

**SGT Aaron L. Rust, 617<sup>th</sup> Military Police Company, Camp Victory Iraq, APO AE 09342;  
VIOP: 302-242-4828**

#### QUESTIONS BY INVESTIGATING OFFICER

SGT Rust pointed to the diagram to show where his location was when SSG Nein called the cease fire.

I was in the first responding squad during the incident. I have no idea what time that was. I saw SSG Nein when I started going down the trench. I was driving at that time. SGT Wilkerson was the TC of SPC Wilkerson at that time. They met with SSG Nein and started walking towards the house. This was after clearing the trench line at ASR Detroit. They were headed to do a search on the back side. We cordoned the area and we still saw some wounded being taken care of. I worked with two wounded AIF. I did not hear any shots after the cease fire was called. I did not see anybody point their weapon in a threatening manner. There were just people walking on the field making sure that the people lying on the ground were actually dead.

#### DIRECT-EXAMINATION

There was one individual in the ditch that was being helped, his face was covered with mud. I asked SPC Mike if the area was checked and secured. I then had SPC Mike hold my M4. I helped pull the person out of the mud. I then got a stretcher. The injured AIF looked like he was hit by a .50 caliber on his right arm and right leg and maybe some other subsequent injuries. There was blood on his torso area and there was blood on his head. I could not tell if he had a wound on his head at first. Maybe that was blood that may have run off his arm or his leg. We placed a tourniquet on his leg. He was saying "Alah-Alah" and he would not say much.

CPT Noltan showed SPC Mike Defense Exhibit B for Identification.

That was the insurgent I saw with his face down in the mud. I recognize his features, size, and the outfit he's wearing.

#### CROSS-EXAMINATION

I do not recall the time I found the insurgent laying on the ditch. Maybe it was about sometime mid-day, it was after lunch. When I came upon the insurgent, his face was down and his head was pointing south. He was on the mud and he was badly shot. He was still conscious but not able to assist his other men. He just laid there, did not attempt to move and he said thanks. I heard him say "Alah Akbar" then "Alah-Alah." Under the ROE, if there is hostile intent, you have the right to shoot. We have ROE cards. We do not make warning shots. When we shoot, there should be a reason, and it should be shoot-to-kill.

#### REDIRECT-EXAMINATION

The wounded insurgent did not show any hostile intent towards me. He did not make any hostile actions towards me. It's strange that he spoke to me in English.

SGT Leigh Ann Hester, 617<sup>th</sup> Military Police Company, Camp Victory, Iraq, APO AE 09342; VIOP: 302-242-4828

#### QUESTIONS BY INVESTIGATING OFFICER

SGT Hester pointed out her location, using the diagram on the screen, when her squad leader called cease fire.

After the cease fire was called, we went to SGT Rivera's truck. SPC Pullen was giving aid at that time to SGT Rivera. SPC Mike came over there to take SGT Rivera to the LZ. Two male soldiers helped us load SGT Rivera in the truck. I took a break, and then myself and SPC Cooper started clearing the insurgents and weapons. I heard SSG Nein call cease fire, SPC Mike was just echoing the call. We were coming down the trench line and he did not want anybody shooting at our direction. I went to the intersection of the two trench lines. There were lots of enemy weapons around. There might have been two AIF insurgents that were running away and did not have an actual weapon with them. There was one there that SPC Cooper and I saw without a weapon. I believe he surrendered. I did not know SGT Burke's name at that time, I just found out his name yesterday. I saw him on the main trench line. The next time I saw SGT Burke, I was closer to the road and he was down the line with SGT Morris. I believe we shared a few words but I'm not sure. I heard two gunshots after the cease fire was called. I'm not sure how far apart from each other the shots were.

#### DIRECT-EXAMINATION

CPT Nolten said "When referring to the dead or wounded AIF you found in the area of the trench line, where did you find them with respect to the trench line?" SGT Hester replied "In it, on the slope, turning away from it towards the orchard, in the orchard, down in the trench line, some outside the trench line."

#### CROSS-EXAMINATION

My first encounter with the 623d was while they were doing a fuel stop. They were coming off a turn towards south of Detroit. We were pulling security. SSG Nein was the first in the convoy, I was in the second, and SGT Rivera in the rear. The fuel stop was about 10 to 15 minutes. We proceeded on, then I saw SSG Nein's HMMWV got hit. SSG Nein's vehicle was about to turn when I saw the explosion and we were being shot at. We immediately pulled off ASR Detroit and I got out of the vehicle. We were receiving fire the whole time and I started firing my M4 and 203 towards the orchard. SSG Nein was called by SPC Cooper saying that there were insurgents to our back side. We ran over to the trench across the road. We killed about 3 to 5 insurgents and wounded countless others. The insurgents were fighting to their deaths. We found weapons within close proximity to the insurgents that were wounded. There were AKs and RPGs. I heard rounds fired after the cease fire was called. I went out to police up the area. I saw SGT Burke on two occasions that day, I did not know his rank and name at that time. I took wounded soldiers from the unit that day. SGT Rivera, SPC Mac, and SPC \_\_\_\_\_ were wounded. I believe that SGT Rivera received a lower vertebrae fracture. SPC Mac's lung

collapsed. The insurgents had escape vehicles in a row. I did not see SGT Burke or the insurgent or who got shot from where I was standing, but I heard two pistols or M9 shots.

#### RE-DIRECT EXAMINATION

There were 26 dead insurgents at that time and 8 were MEDAVACed. I pulled the ammunition and weapons away from the wounded. I did not do the actual searching.

**SPC Ashley Pullen, 617<sup>th</sup> Military Police Company, Camp Victory, Iraq, APO AE 09342**

#### QUESTIONS BY INVESTIGATING OFFICER

SPC Pullen pointed to the diagram on the screen her location after the cease fire was called by SSG Nein.

I was assisting SGT Rivera who was applying first aid. SPC Mike was also there. There were some people who also showed up and I'm not sure who they were. I was then told that they were the 623d element. I had my back to the trench line. There was another soldier from another convoy that showed up. He gave me and SGT Rivera a ride and we dropped SGT Rivera at the LZ. I went back to my truck and pulled security. I was looking at the house down at the corner and I was there for the rest of the day. I did not help with the AIFs and detainees, I was at the radio most of the time. I did not go out in the field.

