original

UNITED STATES	)	
	)	
v.	)	
	)	**MOTION FOR APPROPRIATE RELIEF-- EVIDENTIARY RULING**
BURKE, RICKY A. SGT, U.S. Army B Battery, 1-623 Field Artillery 503d MP BN (ABN), APO AE 09342	)	**1 August 2005**

COMES NOW the United States of America, by and through trial counsel, and submits this Motion for Appropriate Relief requesting a ruling on the admissibility of evidence pursuant to RCM 906(b)(13).

RELIEF SOUGHT

The Government requests that the Court declare that a video of an insurgent beheading a hostage be declared inadmissible because it is irrelevant pursuant to MRE 401 and even if relevant, its probative value is substantially outweighed by the danger of unfair prejudice to the Government pursuant to MRE 403.

BURDEN

As the Moving Party, the burden of proof is on the Government by a preponderance of the evidence.

FACTS

On 20 March 2005 elements of the accused's patrol from B/1-623 FA and a patrol from 617th MP CO were ambushed by insurgents. During the ensuing battle, a number of insurgents were killed and several American Soldiers injured. At the conclusion of the battle, while clearing an enemy trench line, the accused allegedly shot a wounded insurgent in the head. This action forms the basis of the charged offense in this case.

After the battle, American troops collected several items of intelligence from the dead and wounded insurgents. Among these items was a video camera that had digital recordings on it. These digital recordings included a video of insurgents beheading an unknown prisoner with a knife. An insurgent in the video cuts the head off a live prisoner and then holds the head up for the camera. The video was not found in the possession of the alleged victim and there is no evidence that the victim is pictured in the video. The accused did not know of the existence of the video at the time of the alleged misconduct.

ARGUMENT

The Government anticipates that the Defense case may attempt to place the videotape

APPELLATE EXHIBIT II
PART 1 of 2

in evidence before the Court. The video was found after the battle and after the accused's alleged criminal misconduct. There is no evidence that the accused had any knowledge of this videotape at the time of the incident and no evidence that the particular victim in this case is directly related to the video. The video camera was not found on the person of the victim. The existence of this video had no bearing on the incident that occurred. The content of the video is not related to any possible defense of the accused.

MRE 401 defines relevant evidence to be "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In this case, because the accused had no knowledge of the video at the time of the alleged misconduct; because it is not directly tied to the alleged victim; and because it depicts an incident that had no bearing on the relevant battlefield, the video is not relevant pursuant to MRE 401.

However, even if relevant, in this case the introduction of the video into evidence should not be allowed because "its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403. The effect of the video can be expected to inflame the passions of the panel against the alleged victim in this case, an insurgent, and in favor of the accused. By showing an insurgent video found on a video camera on the relevant battlefield, the insurgent victim will be directly linked to the insurgent on the video who wields the knife. The panel's passions and prejudices may be so aroused that they will be unable to fairly consider the facts of this case. Further, the graphic nature of the video is unnecessary to a determination of the guilt or innocence of the accused. Finally, presentation of a video showing a different incident may confuse the panel.

The issue in this case is the accused's conduct during the time in which the charged offense occurred, not the conduct of a different insurgent captured on video performing unrelated acts. The probative value of this video is minimal because it depicts acts unrelated in time, space, and participants to the charged conduct. But the potential unfair prejudicial value is high. Therefore, the video should not be allowed into evidence pursuant to MRE 403.

CONCLUSION

The video showing an insurgent executing a prisoner is irrelevant to the charged offense; further, its probative value is substantially outweighed by the probability of unfair prejudice. Therefore, pursuant to MRE 401 and MRE 403, it should be held to be inadmissible at trial.

MATTHEW W. SHEPHERD
CPT, JA
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the above Motion for Appropriate Relief on the Court and Defense Counsel, CPT Christopher Krafchek and CPT William Brown, by email on 1 August 2005.

MATTHEW W. SHEPHERD
CPT, JA
Trial Counsel

AE II page 3 of 3

original

UNITED STATES	)	
	)	**GOVERNMENT**
v.	)	**RESPONSE TO DEFENSE**
	)	**MOTION TO SUPPRESS**
BURKE, Ricky Allen	)	**TANGIBLE EVIDENCE**
SGT, U.S. Army	)	
B Battery, 1-623d Field Artillery	)	
503d MP Bn, APO AE 09342	)	**31 August 2005**

Now comes the United States of America, by and through trial counsel, and submits this response in opposition to Defense Motion to Suppress Tangible Evidence.

RELIEF SOUGHT

The Government requests that the defense motion be denied.

BURDEN

Pursuant to RCM 905(c)(1) and (2), the burden of persuasion is on the defense as the moving party by a preponderance of the evidence.

FACTS

The facts relevant to this motion are that the accused is charged with attempted premeditated murder for shooting a wounded insurgent on 20 March 2005. The incident occurred along a trench. The insurgent was lying on the north side of the trench. The accused fired two shots at the insurgent, one from the south side and one from the north side of the trench. There is no dispute that the accused fired a shot from the South Side with his M9. There are conflicting accounts of what weapon the accused fired when on the north side of the trench for the second shot. The accused has stated in sworn statements that he used an M9 for the second shot. Two Government witnesses have stated they saw or heard the accused fire an M4 from the north bank of the trench.

The command did not immediately know about the incident involving the accused and CID did not initiate an investigation until several days later. On 6 April 2005, Special Agent Thomas Robinson conducted a crime scene examination at the location of the incident. He brought with him a team that included witnesses from the 617th Military Police Company and other CID agents.

During the crime scene examination, Special Agent Robinson collected one 5.56 mm shell casing from the north bank of the trench at the approximate location where one of the witnesses stated the incident occurred. This witness, SGT Morris, found the shell casing and alerted Special Agent Robinson. No other evidence was collected. Along the north bank of the trench, there were very few shell casings of any kind. Along the south bank there were thousands of 7.62 mm

APPELLATE EXHIBIT III

shell casings. A 7.62 mm shell casing looks significantly different than a 9 mm shell casing or a 5.56 mm shell casing.

After recovering the shell casing, Special Agent Robinson recorded it on a DA Form 4137 and transferred it to Special Agent Stephen Golden, the CID evidence custodian. Special Agent Golden then mailed the shell casing and the M4 carbine used by the accused to the United States Army Criminal Investigative Laboratory for examination. A firearms examiner, Mr. Micheal Brooks, examined the shell casing and the M4 and determined that the shell casing had been fired by that particular M4 carbine. The shell casing and M4 were then mailed back to Special Agent Golden. Pursuant to defense request, Special Agent Golden then mailed the shell casing and M4 carbine to the appointed defense expert witness, Mr. Stephen Deady, for independent testing. Mr. Deady has mailed the M4 and shell casing back to Special Agent Golden.

EVIDENCE

1. DA Form 4137 for shell casing.
2. Shell casing.

WITNESSES

The Government gives notice it may call the following witnesses at the evidentiary hearing on this matter:

1. Special Agent Thomas Robinson
2. Special Agent Stephen Golden
3. Sergeant Dustin Morris

ARGUMENT

The Government first notes that the Defense Motion, although dated 26 August 2005, was served on the Court and the Government on 27 August 2005, approximately four days before trial. At the accused's arraignment on 26 June 2005, the accused requested permission to defer motions at that time. The Court then set 1 August 2005 as the deadline for submission of Motions, service of witness lists, and Notice of Plea and Forum. This Motion is submitted well after the deadline set by the Court and should not even be considered by the Court. The information and circumstances cited by the Defense in its Motion have been available to the defense for several months. The defense had sufficient time prior to 1 August to file this motion.

But if the Court chooses to consider the Motion, each of the defense arguments in support of its motion is completely without merit. In each, the defense has incorrectly interpreted the case law cited and has confused admissibility with weight of the evidence.

1. The defense argument that the shell casing should be suppressed because its pre-collection chain of custody is insufficient is absurd.

The defense argument relies primarily on a series of cases based on United States v. Nault, 4 MJ 318 (1978). These cases stand for the proposition that for the government to introduce laboratory tests of fungible evidence, the Government must be able to show a continuous chain of custody and that the evidence was not altered.[1] However, Nault applies to the chain of custody of evidence ***after*** it is seized by the Government. The defense argument completely misses the point with these cases and attempts to apply Nault's reasoning to the chain of custody of evidence ***before*** the Government seizes it or even knows it exists. The defense makes no assertion that there are any gaps in the chain of custody from the time that a CID Agent collected the shell casing at issue. Instead, the argument is based solely on the lack of a chain of custody of the shell casing before it was seized, which is completely irrelevant to the Nault analysis.

The defense argues that the shell casing is inadmissible because the Government did not cordon off the scene of the incident and cannot show what happened to the shell casing between the time of the incident on 20 March 2005 and the time it was collected on 6 April 2005. This argument goes to the weight of the evidence not to its admissibility. Defense counsel is free to question witnesses regarding this time period, the environmental conditions the shell casing was left in, and the effect this had on the accuracy of the tests conducted on the shell casing. Defense counsel may also argue how this gap in time and changing environmental conditions make the tests less relevant or reliable in argument. But there is no legal bar to the admissibility of this evidence.

If defense counsel's argument that the shell casing is inadmissible were accepted, then the logical extension of that argument would be that no evidence seized by investigators from a crime scene would ever be admissible unless the investigators personally witnessed the crime and took the evidence into custody from the moment of commission of the offense. Investigators are permitted to discover evidence at a crime scene after the actual commission of the crime and then perform laboratory tests on that evidence. Such an argument is absurd and should be rejected.

2. The due process rights of the accused were not violated by a failure to preserve evidence.

The defense claims that the admission of the shell casing would be a denial of due process rights because the Government allegedly acted in bad faith by destroying or failing to preserve evidence. Defense counsel cites to California v. Trombetta, 467 US 479 (1984) and Arizona v. Youngblood, 488 US 51 (1988) as support for this claim. Again, this argument makes absolutely no sense and completely misinterprets these cases. In both Trombetta and Youngblood, the Government was actually in possession of the evidence that it allegedly failed to preserve. In Trombetta the evidence was breath samples from a breath alcohol test and in Youngblood it was semen samples found on clothing. *In order to fail to preserve evidence, the Government must first possess that evidence.* Here the defense argues that the Government failed to preserve

[1] The Government disputes whether the shell casing at issue is even a piece of fungible evidence. A shell casing when fired from a weapon is left with unique marks identifiable by a firearms expert. However, for purposes of analyzing the defense motion, the Government is assuming that it is a fungible item.

evidence because it failed to find 9 mm shell casings at the scene of the crime due to an allegedly inadequate crime scene investigation. This inadequate crime scene investigation is attributed to bad faith. But this argument still never overcomes the logical hurdle that in order to fail to preserve evidence, one must first possess it.[2]

When untangled, the defense attempt to argue that the Government failed to preserve evidence seems to be that the Government violated due process because evidence the accused believes was at the scene was not found. This argument implies that if the Government fails to find evidence that the accused believes is present, it must be because of bad faith and bias on the part of the investigators. There are many reasons why evidence is not located at a crime scene, not just bad faith.

