTC Calvert, MAJ Short
MAJ O'Hara-Hulitt; CPT Falk, 1LT Evans,
~~Mr. Reese~~, SGT Lamb, Mr. Gleason,
Mr. Reese

Expression of desire to remain in the service

Indication he does not want dismissal

Appellate Exhibit LXIII

Prosecution exhibits 11, 12, and 23.

The fact that General Mohwoush turned himself into US Army forces.

The fact that a sleeping bag and electrical cord were used in the commission of the offense.

AND

The fact that the victim died.

Appellate Exhibit LXIV

QUESTION(S) BY COURT MEMBERS

I. My question is directed to Judge
(Name of Witness)

II. My question is:

Is there any specified order
to the to deliberate on the
the conviction?

CPT Morahan
(Name of Court Member)

III. Objection(s) to the question:

Trial Counsel: (YES) (NO)

Defense Counsel: (YES) (NO)

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

☐ Hearsay
☐ Irrelevant
☐ Assumes Facts Not in Evidence
☐ Calls for an Opinion
☐ Privileged Communication
☐ Product of an Illegal Search
☐ Other (Specify) _____

VI. Request Article 39a Session: (YES) (NO)

Appellate Exhibit LXV