#### NO QUESTIONS FROM THE TRIAL COUNSEL

#### CROSS EXAMINATION

We did an AAR after the battle. I talked to my fellow soldiers about what happened. SPC Ordunez was upset after what happened to SGT Rivera. SPC Ordunez can not remember a lot about the incident after the first two days but he remembers most of them now.

Recess: 1240 hours

Reconvene: 1406 hours

The following witnesses were called by Defense, were sworn and testified as follows:

**LTC Todd Abel, 332d EMDG, Balad, Iraq, APO AE 09391**

#### DIRECT EXAMINATION

I attend medical school at Loma Linda University, Southern California. On 1992 to 1996, I attended a residency program and internship in Indianapolis, Indiana. I've been a neuro-surgeon in the Active Air Force at Keesler Air Force Base in Mississippi. I was a neuro-surgeon at Landstuhl, Germany. I've been at Balad since January. I've treated about 50 head injuries at Landstuhl. I treated hundreds of head trauma incidents during my 6-year residence. There were

about a hundred of them from gunshots. Most of the civilian injuries that live to reach the ER are from small caliber pistols. In the civilian world, people with injuries from higher caliber rounds do not survive to reach the hospital. I've operated on 45 injuries since I've been in Anaconda in the last 4 months. Maybe 10 of these were from high caliber rounds. I do not see a large number of 5.56 caliber round injuries at Anaconda, there are more from AK47s. I did not see very many small arms fire in the head while in Balad. The caliber does not matter as much as the energy. A 5.56 caliber round fired from about 10 feet can cause a very significant injury.

I was working at the hospital in Balad and Anaconda on 20 March 2005. The patient #823 came in that day. He was covered with mud.

CPT Krafchek showed LTC Abel a photo for identification.

Looking at the mud and the head injury, I can say that that is him (patient #823). We did a CAT scan on the patient. I examined his medical records.

CPT Krafcheck offered the medical records of patient #823 as Defense Exhibit G for Identification.

Most of these are records from our office in Balad. Patient #823 is the name on the record. This does not affect the care given to the patients. Most of the non-insurgents are given numbers as well. I did an examination that day and I performed surgery. He had a head injury, scalp laceration, and the CAT scan showed that a bullet went into the brain. He did not have significant skull fracture, he did not have significant swelling around the brain. There were no fragments in his brain. I observed from the CAT scan that it bounced off.

LTC Abel is interpreting the diagram of the patient's head using the picture on the screen.

These here are bone fragments that are driven into the brain. The rest of the brain around here does not have any significant swelling, it was a low energy fracture. I've seen cases where just shock waves from an AK 47 tear the brain. In that close proximity, the patient can feel the full force of the shock. We removed a chunk of bone and bury it in the abdomen to accommodate the swelling of the brain. The care of patient #823 was done by the intensive care team with guidance from us. He had some brain swelling but it was not significant. At the helicopter, they are always sedated and chemically paralyzed during the trip to the hospital. Usually they are chemically unconscious. The wound site is up and behind the ear. The trajectory of the shot is at a right angle to the bone that was driven in. For the record, the shot was approximately an inch past his right ear and 2 inches above his ear. The round that hit the patient was a low energy round, certainly not an AK47, based on the amount of damage it was not significant as far as head injuries go. The skull fracture is consistent with a 9mm. He had no injuries in his chest cavity. We have a chest x-ray to show that.

The chest x-ray was shown on the screen and described by LTC Abel. He had injury to his right forearm and also right thigh. When I was doing the surgery on the brain, the orthopedic surgeons were performing surgery on those injuries at the same time. His arm was not amputated because there is still some function in his arm. There are enough useful muscles in

about a hundred of them from gunshots. Most of the civilian injuries that live to reach the ER are from small caliber pistols. In the civilian world, people with injuries from higher caliber rounds do not survive to reach the hospital. I've operated on 45 injuries since I've been in Anaconda in the last 4 months. Maybe 10 of these were from high caliber rounds. I do not see a large number of 5.56 caliber round injuries at Anaconda, there are more from AK47s. I did not see very many small arms fire in the head while in Balad. The caliber does not matter as much as the energy. A 5.56 caliber round fired from about 10 feet can cause a very significant injury.

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his arm. The injury was below the elbow so he can still push himself up. I believe that all these records are all from Balad hospital. I did not see any records from the first medical personnel who attended to the patient. With the extremity injuries, I believe that the patient can still function as a combatant. With the head injury, I think it is doubtful for him to function as a combatant.

#### CROSS EXAMINATION

My specialization is neurological. Pretty much, exclusively, I deal with the PA. When I talked about low energy round you are pretty much talking about hand guns, .22 caliber, 9mm, the M9. The AK47 compared to the M16 has a larger bullet and has a slower muzzle velocity, it has larger amount of energy based on the size of the bullet. The M16 has a smaller bullet and a larger muzzle velocity, and the energy (1/2 mv squared). That is why I talked about the higher-injury energy. The higher velocity talks about the energy, higher energy like the M16s and AK 47 and low energy like the pistols. The patient had thru and thru injury on his right arm, from gunshot. I did not recover a bullet from that wound. As a result of that wound the patient has no structural stability of his hand. He can use his left hand on a weapon and pull the trigger with his right hand or his right hand assisted. The leg wound was a complete fracture of the femur. There were no fragments recovered from that wound. His leg would not have any weight capabilities. He will not be able to carry weight on that right leg. He will not be able to stand up on that right leg. He could not walk unaided. Not every single gunshot to the head cause the brain to swell, it depends on how the energy is imparted to the brain. Generally, there are categories of wounds that you see, there are variations within those categories.

#### QUESTIONS BY INVESTIGATING OFFICER

This is very unlikely to be a shot from an M16. A shot from an M16 five feet away would have caused much more damage. I'm reasonably sure that it was a bullet that hit his head. I do not have specific experience with hand grenade. Basically, during November and December, every single patient brought to Landstuhl with a head injury had survived. Only U.S. people are brought to Landstuhl.