Even if the defense somehow showed that there was a failure to preserve evidence on the part of the Government, the remedy sought by defense does not make sense. Because the Government failed to discover the evidence at the crime scene defense asserts was there, the defense requests the suppression of the evidence that was found. There is no logical connection explaining why a failure to find a 9 mm shell casing should result in the suppression of the 5.56 mm shell casing that was found.

In a desperate attempt to exclude evidence that contradicts the accused's version of events, the defense has undertaken to smear a veteran CID agent because that agent found unfavorable evidence. Special Agent Robinson succeeded in finding a relevant piece of physical evidence in a challenging and dangerous wartime environment. The defense motion unfairly and ignorantly attacks him for perceived inadequacies such as failing to look for shell casings underwater and for not being able to tell the difference between a 7.62 mm shell casing and a 9 mm shell casing. This argument is insulting and should be discarded.

3. The shell casing is clearly relevant.

MRE 401 defines relevant evidence to be "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Physical evidence which is consistent with and corroborates the testimony of other witnesses meets that definition. Further, this evidence directly relates to the issue of what weapon the accused used to shoot the wounded insurgent, which is an important fact since there is disagreement between the accused's version and the version told by Government witnesses. This shell casing, found at approximately the same spot where Government witnesses say the incident occurred makes it relevant to the determination of that fact by the panel. The amount of weight to give this evidence is up to the finder of fact, but the weapon used to shoot the insurgent by the accused is a relevant fact for the panel.

[2] The whole point of requiring the Government to preserve evidence is to allow the defense the opportunity to conduct independent examinations. In this case, the Government fully preserved the evidence seized and even sent that evidence to the defense's own expert for independent testing.

4. The probative value of the shell casing is not substantially outweighed by the danger of unfair prejudice or confusion of the issues.

In making this argument it appears that defense is confusing unfavorable evidence with unfairly prejudicial evidence. The defense counsel makes a broad generalization that there is no possible way a panel could find that the bullet which struck the insurgent in the head was fired by the accused's M4. A panel could come to that conclusion by simply believing the expected testimony of Government witnesses that the accused used an M4 to shoot the insurgent and that the shell casing was found in the location where the incident occurred. Evidence which contradicts the accused's version of events does not violate MRE 403. This evidence is potentially unfavorable to the accused, but it is not unfairly prejudicial or confusing simply because it does not fit with the defense theory of the case.

CONCLUSION

The defense motion is not supported by logic, common sense, the law, or the facts. Instead the defense has grabbed on to legal doctrines that do not apply, claimed that they fit these circumstances without thinking through the logic of the arguments, and then requested suppression. The motion should be denied.

MATTHEW W. SHEPHERD
CPT, JA
Trial Counsel

CERTIFICATE OF SERVICE

I certify that I have served or caused to be served a true copy of the above Government Response to Defense Motion to Suppress Tangible Evidence upon the Court and detailed military defense counsel by email this 31st day of August 2005.

MATTHEW W. SHEPHERD
CPT, JA
Trial Counsel

AE III
page 5 of 5

UNITED STATES	*	**MOTION FOR APPROPRIATE RELIEF--**
v.	*	**EVIDENTIARY RULING**
BURKE, RICKY A. SGT, U.S. Army B Battery, 1-623 Field Artillery 503d MP BN (ABN), APO AE 09342	*	Re: Change of Venue RCM 906(b)(11) **2 August 2005**

Motion

NOW COMES the accused, SGT Ricky A. Burke, by and through his defense counsel, and requests pursuant to R.C.M. 906(b)(11) that the Court transfer this case to LSA Anaconda, and take such other appropriate action as required to prevent prejudice to SGT Burke. The basis of the motion is for the convenience of the parties and to ensure SGT Burke is not subjected to substantial prejudice.

Relief Requested

The Defense requests that the Court move the place of trial to LSA Anaconda.

Legal Standard and Burden of Proof

Upon motion of the Defense, the Defense bears the burden of establishing by a preponderance of the evidence that the current location of the trial should be moved to prevent prejudice to the rights of the accused.

Statement of Facts

SGT Ricky A. Burke is currently assigned to B Battery, 1-623rd Field Artillery (623rd FA), 503d Military Police Battalion. Since arriving to Iraq, SGT Burke, along with the 623rd FA, has continuously been physically located at LSA Anaconda.

SGT Burke's detained Defense Counsel is assigned to LSA Anaconda, Balad Iraq.

A great majority of the witnesses in this case are located at LSA Anaconda.

SGT Burke will suffer no prejudice by having the trial at LSA Anaconda.

The Trial Counsel is located at Camp Victory, Baghdad.

On 23 April 2005, during a convoy to Baghdad, SGT Burke and members of the 623rd FA unit were attacked and hit a Vehicle Born I.E.D (VBIED). A member of the 623rd was seriously injured in the attack. The 623rd convoy was traveling to Camp Victory for the sole purpose of ensuring that SGT Burke was present to have charges read to him by

APPELLATE EXHIBIT IV

COL James B. Brown, 18th MP Brigade. The injury to his fellow soldier has had a severe emotional impact on SGT Burke and left him depressed and sleepless since the date of the attack. This has resulted in loss of weight, sleepless nights, high stress and worry, and ultimately, severe depression.

SGT Burke is currently under the care of MAJ Lamareou and CPT Sullins for severe stress that has arisen since 20 March 2005. SGT Burke is currently receiving prescription medication to help him cope with the effects of this stress and to sleep at night.

Law

R.C.M. 906(b)(11) gives a military judge the authority to change the place of trial " for the convenience of the government if the rights of the accused are not prejudiced.

A change of the place of trial may be necessary when there will be a difficulty in obtaining compulsory process over essential witnesses. See discussion, R.C.M. 906(11).

Even though a military accused has no right to *demand* a specific location of the trial, a military judge has the power to determine the situs of the trial to facilitate the preparation of the defense and for the convenience of the parties concerned. U.S. v. Nivens, 21 U.S.C.M.A. 420, 423 (1972). However, he must balance the convenience of the parties and witnesses, the interest of justice against the inconvenience of the Government. Id.

Argument

It is clear under R.C.M. 906(b)(11) and Nivens that the military judge has the power to change the location of the trial.

In this case, only a minority of the witnesses are located at Camp Victory. Although, the higher level of command is located at Camp Victory, SGT Burke's immediate chain of command is located at LSA Anaconda. All the essential Defense witnesses, for both the case on the merits as well as the pre-sentencing phase of the trial, the Trial Defense Counsel, and SGT Burke are located at LSA Anaconda. Furthermore, many members of SGT Burke's 623rd Field Artillery unit have expressed a desire to attend the trial as a show of support to SGT Burke. They will not be able to attend the trial if it is held at Camp Victory. This will have a traumatic effect on SGT Burke's mental well being and will result in great prejudice to SGT Burke, and may well prevent him from assisting counsel in his own defense.

Additionally, it is highly likely that, due to the large number of them, many of the Defense witnesses from the 623rd FA Company will have to travel via convoy Camp Victory. This is causing SGT Burke a great deal of stress and worsening his condition because he is cognizant of the exposure to attack from VBIED's his fellow soldiers will face while traveling along the route to Camp Victory. Absent a change of venue, SGT

Burke will be substantially prejudiced in preparing his defense because his ability to focus on preparing his defense will be outweighed by his worry over his fellow soldiers.

Furthermore, the defense believes that when the Court completes the above mentioned balancing test, it will conclude that it makes far more sense to try this case at LSA Anaconda as opposed to Camp Victory. The Convening Authority already has a panel in place at LSA Anaconda that can be utilized for the proceedings in this case. (See attachment #1). Thus, there is no risk to the Camp Victory panel members, as they will not have to travel to LSA Anaconda, and granting this request will not create a substantial hardship on the convening authority to put together another in a short period of time.

Witnesses and Evidence

The Defense requests, in the absence of a stipulation of fact, that SGT Burke be called to testify for the limited purposes of the motion.

CHRSTOPHER L. KRAFCHEK
CPT, JA
Defense Counsel

I hereby certify that a copy of this document was served, via email, on the Trial Counsel and on the Military Judge on 2 August 2005.

UNITED STATES	)	**RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF-- CHANGE OF VENUE**
v.	)	
BURKE, RICKY A. SGT, U.S. Army B Battery, 1-623 Field Artillery 503d MP BN (ABN), APO AE 09342	)	**8 AUGUST 2005**

COMES NOW the United States of America, by and through trial counsel, and submits this Response to Defense Motion for Appropriate Relief for Change of Venue.

RELIEF SOUGHT

The Government opposes the Defense Motion for Change of Venue and requests that it be denied. The Government does not request oral argument but requests a decision based on the pleadings.

BURDEN

As the Moving Party, the burden of proof is on the defense to prove by a preponderance of the evidence that the current trial location would prejudice the rights of the accused.

FACTS

1. The Government will stipulate to the facts as stated in the Defense Motion for the purposes of this motion, except the Government does not agree that the "great majority" of witnesses are located at LSA Anaconda. The defense witness list submitted to the Government shows 28 witnesses located at LSA Anaconda and 23 from other locations. (See Attachment 1) This defense motion does not account for the Government's response to the defense witness request. Specifically, the Government has given notice to defense that it intends to deny production of 12 witnesses from LSA Anaconda as being cumulative or not relevant or necessary. (See Attachment 3)

2. The Government and Defense Counsel have cross-served witness lists on each other. (See Attachments 1 and 2) Defense has requested nine witnesses from the United States in its witness list. Defense has stated it will accept VTC testimony in lieu of a live appearance for several of their requested sentencing witnesses.

3. There is not a dedicated court room at LSA Anaconda. In the past, trials have been held in a section of the DFAC and in temporary buildings. These facilities did not have separate private rooms for the panel to deliberate and for the military judge in the same building. Ground has been broken on a courtroom, but it is not scheduled for completion prior to 1 September 2005. Camp Victory has a dedicated court room with VTC

APPELLATE EXHIBIT V

capabilities, pre-wired court reporter recording system, a private panel room for deliberations, a gallery for spectators, and an office for the military judge.

4. CPT Stephan Nolten, assistant trial counsel, is scheduled for R&R leave from Iraq beginning 6 September 2005.

ARGUMENT

a. The moving party must show prejudice in order to support a motion for change of venue pursuant to RCM 906(b)(11).

In order to change venue once set, the moving party must file a Motion for Appropriate Relief pursuant to RCM 906(b)(11) which provides: "The place of trial may be changed when necessary to prevent prejudice to the rights of the accused or for the convenience of the Government if the rights of the accused are not prejudiced thereby." The Discussion to the rule further defines the standard: "A change of the place of the trial may be necessary when there exists in the place where the court-martial is pending so great a prejudice against the accused that the accused cannot obtain a fair and impartial trial there, or to obtain compulsory process over a witness." Manual for Courts-Martial United States (2002 Edition), 2002, II-97.

Therefore, the defense must show by a preponderance of the evidence that conducting the trial at Camp Victory, Iraq will prejudice the accused to the extent that he "cannot obtain a fair and impartial trial." Case law also supports the power of a military judge to change the location of trial in order to "facilitate the preparation of the defense and for the convenience of the parties concerned." United States v. Nivens, 45 CMR 194, 197 (CMA, 1972).

However, this decision should not be viewed outside the context of RCM 906(b)(11). The inconvenience to the parties and the need to facilitate the preparation of the defense should be considered as they relate to the requirement to "prevent prejudice to the rights of the accused." The standard for a change of venue is not simple inconvenience to the defense, but remains prejudice. The inconvenience as described in United States v. Nivens must rise to the level of prejudice in order to require a change of venue.

b. The defense has not shown prejudice within the meaning of RCM 906 (b)(11).

The defense must show prejudice and failed to do so. The defense offers two possible reasons for prejudice: 1.) that the accused will be prejudiced if the trial is not located at LSA Anaconda because members of his unit will not be able to attend to support him; and 2.) that the accused will suffer mental anguish if members of his unit are forced to travel from LSA Anaconda to Camp Victory for his trial and expose themselves to risk while traveling. Neither reason rises to the level of prejudice that requires a change of

venue. And neither argument shows that the accused will not receive a fair and impartial trial at Camp Victory.

1.) **The accused does not have a right to have the members of his unit attend his trial.** Whether the audience supports the accused or not has no bearing on the outcome of the trial. The military judge will ensure that the audience does not disrupt proceedings. To accept the accused's argument would set the precedent that an accused has the right to have supportive members from his unit present to watch a court-martial. Would the Government then have to transport spectators to assure that the accused's supporters were present? The Government's responsibilities do not extend to assuring the proper makeup of the spectators in the gallery. Prejudice requires something more than that the chosen venue will prevent the accused's supporters from attending trial.

Once the convening authority has chosen the location of trial, it should only be changed when necessary to prevent prejudice to the accused. It is not prejudice that an accused would prefer trial at a particular location or that one location may be more supportive of his cause than another. The Government is not required to give the accused a "home-field" advantage. Instead, all that is required is a location where the accused will receive a fair and impartial trial. Camp Victory provides that location and the accused has not presented any argument to the contrary.

2.) **The accused's mental state does not require trial at Camp Victory.** The second argument advanced by the defense is that the accused's mental state requires that the trial be held at LSA Anaconda. The defense argues that the accused suffered mentally after a Soldier was injured in an insurgent attack on the convoy carrying him from Camp Victory back to LSA Anaconda after charges were read to him. As a result of this incident, the accused has suffered depression and mental anguish, blaming himself for the injury. The defense argues that the accused will be prejudiced if trial is held anywhere but LSA Anaconda because he will be worried about being the cause of his fellow Soldiers having to travel to Camp Victory, exposing themselves to another insurgent attack.

The defense argument fails to show real prejudice. Defense counsel has not requested a sanity board pursuant to RCM 706 which it would be required to do if defense counsel truly feared the accused's mental condition prevented him from being able to participate in his own defense. Implicit in the failure of defense to file a motion for an RCM 706 board is a concession by defense that the accused can adequately participate in his own defense. Otherwise defense counsel would be required to move for an RCM 706 board.

The defense argument also fails to make logical sense. Defense argues that the accused will suffer prejudice only if witnesses from his ***own*** unit are forced to travel in Iraq. However, even if the trial is at LSA Anaconda, significant numbers of witnesses and court personnel will be forced to expose themselves to risk while traveling to attend the trial. Is the accused's mental condition only related to worrying about favorable

witnesses? Worry about favorable witnesses at the expense of unfavorable witnesses is not prejudice. And if the accused is worried about the travel of any witness, then there is no location in Iraq where trial could be held to satisfy the accused. Conducting a court-martial in Iraq requires witnesses to travel and be put at some level of risk. That risk does not amount to prejudice to the accused's right to a fair and impartial trial.

c. The inconvenience to the defense of trial at Camp Victory is minimal, does not amount to prejudice, and is outweighed by the inconvenience to the Government of a change in venue to LSA Anaconda.

Although United States v. Nivens does allow a court to consider the convenience of the parties and the need to assist the defense's preparation, the decision also requires that the court consider the inconvenience to the Government of changing venue. Further, mere trifling inconvenience is not enough to constitute inconvenience rising to the level of prejudice and requiring a change in venue. For example, in Nivens itself, the court held that the inconvenience to the accused of holding trial at a location 150 miles away from the scene of the crime and most witnesses, did not rise to the level of prejudice. See Nivens, 45 CMR at 197; see also United States v. Miller, 1986 CMR LEXIS 2371 (NMCCMR, 1986) (inconvenience did not amount to prejudice when accused attempted to move trial from the Philippines to San Diego for purpose of retaining civilian counsel). Similarly, in this case the inconvenience to the defense caused by trial at Camp Victory, Iraq, instead of LSA Anaconda, Iraq, does not constitute prejudice or outweigh the inconvenience to the Government of changing the venue to LSA Anaconda, for the following reasons:

1.) A fully functional, dedicated court room already exists at Camp Victory with an attached panel deliberation room, private office for the judge, private office for the court reporter, a gallery for spectators, a functioning and tested VTC capability, and tested recording system. There is no dedicated court room at LSA Anaconda, with previous trials having been held in trailers or the DFAC. The new court room at LSA Anaconda is still under construction and will not be finished until at least the end of September. The accused requested several sentencing witnesses from the United States and offered form them to testify by video teleconferencing (VTC) instead of personal appearance. The court room at Camp Victory is far more convenient for such testimony because there is a tested, reliable VTC system already in place in the Camp Victory courtroom, but not in the temporary court rooms used in previous cases at LSA Anaconda.

2.) The transportation of witnesses to trial is the Government's responsibility, not the accused's. Any inconvenience caused by trial at Camp Victory is borne entirely by the Government. The Government's responsibility to produce witnesses remains the same, whether at Camp Victory or LSA Anaconda. The need to transport witnesses and how far is a question only for the Government. There is no claim that the Government will be unable to transport the required witnesses.

3.) Trial at Camp Victory does not affect the ability of the accused to prepare witnesses or interview potential witnesses. The accused and his counsel are located at LSA Anaconda with a number of the potential witnesses. There is no claim that the venue has affected the accused's ability to prepare for trial and interview potential witnesses.

4.) Witnesses must travel from LSA Anaconda, Camp Victory, Abu Ghraib, Camp Bucca, and the United States. Although there are more total witnesses at LSA Anaconda, the difficulty for the Government is not numbers so much as number of locations. Camp Victory is more centrally located and is the most convenient location for the Government to coordinate the movement of all witnesses.

5.) The Government's paralegal and support staff is located at Camp Victory which makes it easier for the Government to provide the logistical support necessary to a panel trial.

6.) The case has already been referred to the Camp Victory panel. Although the Convening Authority may vice the membership of the panel, setting the venue as LSA Anaconda forces him to change the panel he selected to hear this case. It requires an additional appointment with the Convening Authority and takes time away from his other duties. Also, notification of panel members for Camp Victory by the Government has already begun. Vicing the panel will require new notifications to the LSA Anaconda panel and slow the process of ensuring full panel attendance.

7.) Assistant Trial Counsel is scheduled for leave starting 6 September 2005 flying out of Camp Victory. Trial at LSA Anaconda on the scheduled dates will prevent him from being able to depart on time in accordance with his leave dates due to the unreliability and unpredictability of transportation in Iraq. Leave dates are scheduled in advance and last minute changes can upset the entire unit's leave plan.

The result of these factors is that the Government has determined that the most convenient location with the best available facilities is Camp Victory, Iraq. This decision is reasonable. The defense has not met its burden of showing by a preponderance of the evidence that the inconvenience of trial at Camp Victory amounts to prejudice requiring a change of venue or outweighs the inconvenience to the Government of trial at LSA Anaconda.

CONCLUSION

The defense motion for a change of venue should be denied because the defense has not shown by a preponderance of the evidence that the accused will suffer prejudice by conducting the trial at Camp Victory.

MATTHEW W. SHEPHERD
CPT, JA
Trial Counsel

Attachments:

1. Defense Witness List
2. Government Witness List
3. Government Response to Defense Witness List

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the above Motion for Appropriate Relief on the Court and Defense Counsel, CPT Christopher Krafchek and CPT William Brown, by email on 8 August 2005.

MATTHEW W. SHEPHERD
CPT, JA
Trial Counsel

UNITED STATES	)	DEFENSE REBUTTAL TO
	)	GOVERNMENT RESPONSE
	)	TO DEFENSE MOTION FOR
v.	)	APPROPRIATE RELIEF--
	)	CHANGE OF VENUE
BURKE, RICKY A.	)	
SGT, U.S. Army	)	
B Battery, 1-623 Field Artillery	)	
503d MP BN (ABN), APO AE 09342	)	8 AUGUST 2005

COMES NOW the Accused, hereinafter SGT Burke, by and through defense counsel, and submits this Rebuttal to Government's Response to Defense Motion for Appropriate Relief for Change of Venue. This rebuttal is submitted to the mischaracterization of the Defense position in its motion for a change of venue.

FACTS

The Defense will stipulate to the facts as stated in the Defense Motion for the purposes of this motion, except the Defense does not stipulate that the Government's response to the Defense Witness List is the final answer on what witnesses will be called. The Defense only just received the Government response to the Defense witness request, so it only seems logical that the Defense could not have considered it when drafting its motion. Although there is not a dedicated court room at LSA Anaconda, there have been many contested cases held at LSA Anaconda and there has never been a problem with either the facilities or the location.