**SPC Jason Mike, 617<sup>th</sup> Military Police Company, Camp Victory, Iraq, APO AE 09342;  
VIOP: 302-242-4828**

#### QUESTIONS BY INVESTIGATING OFFICER

SPC Mike pointed out his position, after SSG Nien called cease fire, from the diagram on the screen.

I am not aware of any gunshots after the cease fire was called. There were soldiers from the 623d that helped us load up. I do not know the names of the soldiers. I was not treating AIF casualties. I was overseeing the CLS. I probably saw 6 AIFs being treated at that time.

## DIRECT EXAMINATION

My MOS is 91W, Combat Medic. I've been in Iraq for 6 or 7 months. I treated around 30 to 40 individuals. Ten to fifteen of those are insurgents. Majority of the wounds I treated are shrapnel wounds. SGT Rust and I treated a wounded insurgent that was laying in the ditch. I helped him place a tourniquet on the individual. The individual was face down. As soon as I walked by, he raised his head up that is why I knew he was alive. I got him out of the trench and SGT Rust treated him.

I ran to another guy who was pretty quiet. This guy had a gunshot wound in his arm and a 50 caliber wound on his leg. I have seen a 50 caliber wound before and this wound was consistent with that. We moved this guy on a stretcher to the shade. He did not make any hostile acts toward me.

## CROSS-EXAMINATION

Even if he was pretty banged up, I do not think he's been dying. He was constantly yelling. He can still function his hand even if he is not moving at all. SSG Nein gave us the ROE briefing that day. CPT Linder usually comes out after our mission briefs and talks about safety. We were allowed to take warning shots that day. The bank was pretty steep. He was saying "Alah." He did not say anything else.

## REDIRECT-EXAMINATION

I'm about 5 feet 9 inches tall. The bottom of the trench is at least 5 feet nine inches.

Recess: 1454 hours

Reconvene: 1501 hours

**Special Agent Thomas Robinson, 48<sup>th</sup> Military Police Detachment (CID), Camp Victory, Iraq, APO AE 09342; DSN: 318-822-2835**

## DIRECT-EXAMINATION

I was notified by my Special Agent In-charge that COL Brown, 18<sup>th</sup> MP Brigade commander, requested a CID investigation on this matter. After initiating the case, I started interviews with the 617<sup>th</sup> Military Police Company. I found out that thru witness interviews, it was alleged that SGT Burke had shot a wounded unarmed AIF person after an engagement on the 20<sup>th</sup> of March. We received statements from the 18<sup>th</sup> MP Brigade that have got to do with their after action report including statements from SSG Nein from the 617<sup>th</sup>, and from SGT Burke from the 623d. That was our first indicator of SGT Burke, who COL Brown was talking about. There were indicators that led us to SGT Burke. We ended up interviewing just about everybody out there, that they assumed that the only person from 623d identified from the witness interviews, on the main canal utilized by the AIF, was SGT Burke. We were able to identify the victim or insurgent involved. Starting with the very first 617<sup>th</sup> witness, we showed them photographs of

the scene exposed by the 617<sup>th</sup> members. SSG Nein, SGT Morris, and I believe SPC Rust, all identified the individual we identified as Hadi Saleh Khalid Al Ujuhishi as the AIF member. It has been reported initially that this individual had died and into the first few interviews, the AIF member was MEDAVACed to Balad and also to the International Zone. Agents in Balad went to the hospital and checked records and came up with packets from 3 AIF members who were transported from this incident. Not to mention, SGT Morris in his interview, advised us he had with him on the MEDAVAC someone who was wounded and was enroute to Balad. One of the packets we have matched the information we have on this insurgent. We had the description wounds from the scene. There was an individual treated at the Air Force hospital with wounds similar to the description. He was transferred to the Baghdad Correctional Confinement Facility in Abu Ghraib. He was subsequently doing better. That is how we were able to ask him his name.

CPT Shepherd showed SA Robinson Prosecution Exhibit #13 for Identification.

I recognize this photo. This is the photo we showed to SSG Nein and SGT Morris for identification of the wounded AIF.

CPT Shepherd showed SA Robinson Prosecution Exhibit #15 for Identification.

This is the photo exposed by Agent Deroussean at Abu Ghraib. This is the photo of the person our units spoke to at Abu Ghraib. We went to the scene. We took photographs and conducted a search for casings and projectiles. We were looking for 9mm and 5.56 casings. We were looking for both casings because from SGT Burke's initial statement and subsequent AARs, he said he shot his 9mm pistol. From witness interviews, we believe he fired an M4 rifle. There was a single 5.56 casing found at the scene. We were doing searches using CID personnel and 617<sup>th</sup> members.

SA Robinson showed from the map where they were doing the search.

We found the casing at the north side of the canal, it was about a 130 yards down. It was almost directly across from the trees. SGT Morris was the person who found the shell casing. It is not abnormal to go to a scene with the witness and fingerprints are used on occasions. SGT Morris picked the casing up to identify it as a 5.56. He then told me he placed it back where it belonged. I photographed the casing where it was. There were no other casings I saw on the entire north side of that. The south side was completely littered with casings. The witnesses said that there was no fighting down on the north side of the canal. I recorded the finding of this casing on a CID form, DA Form 4137.

This DA Form 4137 was offered as Prosecution Exhibit #16 for Identification.

This is the DA Form 4137 that I completed. I recognize it, it has my signature on it. The casing was forwarded to the U.S. Army Criminal Investigation Laboratory for ballistic comparison to the M4 rifle that SGT Burke told us that he carried that day.

CPT Shepherd showed SA Robinson Prosecution Exhibit #17 for Identification.



On the 9<sup>th</sup> of April, we conducted interviews from the 623d personnel. We siezed a rifle that SGT Simpson gave SGT Burke to use. This is a copy of the DA Form 4137 showing the M4 rifle siezed from SGT Simpson. I recognize the form because it has SGT Simpson's signature and my signature. The results show that the shell casing found on the crime scene had been fired by the M4 rifle of SGT Simpson, carried by SGT Burke. This was found thru ballistic test and comparison.