REBUTTAL ARGUMENT

a. The Defense did not request witnesses to be present at the trial to be "spectators", but to actually testify on his behalf at both the case-in-chief and the pre-sentencing phase. Government counsel has already inquired with the chain of command and is well aware that if all of the requested witnesses are required to testify at a trial at Camp Victory, the 623rd may not be able to make its mission. The motion for change of venue was submitted to ensure that all witnesses that had relevant testimony would be available to *testify* on SGT Burke's behalf. If the Court rules in the Government's favor and orders the trial to be held at Camp Victory, the Defense anticipates the Government to use that as a reason to deny SGT Burke's request for witnesses, as that will be a more supportable argument that saying "the expected testimony is either not relevant or it is cumulative". The Defense did not intend to proffer the argument that SGT Burke wants supportive spectators at the trial, but argued that SGT Burke does have the right to have witnesses testify on his behalf on the merits and at the pre-sentencing portion of the trial.

b. The Defense pointed out that SGT Burke is suffering mental anguish over the injury a fellow 623rd soldier received while traveling in a convoy. The Defense then argued that, once the question was raised about where this was going to be held, SGT Burke was

APPELLATE EXHIBIT VI

starting to suffer anxiety about his fellow soldiers traveling again. It does not logically follow that SGT Burke is not worried about other soldiers traveling within the Iraqi theater of operations. It was only pointed out to show there is a reasonable basis for his concern and that

c. The Defense is not required to file a request for a sanity board IAW RCM 706 when it believes an accused will be subjected to substantial prejudice in a particular venue. Furthermore, there is no implicit concession that SGT Burke cannot adequately participate in his defense. In a situation such as the one before the court, the Defense is ethically bound to file a motion for appropriate relief that will alleviate the source of prejudice and not simply waste time and resources by requesting a sanity board. In this case, the source of SGT Burke's anxiety, either reasonable or not, is the fact that this case may be held at Camp Victory, and thereby possibly expose soldiers from his unit to further threat of attack.

d. Camp Victory is not "more centrally located" than LSA Anaconda. LSA Anaconda is the central hub for the CENTCOM AOR. It is used as the departure point almost all soldiers going home on R & R leave. It will be more convenient for witnesses to travel from any of their departure points as it will for them to travel to Camp Victory.

e. The Government sees the Convening Authority on a weekly basis and it is certainly not an inconvenience for the Staff Judge Advocate (SJA) to ask the Command General to sign one more document during any of these office visits.

f. Government Counsel are fungible. The assistant Trial Counsel's leave dates are not relevant to this issue. Furthermore, with the way R & R leave has been working, there is no guarantee the Assistant Trial Counsel will leave on the requested day. There is not a compelling reason for Government counsel to get home other than his own personal convenience. That is not an issue in this case.

CONCLUSION

The Government has the resources and personnel to have this trial held at LSA Anaconda. All of the points made by the Government simply demonstrate that it simply does not want to have to make the effort to travel to LSA Anaconda. Inconvenience does not outweigh the actual prejudice to SGT Burke. For those reasons, the Defense reiterates its request for a change of venue in this matter and order the case to be tried at LSA Anaconda.

//original signed//
CHRISTOPHER L. KRAFCHEK
CPT, JA
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the above Defense Rebuttal to Government Response to Defense Motion for Appropriate Relief on the Court and the Government via electronic mail on 8 August 2005.

//original signed//
CHRISTOPHER L. KRAFCHEK
CPT, JA
Defense Counsel

UNITED STATES	)	
	)	
v.	)	MOTION TO SUPPRESS
	)	TANGIBLE EVIDENCE
BURKE, RICKY A.	)	
SGT, U.S. Army	)	
B Battery, 1-623 Field Artillery	)	
503d MP BN (ABN), APO AE 09342	)	26 August 2005

I. RELIEF SOUGHT

Pursuant to M.R.E. 401, M.R.E. 402, M.R.E. 403, and the U.S. Constitution, the Defense moves this Court to preclude the Government from introducing a 5.56 mm shell casing found at Salmon Pak, Iraq on 6 April 2005, the testimony of Mr. Michael Brooks and a laboratory report prepared by Mr. Brooks explaining the results of testing procedures he performed at the United States Army Criminal Investigations Laboratory (USACIL).

II. BURDEN OF PROOF AND STANDARD OF PROOF

The Government must show a continuous chain of custody which preserves the evidence in an unaltered state." United States v. Nault, 4 M.J. 318 (1978). Likewise, the results of tests performed on a fungible substance require a "chain of custody on which to predicate admission of the laboratory analysis into evidence." United States v. Courts, 9 M.J. 285 (1980). The court must be satisfied by the government's proffer that in reasonable probability, the relevant evidence, the urine sample in this instance, has not changed in important respects. Courts, Id. The Government must show that there is a reasonable probability the sample, which was tested, was in fact from the purported source and that it was not altered. An appellate court reviews a military judge's ruling admitting or excluding evidence for an abuse of discretion. United States v. Grant, 56 M.J. 410 (2001).

III. FACTS IN ISSUE

On 20 March 2005 a U.S. Convoy traveling on ASR Detroit, with convoy security elements B/1-623 FA and the 617th MP Company was ambushed by insurgents in a complex, well organized, and heavily armed attack. During the ensuing battle, twenty-seven (27) insurgents were killed and several American Soldiers were wounded in action. SGT Burke fired approximately sixty (60) to ninety (90) rounds from a M4 rifle while sitting on the right side of his HHMMV during the initial phase of the battle. SGT Burke was using an M4 service rifle he received from his driver, SGT Matthew Simpson. The ejected shell casings were hitting SGT Burke on his arms, face, and body armor while he returned fire at the insurgents. At the conclusion of the battle, during a security sweep of the battle field, the SGT Burke allegedly shot an insurgent in the head after the insurgent reached for an AK-47 assault rifle that was approximately five (5) feet away. This action forms the basis of the charged offense in this case.

APPELLATE EXHIBIT VII

SGT Burke gave a sworn statement as part of an After Action Report (AAR) in which he stated he used a 9MM pistol to shoot the insurgent. SGT Burke then gave an additional statement to CID in which he reiterated his use of the 9MM pistol during the incident with the insurgent. SSG Timothy Nein, SGT Dustin Morris, and SGT Leigh Ann Hester all made statements in which they claim they heard pistol shots on 20 March 2005 during the time when the incident occurred. All three of these witnesses observed SGT Burke holding his 9MM pistol near the insurgent shortly after hearing the fired shots.

The wounded insurgent was taken to LSA Anaconda where he received immediate neurosurgery to remove skull fragments from his brain. The treating neurosurgeon, LTC Todd Abel, did not locate any bullet fragments inside the insurgent's skull during the surgical procedure. CAT scans and X-rays of the insurgent's head, chest area, torso, and extremities showed that there were no bullet fragments in the insurgent's body

On or about 24 March 2005, allegations were made against SGT Burke that the shots fired at the insurgent were not authorized under the Law of War or the Rules of Engagement. COL James Brown, Commander, 18th MP Brigade, reported the allegations to the Criminal Investigation Division (CID) so that an investigation would be initiated.

Between 24 March 2005 and 3 April 2005, CID Special Agent Thomas Robinson (SA Robinson) and other CID agents collected every statement made by solders from the 617th MP Company and 623rd FA Company and all of the AAR statements provided by each unit. Upon review of all of the statement, agents from CID conducted follow-up interviews of each of the witnesses that had relevant knowledge about the attack on the convoy and the complete engagement.

On 6 April 2005, SA Robinson went to the battlefield to conduct a crime scene investigation. He brought with him SSG Nein and SGT Morris. Upon arrival, SA Robinson began video-taping the investigation. However, the video failed after a short period of time (three (3) minutes). Prior to the failure of the tape recorder, members of the group can be heard saying: "I don't know where to begin" or words to that affect. The crime scene investigation lasted approximately one (1) hour. The investigators brought metal detectors with them but elected not to use them because, in the words of SA Robinson, "there were thousands of shell casings all over the area, it would have been useless to do so".

The battlefield itself was drastically altered on 6 April 2005 from its conditions on 20 March 2005. There was considerable growth of vegetation in the seventeen (17) days between the incident and the investigation. The canal was free of water on 20 March 2005 but had approximately two (2) feet of water in it on 6 April 2005. The canal was not as deep on 6 April 2005 (approximately four (4) feet) as it was on 20 March 2005 (five (5) to six (6) feet deep). At no time between 20 March 2005 and 6 April 2005 was any part of the battlefield cordoned off to the public.

The agents did not look for shell casings or bullet fragments near the access road where SGT Burke fired approximately sixty (60) rounds with the M4 service rifle he used that day. SA Robinson specifically went to the battlefield to look for M4 rifle and 9MM pistol shell casings. SA Robinson used his own judgment to discard thousands of rounds located on the south side of the canal. SA Robinson is not an expert on ballistics.

The lone shell casing taken from the scene was found by SGT Morris. There were no witnesses that actually saw SGT Morris locate the shell casing with his naked eyes. SGT Morris did not use a metal detector to locate the shell casing he found at the scene. SGT Morris allegedly picked up the shell casing and then informed SA Robinson that he located it. SA Robinson directed SGT Morris to put the shell casing back where he found it and then photographed the shell casing. SA Robinson did not include this fact in his report and did not mark the DA 4137 evidence custody form he completed.

During the course of the fighting, multiple soldiers used their M4 Rifles in the surrounding area of the canal and trench lines. Specifically, SSG Nein and SGT Hester fired M4 Rifles during the course of the firefight. These facts were included in the AAR completed by SSG Nein and SGT Hester.

The defense is willing to stipulate to the above facts for the purposes of the motion.