CPT Shepherd submitted prosecution exhibit #18, a 4-page laboratory report on the weapon used.

This is the copy of the USACIL report regarding comparison and test firing of weapon. This is the report that confirms that the casing matches the weapon of SGT Simpson. I spoke with SGT Burke about this investigation. I advised him of his rights under Article 31. I did it using a DA Form 3881, which is the Rights and Warning form, and he waived his rights.

CPT Shepherd submitted DA Form 3881 as Prosecution Exhibit #19 for Identification.

This is the DA Form 3881 where SGT Burke waived his rights. I informed him of the offense of which I suspected. That offense is attempted murder. SGT Burke asked me "Is he still alive?" I thought that was significant because I thought that SGT Burke didn't know anything about our investigation. SGT Burke stated that he shot a wounded AIF twice with an M9 after he felt threatened. He did not explain specifically how he felt threatened. I asked him several times, to be specific, how he felt threatened. I asked SGT Burke several times if he fired an M4 rifle and he said no. He initially told me that this individual rolled towards a weapon. Then he changed and said that this individual was moving towards the side as if he was reaching for a weapon.

CPT Shepherd showed the view of the trench at the scene. He was pointing to the diagram on the screen.

SGT Burke stated that the insurgent was partially atop the crest of the ridge. That was in the MSR side, north side of the canal. SGT Burke stated that he fired the first shot when he was across from the insurgent. When we went back to the scene and found the shell casing, we figured the trench was approximately 23 feet. It was approximately 10 feet down the slope on that MSR side of the trench. The accused stated that his weapon was at the inner slope, north side. SGT Burke's statements have discrepancies. Initially he said 3 to 5 feet, and later he said 5 to 6 feet. The weapon that he described to me was between the insurgent and the dirt road that runs along the row of trees, to the south-east, along the inner slope. That statement was significant to me because he told us that this guy was rolling towards his left and reaching with his right arm. I found it significant because the medical records and photographs of this injured insurgent, his arm was pretty wounded from a .50 caliber or a large caliber rifle. When he fired that second shot, he stated that he crossed the canal and stood to the right side of the insurgent, the insurgent being on his back. He stated that this individual moved again and he felt threatened and shot him. During the course of the interview, SGT Burke did not maintain consistency, through out the interview, that the insurgent rolled towards a weapon. Towards the later part of

the interview, he changed from rolling to making a move as if to him, side to side. He told me that the insurgent was searched. He said that one of the units did the search before the shots.

### CROSS-EXAMINATION

I've been in CID since 1986. I did several hundreds of subject interviews, maybe 1,500 to 2,000. About 80 percent of those I got a confession. Some cases do not require interviews. I think we did 8 canvas interviews in this case. Those canvas interviews were done with the 623d. Those canvas interviews did not indicate that SGT Burke was close to SPC Hughes, the soldier that was killed the day before. I did not talk to anybody that stated that SGT Burke was upset and wanted revenge for the death of SPC Hughes. The typical CID interview takes about a couple of hours, 3 or 4 hours, it depends. Four to six hours is a long interview. I think I interviewed SGT Burke for 4 and a half hours. SGT Burke did not confess. I did most parts of the interview. For one part, about 5 minutes, the Special Agent In-Charge conducted an interview. The SAIC was present and asked Burke to demonstrate what occurred. He also asked him why he felt it was necessary to shoot him. It does not say in the interview that the SAIC asked this question. The total content of the interview is not included in that sworn statement. We conducted the search of the scene on 6 April. The trench was not in the same condition as it was on 20 March. The vegetation was higher and there was water in the canal. I was right across the canal from SGT Morris when he found the casing. He yelled out "I got one." I did not see him pick it up and I told him to put it back and I'll come over. I did not include in the report that SGT Morris actually picked up the casing at first. We can submit to a fingerprint test, but we did not in this case. That was my decision. SGT Morris and SSG Nein were trying to find out where the shooting took place. Separately, they concluded it occurred where it occurred because of the location of the MEDAVAC. The south-side of the canal had tons of shell casings. I searched for about 30 minutes and I picked up several casings. I did not send those for ballistic testing. I did not see any 5.56 mm casings on the south-side. We did not find any projectiles on the north-side. I took a metal detector but I did not use it. I read the statement SGT Burke gave on the 20<sup>th</sup> of March.

SA Robinson identified SGT Burke's statement and CPT Krafchek submitted it as Defense Exhibit H.

We found the round approximately 130 yards from the dirt road and about 150 to 200 yards from the orchard. I was not asked to investigate any of the 617<sup>th</sup> soldiers, not even SPC Ordunez. I believe I'm familiar with the ROE of the 617<sup>th</sup> they used that day. The primary ROE used that day was to use the amount of force necessary to protect yourself. I did not talk to the people of the 617<sup>th</sup> about their emotions. I asked SGT Burke what he was thinking when he was walking down. SGT Nein told me that SGT Burke calmed down. I want to know what he was thinking as he was making statements to SSG Nein. SSG Burke said "It's payback time." I did not take any of the 623d soldiers to the site. SGT Burke cooperated with me, he did not demand his right to an attorney. At one point, I pressed SGT Burke during the interview. Every time he responded "I felt threatened."

## REDIRECT EXAMINATION

I did not send this shell casing for fingerprint test because I believe that there are no fingerprints there. Based on my knowledge of ballistic testing, someone picking up a shell casing will not affect those testing procedures. I did not use a metal detector because there were thousands of casings and it would blow it out. They appear to be 7.62 caliber casings which are consistent with rounds fired by an AK47. I did not use the metal detector in the north side because we put it away. There were no casings there, we needed to look with our eyes and search. There is a point in the ROE where you can no longer shoot someone, when they are no longer a threat. This is the reason why CID is investigating this case.

## RECROSS-EXAMINATION

We searched pretty extensive, about an hour. The south-side had no other casings, so would not characterize it as a needle in a hay stack. The casing was there.