VI. LEGAL AUTHORITIES

United States v. Bordelon, 43 M.J. 531 (1995)
United States v. Courts, 9 M.J. 285 (1980)
United States v. Maxwell, 1992 C.M.R. 606 (1992)
United States v. Grant, 56 M.J. 410 (2001)
United States v. Nault, 4 M.J. 318 (1978)
United States v. Jones, 404 F. Supp. 529 (1975) (cited in US v. Nault)
United States v. Carrott, 25 M.J. 823 (A.F.C.M.R. 1988)
Jones v. Commonwealth, 228 Va. 427 (1984)
United States v. Ladd, 885 F.2d 954, 957 (1st Cir. 1989).
California v. Trombetta, 467 U.S. 479, 81 L. Ed 2d 413, 104 S. Ct. 2528 (1984)
United States v. Kern, 22 M.J 49 (C.M.A. 1986
Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333 at 337, 102 L. Ed. 2d 281 (1988)
Military Rule of Evidence 401, 402, and 403

V. LIST OF EVIDENCE

5.56 Shell Casing marked TDR, 1240, 6 Apr 05.
M4 carbine, Serial Number W077786
Evidence Voucher #339/05 recorded the chain of custody for the shell casing
Evidence Voucher #351/05 recorded the chain of custody for the M4

VI. WITNESSES TO BE PRODUCED

1. SA Thomas Robinson
2. SSG Timothy Nein
3. SGT Dustin Morris
4. SGT Matthew Simpson
5. SGT Ricky A. Burke (for the limited purpose of this motion)
6. SFC Rickie Hammons
7. Mr. Michael Brooks
8. COL Paul Davis

VII. ARGUMENT

A. The Government cannot establish a continuous chain of custody preserving the shell casing in an unaltered state from the time it was placed at the scene until it was discovered during an investigation

A chain of custody is a foundational prerequisite for admitting real or tangible evidence on a substantive issue in the case. Ordinarily, gaps in the chain of custody go to the weight of the evidence, rather than its admissibility. However, in this case, fungible evidence only becomes "admissible and material through a showing of continuous custody which preserves the evidence in an unaltered state." United States v. Nault, 4 M.J. 318 (1978). Additionally, when the Government intends to rely primarily on a laboratory test result, there is authority for the proposition that the chain should run in a strict manner to support the basis for the testing and/or expert testimony. Jones v. Commonwealth, 228 Va. 427 (1984). Likewise, the results of tests performed on a fungible substance require a "chain of custody on which to predicate admission of the laboratory analysis into evidence." Courts, 9 MJ at 290. The Government must show that there is a reasonable probability the sample which was tested was in fact from the purported source and that it was not altered.

In this case, there is a fatal gap in the chain of custody. Due to the fact that SGT Burke fired approximately one-hundred and fifty (150) rounds with his M4 rifle on 20 March 2005, the shell casing is "fungible" evidence. The Government's "purported source" is the location where the shell casing was found. The Government cannot demonstrate by a reasonable probability that the shell casing found at the scene was present when the shooting occurred. The Government is required to show that the evidence has not changed in important respects. The battlefield and location where the evidence was found was drastically altered on 6 April 2005. The Government did not cordon off the area and cannot offer any evidence to prove that the location was not changed in an important respect. The Government can not even be certain of the exact location where the insurgent was found on the battlefield after the shooting. There is no bullet fragment in this case. Therefore, the Government does not have a causal link between the shell casing found somewhere at the scene and the injuries to the insurgent. Based on the fact that the evidence is of a fungible nature (there were over one-hundred and fifty (150) other M4 rifle shell casings in the area) and that the Government cannot show that the shell casing was found at the location where the insurgent was injured, it

cannot be proven that the Government has established the necessary foundational prerequisite to admit the shell casing into evidence in this case.

B. The Government's Failure to Preserve Evidence Constitutes a Denial of SGT Burke's Right to Due Process

The Government has a duty to preserve evidence on behalf of defendants. California v. Trombetta, 467 U.S. 479, 81 L. Ed 2d 413, 104 S. Ct. 2528 (1984). Trombetta is applicable in military law. United States v. Kern, 22 M.J 49 (C.M.A. 1986). The duty to preserve evidence arises when the Government has knowledge of the existence of evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Next, the Defense must show bad faith on the part of the police. Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333 at 337, 102 L. Ed. 2d 281 (1988).

In the case before the court, the Government had knowledge of the existence of 9MM pistol expended shell casings that would have played a significant role in SGT Burke's defense. Based on his multiple statements about the events of 20 March 2005, the Government clearly had knowledge that SGT Burke claimed to have used his 9MM pistol in self defense against the insurgent. SA Robinson conceded this fact at an Article 32 hearing on 18 May 2005. Additionally, three (3) of the witnesses from the 617th MP Company claimed they heard pistol shots fired. There is no doubt that the Government was aware of an exculpatory nature existed before the evidence was destroyed.

There is no doubt that such evidence, if found, would have played a significant role in SGT Burke's defense as it would have clearly demonstrated that SGT Burke's version of events occurred as he said in the sworn statement he provided at the AAR meeting. SGT Burke does not have either the means or methods to conduct a crime scene investigation in a deployed environment.

The Government, through the blatantly deficient crime scene investigation of SA Robinson, has acted in bad faith in this case. SA Robinson admitted the investigators found thousands of shell casings but discarded them because he believed they did not match an M4 or 9MM's shell casing. SA Robinson, and none of the investigators with him on 6 April 005, are qualified experts in the field of ballistics. Ballistics is a specialized field that requires years of training. SA Robinson's responsibility on 6 April 2005 was to conduct a neutral investigation to find evidence, even if that evidence was exculpatory in nature. SA Robinson did not search in the bottom of the trench. The investigators also brought metal detectors with them but decided against using them because of the large volume of shell casing in the area. SA Robinson also acted in bad faith when he failed to mention that it was SGT Morris that actually located the M4 rifle shell casing on 6 April 2005. Furthermore, Agent Robinson did not conduct a "crime scene re-creation" to attempt to establish an ejection pattern when SGT Burke fired the

9MM pistol. By putting his judgment in the place of scientific expertise and discarding thousands of shell casings, SA Robinson acted in bad faith. SA Robinson has been a CID Agent for nearly twenty years and he has conducted thousands of investigations. He is a well trained, experienced investigator and it cannot be assumed his actions were an oversight or based simply on incompetence. His actions clearly demonstrate bad faith and complete disregard for SGT Burke's right to have evidence preserved. The only appropriate remedy is suppression of the one (1) piece of evidence taken during a deficient crime scene investigation.

C. Pursuant to Military Rule of Evidence 401, the shell casing is not relevant.

MRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." The issue of whether or not SGT Burke fired an M4 on 20 March 2005 is not in dispute. There is no evidentiary link between the shell casing found at the alleged crime scene on 20 March 2005 and the bullet that struck the insurgent. The issue in this case is whether SGT Burke was justified in using deadly force against an insurgent. The shell casing's presence at a spot just seventy-five (75) to one-hundred (100) meters away from where he fired approximately sixty (60) rounds with the same weapon does not make it more or less probable that SGT Burke's use of deadly force against an insurgent was unjustifiable or without excuse. Since this evidence is not relevant under MRE 401, it must be excluded under MRE 402.

D. The probative value of the shell casing is substantially outweighed by danger of unfair prejudice, confusion of the issues, misleading the members and needless presentation of cumulative evidence

The probative value of the shell casing is substantially outweighed by the danger of unfair prejudice to SGT Burke. The shell casing can only be offered to prove SGT Burke fired the M4 rifle he was in possession of it on 20 March 2005. The shell casing has little or no value because this fact is not in dispute. There is a high likelihood that allowing the shell casing into evidence along with the subsequent testimony of Mr. Brooks will confuse and mislead the members to draw the inference that the shell casing Mr. Brooks examined was from the bullet that struck the insurgent. There is absolutely no evidence to support this finding of fact by the panel as the bullet that struck the insurgent was not found at the scene. This very real possibility creates the risk of unfair prejudice. There is also the very real risk that admission of the shell casing, and the subsequent laboratory reports, will constitute unfair prejudice because a panel may unjustifiably rely on the scientific expertise of Mr. Brooks and not give the appropriate level of weight to the other evidence submitted during the course of the trial.

VIII. CONCLUSION

For the above reasons, the accused respectfully requests the suppression of the shell casing, testimony of Mr. Brooks, and all other information, to include statements or reports, that are derived from its existence.

CHRISTOPHER L. KRAFCHEK
CPT, JA
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that this Defense Motion to Suppress was served on the Government, CPT Matthew Shepard and CPT Stephen Nolten, and the Court via electronic on 26 August 2005.

CHRISTOPHER L. KRAFCHEK
CPT, JA
Defense Counsel

UNITED STATES	)	
	)	DEFENSE RESPONSE TO
v.	)	GOVERNMENT MOTION
	)	FOR APPROPRIATE
BURKE, RICKY A.	)	RELIEF
SGT, U.S. Army	)	
B Battery, 1-623 Field Artillery	)	
503d MP BN (ABN), APO AE 09342	)	**11 August 2005**

COMES NOW the Accused, SGT Ricky Burke, by and through his detailed Defense counsel, and submits this Response to Government's Motion for Appropriate Relief requesting a ruling on the admissibility of evidence pursuant to RCM 906(b)(13).

RELIEF SOUGHT

The Defense requests that the Court deny the Government's motion to suppress video footage of insurgents beheading a hostage because this motion is premature, the video is relevant, the probative value is not substantially outweighed by the danger of unfair prejudice to the Government, and, pursuant to M.R.E. 404(a)(2), SGT Burke is entitled to offer evidence of a pertinent trait of character of the alleged victim of a crime as part of the affirmative defense of self defense. Suppression of this evidence would amount to substantial prejudice against SGT Burke because it may limit his right to offer an affirmative defense and prove that the alleged victim was the aggressor.

BURDEN

As the Moving Party, the burden of proof is on the Government by a preponderance of the evidence.

FACTS

On 20 March 2005 elements of the SGT Burke's patrol from B/1-623 FA and a patrol from 617th MP CO were ambushed by insurgents. During the ensuing battle, a number of insurgents were killed and several American Soldiers injured. At the conclusion of the battle, while clearing an enemy trench line, the accused allegedly shot a wounded insurgent in the head after the insurgent reached for an AK-47 rifle that was approximately five (5) feet away. This action forms the basis of the charged offense in this case.

After the battle, American troops collected several items of intelligence from the dead and wounded insurgents. Among these items was a video camera that had digital recordings on it. These digital recordings included a video of insurgents beheading an unknown prisoner with a knife. An insurgent in the video cuts the head off a live prisoner and then holds the head up for the camera. The insurgents seen in the video are

APPELLATE EXHIBIT VIII

wearing similar clothing to that of the alleged victim in this case and they are all chanting "Ali Akbar" (God is great) during the beheading. The insurgent, when found on the battlefield, was also saying "Ali Akbar" (God is great). The Government has not conducted any type of voice-analysis tests on the video to determine if the alleged victim was present at this beheading.

SGT Burke has given numerous statements asserting that he shot the insurgent out of self-defense.