**SGT Matthew Simpson, B Battery, 1-623d Field Artillery, LSA Anaconda, Balad, Iraq,  
APO AE 09391**

## QUESTIONS BY INVESTIGATING OFFICER

SGT Simpson identified his location after the cease fire was called. He was pointing to the diagram on the screen.

I was focused mainly on the field. SGT Simpson pointed to the sector he was scanning. SGT Burke and SGT Nein went towards the trench. We took SGT Rivera to the MEDAVAC site. I first met SGT Burke in November when we were mobilized. We went on a couple of summer drills together. SGT Burke was rather calm after the initial attack. He took charge and worked the situation the best that he could. We're not well trained on capturing actual detainees. We had a few classes that were not in depth as far as the processing of detainees. We had this training before we came in country. It was a brief class, not longer than an hour. We did the initial type of patting down and placing the cuffs. Then we were told to fill out a document. We had to treat the detainees with dignity and respect. We treat the wounded the same way. We have an ROE briefing before we go out on a combat patrol. We have special teams when we roll out. We do not have a designated team for detainees. We did not have any flexi-cuffs on our person at that time. We had one or two sets per vehicle. SGT Burke is an excellent individual. He takes care of us. He is a good leader.

## DIRECT-EXAMINATION

The ROE briefings are basically the same. We discuss the 5 Ss. I am not aware of a system we use when we come up upon an insurgent. A hostile act is endangering you or another soldier's life. Pointing a weapon at you is a hostile intent.

SGT Simpson identified their location before the convoy got hit. He was pointing to the diagram on the screen.

We were heading south towards Scania. We stopped the vehicle. SGT Burke stepped out and fired his M203. I handed him my M4. He probably used 2 or 3 magazines. This was just during the very beginning. SGT Burke was rather calm. When we had security, we actually took our convoy around on the left side. While the vehicle was in motion, SGT Burke did not shoot his weapon anymore. His urgency of concern was to help the soldiers. SGT Burke stopped engaging the insurgents and gave medical aid to SGT Rivera. SGT Burke did not say that he was going to kill some people. I saw 617<sup>th</sup> soldiers. I saw SGT Burke again after the cease fire was called, he was rather calm. I saw weapons in close proximity to the insurgents. SGT Burke did not tell me that he shot any insurgent.

On the route back to Scania, I heard SGT Burke say that he shot an insurgent. He did not say any derogatory comments about the insurgents. Everything I told the IO today is the truth that I understand.

#### CROSS-EXAMINATION

When I'm guarding a wounded prisoner, I would consider reaching for his weapon to be hostile intent in order to harm me. If the weapon is not within reach, I will not engage that. If the insurgent tries to move but not reaching towards a weapon, I'll probably tell him to stop. I went down the same trench line where SGT Burke went. I do not recall seeing an insurgent on the MSR side. When I was in my truck, before SGT Burke came back, I did not hear any shots fired. I am not aware of any soldier headed down the trench line.

#### REDIRECT-EXAMINATION

After the initial engagement, I'm aware of SGT Burke and SSG Nien going down the trench. We were looking at the insurgents and doing security as well. I'm not aware of any policies about guarding detainees. I know that if two individuals are there, one pulls security while the other one searches. The one that is doing the searching has no weapon.

**SGT James Baker, B Battery, 1-623d Field Artillery, LSA Anaconda, Balad, Iraq, APO AE 09391**

#### QUESTIONS BY INVESTIGATING OFFICER

I never heard the cease fire at all. When we loaded the casualties, we still heard firing. When I got out of the vehicle, a female walked toward me with a wounded civilian. There was this guy who was wounded in the arm, we put him on the helicopter.

While SGT Baker was talking, he was pointing to the diagram on the screen to show his location.

I've known SGT Burke since the 1st of January. He is a squared away soldier. I did not hear any gunshots after everyone stopped firing.

## DIRECT-EXAMINATION

We got our vehicles ready before we left Anaconda to go to Scania. We looked at the board and take some intelligence notes. We are told of the information about the day. We have a little squad prayer and we are out there. SGT Burke was present during the briefing on the 20<sup>th</sup>. He was getting the information from the squad leader. SGT Burke's demeanor and attitude before we left were the same as everybody else, which is normal, very squared away. There was communication between myself and SGT Burke before we left LSA Anaconda headed south to Scania. It was some information about the convoy. The tone of SGT Burke's voice was normal, he was not irate. We had to stop to refuel. I was the front vehicle in the convoy. When we pulled out, we were fired on. There were AK47s firing from the rear. Another man came up with an RPG. The RPG hit the ground and blew my tires out. The Iraqi National Guard stopped and got out. We called for a nine line MEDEVAC and heavy air support. I found 4 dead third party nationals. SGT Burke did not have his rank on his body armor that day. He does not have his name on his body armor and kevlar. After they ended the fire, I saw SGT Burke when I was in the field, he was walking back. He was normal and walking toward me, I saw SGT Simpson behind him. SGT Burke did not make any statements about payback or revenge. I'm aware of the 623d soldier, SPC Hughes, who got killed the day before. I was sad, he lived across from me but I really did not know him. I assume that SGT Burke knows him because he was part of the team. The emotion that I had was pretty much shared by the whole company. I am not aware of anyone in our unit who felt that they needed to get some revenge or payback. SGT Burke did not tell me about any comments to that effect. I spoke to SGT Burke after our convoy left from the ambush site headed on to Scania. He was concerned about me when we were taking fire. Thirty six hours when we reached Scania, I observed SGT Burke's behavior with regards to what happened. He was worried about the TCNs. My testimony here is not in anyway biased. I did not say anything to the investigating officer that is misleading or to protect SGT Burke. I heard about the allegations against SGT Burke.

## QUESTIONS BY THE INVESTIGATING OFFICER

We were trained at Fort Dix about EPWs and searching detainees. We had a class on how to treat prisoners and separating them. It's about the law of land warfare. I did not have the same class because I came in late. They just explained it to us and demonstrated. We are suppose to give the wounded the best treatment possible.

## CROSS-EXAMINATION Counsel

I did not see any soldier clearing the trench after the firing stopped. I saw soldiers walking to the trench. I did not identify any soldier from that group.

## REDIRECT-EXAMINATION

CPT Brown showed SGT Baker a card which he identified it as a ROE card.

This was the same ROE card that we used.

CPT Brown submitted the ROE card as Defense Exhibit J.

I assumed that the team leader or squad leader from the 617<sup>th</sup> that pulled up to me at the fuel stop was from the A element. He was the front vehicle.

**SPC Kirby Lee Gregory, B Battery, 1-623d Field Artillery, LSA Anaconda, Balad, Iraq,  
APO AE 09391**

#### QUESTIONS BY INVESTIGATING OFFICER

On the 20<sup>th</sup> of March, I was with C Team. I was with SGT Burke and SGT Simpson.

SPC Gregory showed the location on where they stopped. He was pointing to the diagram on the screen.

The atmosphere in the truck, after we got into an ambush, was calm. There were no bullet holes on our truck after the ambush. We placed SGT Rivera in our vehicle and we took him to the LZ. I did not exactly hear any gunshots after we returned from the LZ. We were given classes on how to search detainees before we deployed.

#### DIRECT-EXAMINATION

I've known SGT Burke since 2 November 2004, he is my team leader. I've been in two fire fights since I've been here, each time I followed his leadership. I have never felt that SGT Burke wasn't a good leader. I do not feel that my life is in jeopardy because of his actions. He is a strong and bold NCO. I did not hear him talk about revenge in any shape or form on 20 March. I am the gunner of the vehicle. I do not know SPC Hughes who was killed.

#### CROSS-EXAMINATION

After returning from the LZ, I stayed in my vehicle. I'm the gunner so I stayed in the turret. I did not see SGT Burke near the trench. I did not know what happened because I was not there and I did not hear any pop because I would not be able to hear it. I stated that I did not hear any gunshots after the fire fight had died down.

Recess: 1706 hours

Reconvene: 1716 hours

**SFC Ricky Hammons, B Battery, 1-623d Field Artillery, LSA Anaconda, Balad, Iraq, APO  
AE 09391**

#### QUESTIONS BY INVESTIGATING OFFICER

I've been in the unit since October 2004 and I knew SGT Burke since that time. He is one of my better NCOs. You do not really have to look over your shoulder. We had some briefings on

detainee operations and handling. We had different scenarios, how to search detainees, and detain them with flexi-cuffs. The battalion has an SOP that we detain the detainees and contact the higher ups and transport these detainees. Before we go out on a convoy, we use a sand table to let everybody else know what to do. We did not train on prisoner handling techniques since we've been in country. We have flexi-cuffs and duck tape to bind prisoners. We did searches at Fort Dix. When we search detainees, two will provide security and the other person's main objective is to search the prisoner. When he finds something during the search, he needs to let the others know that he found something that is not right. The uniform of the guy doing the actual search is "full battle rattle." He will sling his weapon while searching. I work full-time as a mechanic for the National Guard and part time as a paramedic.

#### DIRECT-EXAMINATION

Every time my troops go out on a convoy or patrol, I give them ROE briefs before we go out. I read it to them every single time. I explain it to them also. Usually an hour before the mission, the squad leader and I go in the TOC and seek the last 12 to 24 hours of intelligence that they know that just happened. Then I brief them with the mission and the intelligence report. Usually it includes the weather, the activity that is in the area, and the possibility of an activity in the surrounding areas. Sometimes the intelligence report gets pretty specific and sometimes it's pretty much generic. The biggest number of insurgents the intelligence report say are usually about 3 to 5 at a time, they just usually hit and run. Majority of the intelligence reports are hit and run, like setting up IEDs and small arm fire and they get out of there. Most of the intelligence reports can not really show that these insurgents are willing to fight, until this day. On the day in question, it was clear that they were fighting further than usual. It was a real fight. There was no doubt in my mind that every person in the convoy knew that a fight was on. It was clear this was not a hit and run. We get some actual written reports not much about the insurgents but VBIEDs that are in the area, it changes a lot. I like SGT Burke, he's one of my soldiers. I would not come here and lie for him today because I know that would be wrong. Everything I said was true. I was not in the area when SGT Burke went down with SSG Nein to clear the trench. I do not know the exact time they went down. We were taking very heavy fire. He told me that he had to shoot the insurgent on the leg and he kept on reaching for a weapon so he had to shoot. He volunteered that information. I do not have any reason to doubt his word.

Recess: 1735 hours

Reconvene: 1804

#### CLOSING ARGUMENTS BY TRIAL COUNSEL

CPT Shepherd used the map in his closing arguments.

This is a case of the violation of the Rules of Engagement, a questionable decision or judgment call by the accused. It is a case of a deliberate attempt to kill a non-combatant, a wounded enemy soldier, who was out of the fight. Straight from the ROE card, the accused's defense submitted as evidence, do not engage anyone who has surrendered or is out of battle, due to sickness or wounds. This is not a question of a judgment call. It is a question of engaging

someone who is out of battle. We look at the evidence first that was presented today of what has happened. What made the chain of events, to where on March 20, when they were clearing the field. Then take a look at what the accused told CID for his side of the story and examine whether that fits the facts that have been introduced in this hearing today.