On 6 June 2005, a Government representative interviewed, with the aid of an interpreter, the alleged victim at a detainee hospital at Camp Bucca, Iraq. The alleged victim, Hadi Saleh Khalid Al-Ujuhishi, ISN #172105, is interned at the Camp Bucca Detainee Hospital recovering from his wounds. When asked how he was injured, Mr. Al-Ujuhishi claimed to be a farmer who was out in a field with his brother when a group of terrorists attacked a convoy. He described an American counterattack on the terrorists. As the terrorists were running away, Mr. Al-Ujuhishi became mixed up with them and was shot in the arm and leg. That was the last thing he remembered. He did not remember being shot in the head and stated that he only found out about the injury after awakening in the hospital. Mr. Al-Ujuhishi remains at Camp Bucca.

On 10 June 2005, CID Special Agent Mark Vilcellio interviewed the insurgent at the Camp Bucca detention facility. During this interview, the alleged victim claimed that he "was not an insurgent, but just a poor farmer who was looting containers when the ambush occurred".

ARGUMENT

a. The Government Motion to Suppress the Video is Premature

This motion is premature because suppression of the video at this time might materially limit SGT Burke's right cross-examine any of the Government witnesses.

b. The Video is Relevant Pursuant to MRE 401

MRE 401 defines relevant evidence to be "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In this case, SGT Burke has asserted that he acted in self-defense when he fired upon the insurgent. The insurgent has stated on at least two occasions that he is not an insurgent and was only present at the battle because for innocent reasons. Thus, there is a question of fact as to whether the alleged victim was either an insurgent or simply at the battlefield for innocent purposes. The video is crucial to the determination that the panel must make in determining the alleged victim's status. Suppression of the video would prevent the panel from learning that the alleged victim was similarly dressed to the men in the beheading video, used similar phrases during a time of stress as the men in the video used

during the beheading, and that the video itself was found at the battlefield, immediately after the firefight.

c. The Probative Value of the Video is Not Substantially Outweighed by the Danger of Unfair Prejudice to the Government

There is no danger of unfair prejudice to the Government. The Government argument that the video will "inflame the passions of the panel against the alleged victim in this case" lacks merit. If the Government's argument is followed to its logical conclusion, the Government is saying that the mere presence of the video on the battlefield should have "inflamed the passion" of any reasonably thinking U.S. Soldier. That argument would also apply to SGT Burke's chain of command and would include the very same convening authority that sent this case to trial. Every commander in SGT Burke's chain of command has either seen the video or is aware of its existence and they were able to maintain their neutrality. It is logical and reasonable to assume the panel members will do the same thing and not be unduly influenced by the graphic nature of the beheading should it be introduced into evidence. This case is set to be tried in front of a panel selected by the convening authority that sent this case to trial. To suggest that this very same panel will act on its passions and prejudices, and thereby ignore its duty, is not a credible argument.

d. The Rules of Evidence Allow SGT Burke to Offer Character Traits of the Alleged Victim for When Asserting an Affirmative Defense of Self Defense

It is foreseeable that either the Government will argue, or the alleged victim will claim, that the victim was a peaceful, unknowing bystander who was innocently caught in the crossfire between insurgents and U.S. forces. By its very nature, raising the affirmative defense of self-defense, the character of the alleged victim is called into question. Pursuant to M.R.E. 404(a)(2), SGT Burke is entitled to offer evidence of a pertinent trait of character of the alleged victim of a crime as part of the affirmative defense of self defense. SGT Burke has consistently asserted that he acted in self defense. Suppression of this evidence would amount to substantial prejudice against SGT Burke because it would limit his right to offer an affirmative defense and prove that the alleged victim was the aggressor on 20 March 2005.

CONCLUSION

For the reasons stated above, the beheading video is relevant to the charged offense and the Defense requests the Court deny the Government's motion and hold it admissible at trial.

//original signed//

CHRISTOPHER L. KRAFCHEK
CPT, JA
Defense Counsel

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the above Defense Response to Government Motion for Appropriate Relief on the Court and the Government via electronic mail on 11 August 2005.

//original signed//

CHRISTOPHER L. KRAFCHEK
CPT, JA
Defense Counsel

UNITED STATES	)	
	)	**NOTICE OF FORUM**
v.	)	**AND PLEA**
	)	
BURKE, RICKY A.	)	
SGT, U.S. Army	)	
B Battery, 1-623 Field Artillery	)	
503d MP BN (ABN), APO AE 09342	)	17 **August 2005**

1. Plea: In the above captioned case, the accused, by counsel, pleads as follows:

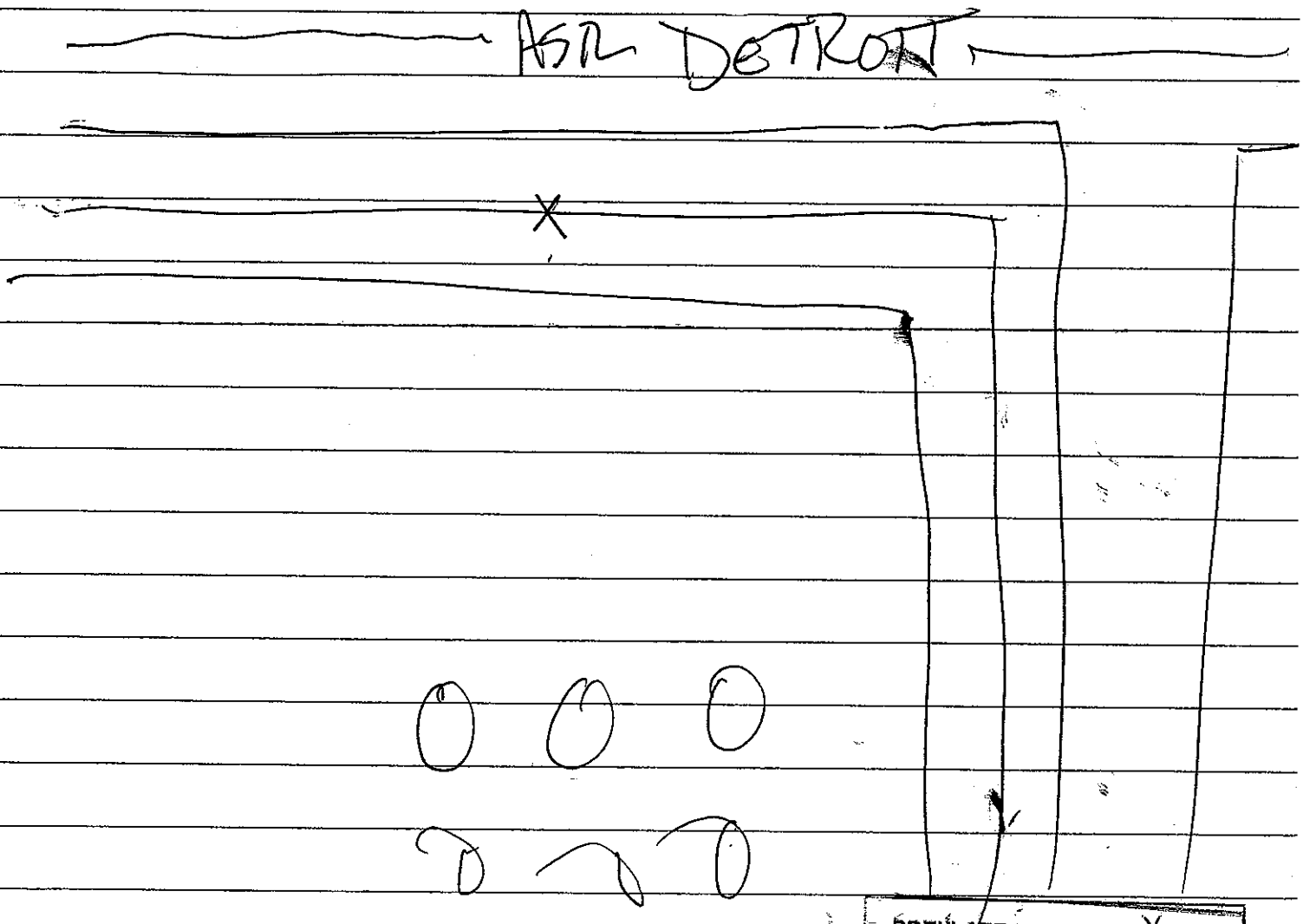
To the Specification of Charge I and the Charge: NOT GUILTY

2. Forum: The accused requests trial by a panel including enlisted members pursuant to RCM 903(b)(1). The accused reserves the right to withdraw this request pursuant to RCM 903(d)(1).

/// original signed ///
RICKY A. BURKE
SGT, US Army
Accused

/// original signed ///
CHRISTOPHER L. KRAFCHEK
CPT, JA
Trial Defense Counsel

APPELLATE EXHIBIT IX



APPELLATE EXHIBIT X

OFFICE OF THE CLERK OF COURT
US ARMY JUDICIARY
ARLINGTON, VIRGINIA 22203-1837

THE RECORD OF TRIAL HAS BEEN REVIEWED FOR RELEASE UNDER THE PROVISIONS OF THE FREEDOM OF INFORMATION ACT. THE DOCUMENT[S] DESCRIBED AS FOLLOWS HAVE BEEN REMOVED FROM THIS COPY OF THE RECORD BECAUSE THE RELEASE WOULD BE IN VIOLATION OF THE DOD FREEDOM OF INFORMATION ACT PROGRAM, DOD 5400.7-R, EXEMPTION (b)(6) 5 U.S.C. 552(b)6):

Photographs

OFFICE OF THE CLERK OF COURT
US ARMY JUDICIARY
ARLINGTON, VIRGINIA 22203-1837

THE RECORD OF TRIAL HAS BEEN REVIEWED FOR RELEASE UNDER THE PROVISIONS OF THE FREEDOM OF INFORMATION ACT. THE DOCUMENT[S] DESCRIBED AS FOLLOWS HAVE BEEN REMOVED FROM THIS COPY OF THE RECORD BECAUSE THE RELEASE WOULD BE IN VIOLATION OF THE DOD FREEDOM OF INFORMATION ACT PROGRAM, DOD 5400.7-R, EXEMPTION (b)(6) 5 U.S.C. 552(b)6):

Exhibit

Not Suitable for the Photocopier

COURT MEMBER QUESTION

directed to:

SGT Morris

(name of witness)

① When you first saw SGT Burke was he in the trench next to the AIF or was he on the other side of the trench?