First, Sir, take a look at the map. On March 20<sup>th</sup>, in the field, there was the orchard, and the intersection of the dirt road, and the irrigation ditch where these all occurred. SSG Nein calls a cease fire. At the end of that cease fire, he proceeds to clear this ditch. And the reason he was able to call cease fire because the firing there had ceased. He decides to move down the ditch, but he testified before he went, he grabbed a soldier from 623d because he did not want to go by himself. He saw a soldier from 623d and as he was scanning the sky ready to go down this ditch, he hears a comment about it being pay back time. Right away, even though he is not so worried he is not going to bring him down the ditch, SSG Nein asked him "Hey are you ok?" because he does notice his manner and the comment made about being pay back time. That caused some concern to make him ask if he is ok. But it was an end of a serious engagement. So, because he needs to accomplish his mission, he takes the accused down that ditch. As they were walking down this ditch, approximately perpendicular to this first row of trees and at the edge of the field, along this ditch, they came upon this wounded insurgent. He's up on the bank on the north side of this ditch, he's laying there. SSG Nein testified that he did not see any weapons when he did a cursory glance. He did not see any AK47s, he did not see any weapon within range. If he had, he would have taken it out of the way, because that is what they are doing. They were clearing the field of threats. Clearing the ditch of enemies so enemy insurgents couldn't continue to engage them. Then while he was standing there, he says that the insurgent has his right arm so it's underneath him, and that concerns him, but not so much to feel threatened enough to shoot him. And so he tries to get him to move his arm and eventually he does. He moves that arm so it lifts him up on his right arm, starts leaning on that. His elbow, according to Dr. Abel, could have supported that. He could have lifted himself up with his elbow, despite having had a wound in his forearm. So while SSG Nein is trying to take control of this situation, the accused says to him "Let me shoot him." He said it not just once but twice. And twice SSG Nein has said "no, you can't shoot him." So right away, we already got the accused, he said "It's pay back time." Twice that time, after encountering a wounded enemy, has said "Let me shoot him." SSG Nein continues on down the trench. He leaves the insurgent in the north-side. He leaves SGT Burke, the accused, on the south-side, as he continues down the trench. He then hears a shot. He continued on down the trench, turns around and he sees the same 623d soldier holding a pistol. As he heard the shot, he also sees the insurgent, who from his sort of popped up position, now falling back. And after SSG Nein sees that, he assumes that the accused shot and killed him, so he continues down the trench.

But meanwhile, he was not the only witness to this. SGT Morris has come up on his team. SGT Morris comes up on the north bank. As he comes upon this wounded enemy, SGT Burke, the accused is on the south bank. He hears the shot, he does not think it hits him. It appears to him to be a shot towards this wounded insurgent. He hasn't seen any weapons near him, so he was surprised, so he ceased the searching. This is a case where another soldier does a full search and found no weapons. He also said that he did a cursory look with his eyes, again sees no weapons. He believes the situation to be clear, he moves on. Before he moves on, the accused made another comment about being pay back time. He continues on, he hasn't gone very far, when he



hears another shot. This time he turns around he sees the 623d soldier now on the north bank standing over the insurgent that he had just left him with and holding what appears to be an M4 on his hand. The shot that he heard sounded like an M4. From the time after he searched and left him, the accused has moved across that ditch to assume a position directly above the insurgent. What is important about SGT Morris' testimony is that he walked up on this north side to the insurgent. He did not find any weapons. No AK47s as he was pushing up that north-side of the ditch. Yet the statement made by the accused later to CID, that is the same area where he said the weapon was.

A third witness was there, SPC Ordunez. He was on the south bank, the same side that the accused had previously been on. He sees the accused standing over the insurgent with an M4 in his hand pointing to the insurgent. He sees him and hears the shot, and sees the body of this insurgent jerk. He said it was from the shoulder area towards the top of the insurgent's body in general. He says he also looked around and saw no weapons. He then proceeded to continue to clear this ditch, then moved on. So the other facts that are important, besides having had these three witnesses, there's additional physical evidence. SPC Ordunez and SGT Morris saw the accused holding an M4 over this insurgent when they heard the shots. An M4 shell casing was found on the north-side of that bank in the approximate location where SGT Morris says this incident occurred based on his recollection of where that incident was in relationship to this orchard. That matches up ballistically to the weapon carried by the accused during this engagement. Physical evidence collaborating both the version of events of both SGT Morris and SPC Ordunez. So it's not a question of just the credibility of these witnesses cause there's physical evidence collaborating what they say. Additional evidence: SGT Morris, after this, says the accused pushes with his feet the body of this insurgent down into the ditch. After the incident when SPC Mike and SGT Rust are moving the five wounded insurgents to the orchard. They found the body of this wounded insurgent at the bottom of the ditch. And again, they find this body in roughly the same area in the ditch, roughly even with the end of the orchard. So again it is all consistent with the location of where this body is found at the bottom of the ditch in the same general physical location and consistent with SGT Morris saying that the accused pushed that body down into the ditch. There was a fact that he was at the top and then at the bottom.

We look at the wounds this insurgent has. According to SGT Rust, he has a .50 caliber wound on his right leg and his right arm. You can see from the picture of the insurgent as well, there's a serious wound in his arm and the feasibility of him able to use that hand to fire a weapon is such that Dr. Abel said that he can only use this with the assistance of either another hand or another person, only with assistance.

This is a clearly wounded insurgent, who's wounds are serious enough that he would not be expected to be seriously resisting, certainly not after having been searched, and having been complacent during the search, who is going to resist, who is going to pull a grenade, is going to pull a hidden gun that would have been found during that search or used during that search. Instead, nothing was found and he did not even resist the search.

In fact, other the statement given by the accused to CID, no one else indicates that this insurgent made any movement beyond that what have been normally expected of somebody experiencing .50 caliber wounds to the arm and leg and in pain.

The accused told CID that there was a weapon on this north-side of the ditch, an AK47 on the slope this insurgent was rolling to, and that's why he engaged. Consider that. On this inside of the slope, not hidden behind rocks, on the other side of the top of the slope, not hidden in the bushes right beside them, but on the inside slope on the south-east-side where, if soldiers are traveling up along the top of the top of the ditch, from the start point walking down as SGT Morris did, they should have seen that weapon. If soldiers are walking on the south-side of the ditch as SSG Nein and SPC Ordunez were walking, because it was on the slope, it should've been also visible to them. Yet all three of them say there was no weapon in that vicinity that the nearest weapons were 5 to 10 feet away at the bottom of that ditch.

Consider what the accused told CID. His own actions he described to CID. As far as one shot from the south-side, one shot that he says it hit the injured insurgent's leg. Then he crosses over the ditch to stand over the injured insurgent. He did not tell SA Robinson that he went straight to that weapon. He did not tell him that he went straight between the weapon and the insurgent. He crossed over and stood at the north-side over the insurgent with his weapon and that's where he says he fired the second shot. If there is a weapon within range that was a threat the reasonable thing that a soldier would have been expected to do, if that were the case, is to move to get either between that weapon and the insurgent, to go get that weapon, not to cross over, taking time to cross over the ditch, while presumably that insurgent was still a threat, that he had been in the first place, and then assume a position over him to fire a shot to the head from just a few feet away.