② When left the AIF, where was SGT Burke? How far was he from the AIF? ___ feet

SGM Olyk A. Egge

(Signature of Court Member)

OBJECTIONS:

Trial Counsel: YES_____ No MWS BASIS_____

Defense Counsel: YES CK No_____ BASIS_____

Appellate Exhibit XVI

COURT MEMBER QUESTION

directed to:

SPC Mike

(name of witness)

Did you observe any other wounds.(? → On the Insurgent

(Signature of Court Member)

OBJECTIONS:

Trial Counsel: YES_____ No MWS BASIS_____

Defense Counsel: YES_____ No CK BASIS_____

Appellate Exhibit XVII

COURT MEMBER QUESTION

directed to:

SA Robinson
(name of witness)

① Please describe the physical condition the single 5.56 shell casing was in when you first saw it. (i.e. tarnished, weathered, did it look like it was sitting out in the elements for 2 weeks?) ② Was its condition similar to all the 7.62 and other non-NATO shell casings in the area?

③ Was the 5.56 shell casing found under the dirt, on top of the dirt, along side vegetation? (describe)

Patty A. Reim
PATTY A. REIM
(Signature of Court Member)

OBJECTIONS:

Trial Counsel: YES_____ No MWS BASIS_____

Defense Counsel: YES_____ No MK BASIS_____

Appellate Exhibit XVIII

COURT MEMBER QUESTION

directed to:

_____
(name of witness)

I want to see the photo (Exhibit 9).

SGM Olyk R. Eggs
(Signature of Court Member)

OBJECTIONS:

Trial Counsel: YES_____ No MWS BASIS_____

Defense Counsel: YES_____ No CLC BASIS_____

Appellate Exhibit XIX

COURT MEMBER QUESTION

directed to:

SGT Hester

(name of witness)

Where did it sound like the two shots you heard seem to have come from the inside or outside of the trench?

Bernard Harper

SGM Harper, Bernard

(Signature of Court Member)

OBJECTIONS:

Trial Counsel: YES_____ No MJS BASIS_____

Defense Counsel: YES_____ No CLL BASIS_____

Appellate Exhibit XX (20)

UNITED STATES	)	
	)	
v.	)	
	)	FINDINGS WORKSHEET
SGT Ricky A. Burke	)	
	)	
B Bty, 1-623d FA, 503d MP Bn (Abn), APO AE 09342	)	

[NOTE: After the court members have reached their findings, the President shall strike out all inapplicable language. After the Military Judge has reviewed the worksheet, the President will announce the findings by reading the remaining language. The President will not read the language in bold print.]

Sergeant Ricky A. Burke, this court-martial finds you:

I. Of the Charge and its Specification (Attempted Premeditated Murder)

(Not Guilty) ~~(Guilty)~~

(Not Guilty ~~but Guilty~~ of a violation of Article 80, Attempted Unpremeditated Murder, of the Charge Guilty)

(Not Guilty ~~but Guilty~~ of a violation of Article 80, Attempted Voluntary Manslaughter, of the Charge Guilty)

(Guilty, Except the words:

_____

_____

Substituting therefore the words:

_____

_____

Of the excepted words Not Guilty, of the Substituted Words Guilty, of the Charge of _____ Guilty)

APPELLATE EXHIBIT XXI

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

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

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

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

In the Specification of the Charge, the accused is charged with the offense of Attempted Premeditated Murder, in violation of Article 80 of the UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond a reasonable doubt of the following elements:

3-4-2. ATTEMPTED PREMEDITATED MURDER (ARTICLE 80)

(1) That at or near Salman Pak, Iraq, on or about 20 March 2005, the accused did a certain act, that is: shooting Hadi Saleh Khalid Al Ujuhishi in the head with a firearm;

(2) That such act was done with the specific intent to kill Hadi Saleh Khalid Al Ujuhishi; that is, to kill without justification or excuse;

(3) That such act amounted to more than mere preparation, that is, it was a substantial step and a direct movement toward the unlawful killing of Hadi Saleh Khalid Al Ujuhishi; and

(4) That such act apparently tended to bring about the commission of the offense of premeditated murder; that is, the act apparently would have resulted in the actual commission of the offense of premeditated murder except for a circumstance unknown to the accused or an unexpected intervening circumstance which prevented completion of that offense; and

(5) That at the time the accused committed the acts alleged, he had the premeditated design to kill Hadi Saleh Khalid Al Ujuhishi.

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

Preparation consists of devising or arranging the means or measures necessary for the commission of the attempted offense. To find the accused guilty of this offense, you must

APPELLATE EXHIBIT XXII

find beyond a reasonable doubt that the accused went beyond preparatory steps, and his acts amounted to a substantial step and a direct movement toward commission of the intended offense. A substantial step is one that is strongly corroborative of the accused's criminal intent and is indicative of his resolve to unlawfully kill.

Proof that a person was actually killed is not required. However, it must be proved beyond a reasonable doubt that the accused specifically intended to kill Hadi Saleh Khalid Al Ujuhishi without justification or excuse.

The intent to kill does not have to exist for any measurable or particular length of time before the acts of the accused that constitutes the attempt.

For attempted premeditated murder, the intent to kill must precede the act that constitute the attempt. "Premeditated design to kill" means the formation of a specific intent to kill and consideration of the act intended to bring about death. The "premeditated design to kill" does not have to exist for any measurable or particular length of time. The only requirement is that it must precede the act that constitute the attempt.

For the lesser, included offense of attempted unpremeditated murder, the intent to kill must exist at the time of the act that constitute the attempt.

The intent to kill may be proved by circumstantial evidence, that is, by facts or circumstances from which you may reasonably infer the existence of such an intent. Thus, you may infer that a person intends the natural and probable results of an act he purposely does. Therefore, if a person does an intentional act, which is likely to result in death, it may be inferred that he intended to inflict death. The drawing of this inference, however, is not required.

If you find beyond a reasonable doubt all the elements of attempted premeditated murder except the element of premeditation and you find beyond a reasonable doubt that the attempted killing was not done in the heat of sudden passion caused by adequate provocation, which I will mention in a moment, you may find the accused guilty of the lesser, included offense of attempted unpremeditated murder.

With respect to the accused's ability to premeditate, you are advised that an issue has been raised by the evidence as to whether the accused acted in the heat of sudden "passion." Passion means a degree of rage, pain, or fear, which prevents cool reflection. If sufficient cooling off time passes between the provocation and the time of the attempted killing which would allow a reasonable person to regain self-control and refrain from killing, the provocation will not reduce attempted murder to the lesser offense of attempted voluntary manslaughter. However, you may consider evidence of the accused's passion in determining whether he possessed sufficient mental capacity to have "the premeditated design to kill." An accused cannot be found guilty of attempted premeditated murder if, at the time of the attempted killing, his mind was so confused by anger, rage, pain, sudden resentment or fear that he could not or did not premeditate. On the other hand, the fact that the accused's passion may have continued at the time of the attempted killing does not necessarily demonstrate that he was deprived of the ability to

premeditate or that he did not premeditate. Thus, if you are convinced beyond a reasonable doubt that sufficient cooling off time had passed between the provocation and the time of the attempted killing, which would allow a reasonable person to regain his self-control and refrain from attempting to kill, you must decide whether he in fact had the premeditated design to kill. If you are not convinced beyond a reasonable doubt that the accused attempted to kill with premeditation you may still find him guilty of attempted unpremeditated murder if you are convinced beyond a reasonable doubt that the accused attempted to kill Hadi Saleh Khalid Al Ujuhishi without justification or excuse.

The lesser offense of attempted voluntary manslaughter is included in the crime of attempted premeditated murder.

Attempted voluntary manslaughter is the attempted unlawful killing of a human being, done with an intent to kill, in the heat of sudden passion caused by adequate provocation. The presence of sudden passion caused by adequate provocation differentiates attempted unpremeditated murder from attempted voluntary manslaughter.

Acts of the accused which might otherwise amount to attempted premeditated murder constitute only the lesser offense of attempted voluntary manslaughter if those acts were done in the heat of sudden passion caused by adequate provocation. Passion means a degree of anger, rage, pain, or fear, which prevents cool reflection. The law recognizes that a person may be provoked to such an extent that in the heat of sudden passion caused by adequate provocation, he attempts to strike a fatal blow before he has had time to control himself. A person who attempts to kill because of passion caused by adequate provocation is not guilty of either attempted premeditated or unpremeditated murder. Provocation is adequate if it would cause uncontrollable passion in the mind of a reasonable person. The provocation must not be sought or induced as an excuse for attempting to kill.

If you are not satisfied beyond a reasonable doubt that the accused is guilty of attempted premeditated or unpremeditated murder, but you are satisfied beyond a reasonable doubt that the attempted killing, although done in the heat of sudden passion caused by adequate provocation, was done with the intent to kill, you may still find him guilty of attempted voluntary manslaughter.

5-2-1. SELF-DEFENSE

The evidence has raised the issue of self-defense in relation to the offenses of attempted premeditated murder, attempted unpremeditated murder, and attempted voluntary manslaughter.

Self-defense is a complete defense to the offenses of attempted premeditated murder, attempted unpremeditated murder, and attempted voluntary manslaughter.

For self-defense to exist, the accused must have had a reasonable apprehension that death or grievous bodily harm was about to be inflicted on himself and he must have actually believed that the force he used was necessary to prevent death or grievous bodily harm.

In other words, self-defense has two parts. First, the accused must have had a reasonable belief that death or grievous bodily harm was about to be inflicted on himself. The test here is whether, under the same facts and circumstances present in this case, an ordinary prudent adult person faced with the same situation would have believed that there were grounds to fear immediate death or serious bodily harm. Because this test is objective, such matters as intoxication or emotional instability of the accused are not relevant. Second, the accused must have actually believed that the amount of force he used was required to protect against death or serious bodily harm. To determine the accused's actual belief as to the amount of force, which was necessary, you must look at the situation through the eyes of the accused. In addition to the circumstances known to the accused at the time, the accused's age, intelligence, emotional control and all other evidence about the accused's background are important factors to consider in determining the accused's actual belief about the amount of force required to protect himself. As long as the accused actually believed that the amount of force he used was necessary to protect against death or grievous bodily harm, the fact that the accused may have used excessive force or a different type of force than that used by the attacker does not matter.

The prosecution's burden of proof to establish the guilt of the accused not only applies to the elements of the offense of attempted premeditated murder and the lesser included offenses of attempted unpremeditated murder, and attempted voluntary manslaughter, but also to the issue of self-defense. In order to find the accused guilty you must be convinced beyond a reasonable doubt that the accused did not act in self-defense.

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

5-3-3. DEFENSE OF ANOTHER

The evidence has raised the issue of defense of another in relation to the offenses of attempted premeditated murder, attempted unpremeditated murder, and attempted voluntary manslaughter. There has been some testimony or evidence that the accused may have been defending SGT Morris. A person may use force in defense of another only if that other person could have lawfully used such force in defense of himself under the same circumstances.

For defense of another to exist, the accused must have had a reasonable belief that death or grievous bodily harm or some lesser degree of harm, was about to be inflicted on the person defended, and, the accused must have actually believed that the force he used was necessary to protect that person.

In other words, defense of another has two parts. First, the accused must have had a reasonable belief that death or grievous bodily harm or a lesser degree of harm was about to be inflicted on SGT Morris. The test here is whether, under the same facts and circumstances present in this case, a reasonably prudent person, faced with the same situation, would have believed that death or grievous bodily harm or some lesser degree of harm was about to be inflicted. Second, the accused must have actually believed that the amount of force he used was necessary to protect against death or other harm.

If the accused reasonably apprehended that death or grievous bodily harm was about to be inflicted upon SGT Morris, then he was permitted to use any degree of force he actually believed was necessary to protect against death or grievous bodily harm. The fact that the accused used excessive force, if, in fact, you believe that, or that he used a different type of force than that used by the attacker does not matter.

If the accused reasonably apprehended that some harm less than death or grievous bodily harm was about to be inflicted, he was permitted to use the degree of force he actually believed necessary to prevent that harm. However, he could not use force, which was likely to produce death or grievous bodily harm. The accused was not required to use the same amount or kind of force as the attacker.

To determine the accused's actual belief as to the amount of force necessary, you must view the situation through the eyes of the accused. In addition to what was known to the accused at the time, the accused's age, intelligence, emotional control and all other evidence about the accused's background are important factors to consider in determining his actual belief as to the amount of force necessary to protect SGT Morris.

If the accused reasonably believed that death or grievous bodily harm was about to be inflicted upon SGT Morris, and if he believed that the force he used was necessary to protect against death or grievous bodily harm, he must be acquitted of the alleged offense and all lesser included offenses.

If the accused reasonably apprehended that some harm less than grievous bodily harm was about to be inflicted upon SGT Morris, and if he believed that the force he used was necessary to prevent this harm, and such force was not likely to produce death or grievous bodily harm, he may not be convicted of any of these offenses, including the lesser included offenses.

The prosecution's burden to establish the guilt of the accused not only applies to the elements of the offense of attempted premeditated murder and to the lesser included offenses of attempted unpremeditated murder, and attempted voluntary manslaughter, but also to the issue of defense of another. Unless you are satisfied beyond a reasonable doubt that the accused did not act in defense of another, you must acquit the accused of the offenses of attempted premeditated murder, attempted unpremeditated murder, and attempted voluntary manslaughter.

7-12. ACCUSED'S ELECTION NOT TO TESTIFY

The accused has an absolute right to remain silent. You will not draw any inference adverse to the accused from the fact that he did not testify as a witness. The fact that the accused has not testified must be disregarded by you.

7-3. CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is evidence, which tends directly to prove or disprove a fact in issue. If a fact in issue was whether it rained during the evening, testimony by a witness that he or she saw it rain would be direct evidence that it rained.

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

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

I have instructed you that premeditation and intent to kill must be proved beyond a reasonable doubt. Direct evidence of intent is often unavailable. The accused's intent, however, may be proved by circumstantial evidence. In deciding this issue, you must consider all relevant facts and circumstances.

7-8-1. CHARACTER--GOOD--OF ACCUSED TO SHOW PROBABILITY OF INNOCENCE

To show the probability of his innocence, the defense has produced evidence of the accused's character for peaceableness and good military character.

Evidence of the accused's character for peaceableness and good military character may be sufficient to cause a reasonable doubt as to his guilt.

On the other hand, evidence of the accused's good character for honesty, truthfulness, peaceableness and good military character may be outweighed by other evidence tending to show the accused's guilt.

7-7-1. CREDIBILITY OF WITNESSES

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

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

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

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

7-9-1. EXPERT TESTIMONY

You have heard the testimony of COL Paul Davis, Mr. Stephen Deady, Dr. Todd Abel and Mr. Michael Brooks. They are known as "expert witnesses" because their knowledge, skill, experience, training, or education may assist you in understanding the evidence or in determining a fact in issue. You are not required to accept the testimony of an expert witness or give it more weight than the testimony of an ordinary witness. You should, however, consider their qualifications as experts.

When an expert witness answers a hypothetical question, the expert assumes as true every asserted fact stated in the question. Therefore, unless you find that the evidence establishes the truth of the asserted facts in the hypothetical question, you cannot consider the answer of the expert witness to that hypothetical question.

Only you, the members of the court, determine the credibility of the witnesses and what the facts of this case are. No expert witness or other witness can testify that the a witness' account of what occurred is true or credible, or that the witness believes the another witness. To the extent that you believed that any witness testified or implied that he or she believes a particular witness or that another witness is credible, you may not consider this as evidence that a crime occurred or that the witness is credible.

7-11-1. PRIOR INCONSISTENT STATEMENT

You have heard evidence that one or more of the witnesses made a statement prior to trial that may be inconsistent with his/her testimony at this trial. If you believe that an inconsistent statement was made, you may consider the inconsistency in evaluating the believability of the testimony of the witness.

You may not, however, consider the prior statement as evidence of the truth of the matters contained in that prior statement.

7-11-2. PRIOR CONSISTENT STATEMENT

You have heard evidence that one or more of the witnesses made a statement prior to trial that may be consistent with his/her testimony at this trial. If you believe that such a consistent statement was made, you may consider it for its tendency to refute the charge of recent fabrication, improper influence or improper motives. You may also consider the prior consistent statement as evidence of the truth of the matters expressed therein.

7-4-2. STIPULATIONS OF EXPECTED TESTIMONY

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

7-15. VARIANCE--FINDINGS BY EXCEPTIONS AND SUBSTITUTIONS

If you have doubt about the time, place or manner in which the injuries described in the specification were inflicted but you are satisfied beyond a reasonable doubt that the offense or a lesser included offense was committed at a time, at a place or in a particular manner which differs slightly from the exact time, place or manner in the specification, you may make minor modifications in reaching your findings by changing the time, place or manner in which the alleged injuries described in the specification were inflicted, provided that you do not change the nature or identity of the offense or the lesser included offense.

CLOSING SUBSTANTIVE INSTRUCTIONS ON FINDINGS

You are further advised:

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

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

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

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

By "reasonable doubt" is not intended a fanciful or ingenious doubt or conjecture, but an honest, conscientious doubt, suggested by the material evidence, or lack of it, in the case. It is an honest misgiving generated by insufficiency of proof of guilt. Proof beyond a reasonable doubt means proof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must exclude every fair and reasonable hypothesis of the evidence except that of guilt. The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution, which does not amount to an element, need not be established beyond a reasonable doubt.

However, if, on the whole evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty.

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

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

At this time you will hear argument by counsel. Counsel may make reference to instructions that I gave you, and in that regard, I would merely say that if there is any inconsistency between what counsel may say about the instructions and the instructions which I gave you, you must accept my statement as being correct.

As the government has the burden of proof, trial counsel may open and close. Trial counsel, you may proceed.

(ARGUMENT OF COUNSEL)

PROCEDURAL INSTRUCTIONS

The following procedural rules will apply to your deliberations and must be observed: The influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment. Your deliberation should include a full and free discussion of all the evidence that has been presented. After you have completed your discussion, then voting on your findings must be accomplished by secret, written ballot, and all members of the court are required to vote.

You vote on the specification under the charge before you vote on the charge.

If you find the accused guilty of any specification under a charge, the finding as to that charge must be guilty. The junior member will collect and count the votes. The count will then be checked by the president, who will immediately announce the result of the ballot to the members.

The concurrence of at least two-thirds of the members present when the vote is taken is required for any finding of guilty. Since we have 9 members, that means 6 members must concur in any finding of guilty.

If you have at least 6 votes of guilty of any offense then that will result in a finding of guilty for that offense. If fewer than 6 members vote for a finding of guilty, then your ballot resulted in a finding of not guilty bearing in mind the instructions I just gave you about voting on the lesser, included offenses.

You may reconsider any finding prior to its being announced in open court. However, after you vote, if any member expresses a desire to reconsider any finding, open the court and the president should announce only that reconsideration of a finding has been proposed. Do not state:

(1) whether the finding proposed to be reconsidered is a finding of guilty or not guilty, or (2) which specification (and charge) is involved. I will then give you specific further instructions on the procedure for reconsideration.

As soon as the court has reached its findings, and I have examined the Findings Worksheet, the findings will be announced by the president in the presence of all parties. As an aid in putting your findings in proper form and making a proper announcement of the findings, you may use Appellate Exhibit XXI (21), the Findings Worksheet which the Bailiff may now hand to the president.

LTC Darden, as indicated on Appellate Exhibit XXI (21), the first portion will be used if the accused is completely acquitted or convicted of the charge and specification as charged. The second part will be used if the accused is convicted of any named lesser included offense. Once you have finished filling in what is applicable, please line out or cross out everything that is not applicable so that when I check your findings I can ensure that they are in proper form.

The worksheet in no way indicates an opinion by myself or counsel concerning any degree of guilt of this accused. The worksheet is provided only as an aid in finalizing your decision.

Any questions about the findings worksheet?

If, during your deliberations, you have any questions, open the court, and I will assist you. The Uniform Code of Military Justice prohibits me and everyone else from entering your closed session deliberations. As I mentioned at the beginning of the trial, you must all remain together in the deliberation room during deliberations. While in your closed-session deliberations, you may not make communications to or receive communications from anyone outside the deliberation room, by telephone or otherwise. If you have need of a recess, if you have a question, or when you have reached findings, you may notify the Bailiff, who will then notify me that you desire to return to open court to make your desires or findings known. Further, during your deliberations, you may not consult the Manual for Courts-Martial or any other legal publication unless it has been admitted into evidence.

COURT MEMBER QUESTION

directed to:

Col Davis

(name of witness)

When Did He arrive in Country?

2TC Allen J. Darden

(Signature of Court Member)

OBJECTIONS:

Trial Counsel: YES_____ No X mws BASIS_____

Defense Counsel: YES_____ No NO dk BASIS_____

Appellate Exhibit XXIII

FLYER

THE CHARGE: Violation of the UCMJ, Article 80

THE SPECIFICATION: In that Sergeant Ricky Allen Burke, U.S. Army, did, at or near Salman Pak, Iraq, on or about 20 March 2005, attempt with premeditation to murder Hadi Saleh Khalid Al Ujuhishi by means of shooting him in the head with a firearm.

APPELLATE EXHIBIT XXII