Further, as SA Robinson explained, the fact that this weapon was on the south-east side of the insurgent and based on the injury that he had sustained to his right arm, according to the doctor, needs assistance so he could fire a weapon. It is not reasonable to believe that the insurgent would be moving and turning in such a way to be able to reach that weapon to his left with his right arm. That is the version that the accused had told CID. Then he fires one shot from one side of the ditch because there's a threat towards this AK47. He believes that he was about to roll towards another weapon so he crosses over and fired the second shot into the head from the north-side of the ditch. When he fires that second shot, he's still concerned that the victim is about to roll towards that weapon. As SA Robinson explained, it wasn't just that he was just rolling towards that weapon. First it was, he was rolling towards that weapon and then it changed to he was about to roll. Just as the distances changed as he was explaining to CID changed from within reach to if he had rolled, it would have been within reach. That's the accused's own version as told to CID.

Sir, what we have here is not a case of poor judgment call in the ROE where the soldier automatically gets the benefit of the doubt. What we have here is a case of a soldier telling other soldiers it's payback time, of a soldier asking a senior NCO twice to shoot a wounded insurgent being told no twice. A soldier who fires one shot from one side of the canal, crosses over and fires a kill shot to the head while standing over him in the same spot where three other soldiers have looked and have seen no weapon within arms reach, and then kicking that body back down

or pushing with his foot afterwards back down into the ditch. What this case is, a case of intentional killing, attempted killing, a case in which the accused as shown by his statements, and the shooting to the head by standing over this insurgent from close range, had premeditation. And a case in which the accused took a substantial step towards completing the charged act of murdering this wounded insurgent. The standards of an Article 32 is whether reasonable grounds exists to believe that he committed the offense and then make a recommendation for the proper disposition of the offense. The government believes that the evidences presented today has shown that reasonable grounds do exist to believe that the accused committed this offense. As such, because of the seriousness of shooting intentionally a wounded insurgent prisoner who is out of the fight, that the serious level of these charges require that you recommend a General Court-Martial.

### **CLOSING ARGUMENTS BY DEFENSE COUNSEL**

I would like to add all the sworn statements from the 617<sup>th</sup> admitted as evidences. Look at each of those statements and recall what you have heard today. You will see in those statements that there are inconsistencies. The government said that SSG Nein said that there was no weapon in sight. He did not say that. He said that there was a weapon in the ditch. The first part of SGT Baker's statement said he noticed that there was a weapon. If you look at all the facts, you will see repeated inconsistencies. If you read SGT Nein's statement, he heard one shot. He heard an M9 shot. When he looked back, he never saw Ordunez, he never saw Morris. There were inconsistencies between them. It does not mean they are liars, it means that they are mistaken. As each mistake amounts, more doubts occur and you have less reason to recommend this to a General Court-Martial.

You will have to make your recommendations at the conclusion of this. Before you start, the first thing that the defense would ask is that you recommend that the 617<sup>th</sup> and the 623d receive training on the ROE, training on how to process detainees. They are not trained to standard according to the evidence. You heard SGT Rust say, warning shots are not authorized. You shoot to kill. Mike says, you can take warning shots. They are both in the same unit operating in the same ROE.

The 617<sup>th</sup> soldier heard SGT Burke say "Let me shoot him" twice. That is a clear indication that he's just at the blow. That's the kind of person SGT Burke is. He's just kind of person, who just wanted to shoot every person he can see. He thought the shot was authorized, he has no clarification. And when he got clarification, he followed that order.

Let's just say that the statement of SSG Nein, offered as evidence, reasonably happened as what he said. That does not mean everything happened the way it did. He said he did not see SGT Baker. He does not recall whether he saw SGT Morris. He also said that the 623d soldier was the one he spoke to at the convoy. You heard SGT Baker testify. SSG Nein was mistaken in his initial assessment. SGT Burke said that he's pumped up and ready to go. That is the kind of soldier SGT Nein wants with him to clear and do security acts. Did SGT Burke attempt to take the life of the insurgent? You heard the testimony of SPC Ordunez. He said he saw the shot. He actually had eyes on the insurgent when he was shot. SPC Ordunez might be traumatized and maybe suffering from some type of defect based on SGT Rivera being hurt. Is SPC Ordunez

credible? He said he heard two shots, immediately after SGT Burke asked him for clarification. First of all, why will a Sergeant ask him for clarification. Second, nobody else heard that comment.

There was also a lot of talk about the M4 casing that was found. Dr. Abel was saying that it was an M9 round that hit him on the head. The government is saying that the second shot was from an M4. Ordunez said that the M4 round was the one that hit him on the head.

SGT Burke made a lot more statements than just to CID. If he chose to use the M9 or M4, who cares, SGT Burke said he had to use his M9 and that is what he thought. We do not have any indication at all that the CID agent complained and said that SGT Burke was not exactly sure so he changed his story. They put important things in the statement to make the soldiers look bad, and it was not in there. If you read the AAR it is consistent from day one.

In the medical report, you will see that when they asked SGT Morris if the wounded insurgent has a weapon, SGT Morris replied yes and it's an AK 47. This was during the in-processing. SGT Simpson testified that there were weapons on both sides of the slope.

The purpose of today's investigation is to do justice. There are lots of inconsistencies, the bottom line is: we don't know. Think about possible self defense, possible authorized shot in the rules of engagement. The government has to prove him guilty beyond reasonable doubt in a court-martial. You should recommend that this case not go forward.

Sir, in your recommendation, please take into consideration all the facts. Take into consideration that this guy was fighting until the end based on the intelligence report. The ROE is clear: hostile act, hostile intent, you have the right to use deadly force. SGT Burke is a good NCO, and a good person. You don't have any reason to doubt him. He has a good defense of a reasonable mistake. Consider also the lack of ROE training and lack of detainee treatment training.

The Article 32(b) hearing closed at 1832 hours.