

COURT-MARTIAL RECORD

NAME RICHMOND, EDWARD L. PFC

SSN [REDACTED] (L) 61-2

ACTIONS CODED:

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JALS-CC FORM 24, 1 OCTOBER 2000 JUN 13 2005

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VERBATIM¹
RECORD OF TRIAL²
(and accompanying papers)

VOL ~~IV~~ of ~~V~~
ORIGINAL COPY

VI of VII

OF

RICHMOND, Edward L.,
Jr.

(NAME: Last, First Middle Initial)

HHC, 1st Bn, 27th In,
2nd Bde, 25th IN
(unit/Command Name)

(Social Security Number)

US Army
(Branch of Service)

Private First Class

(Rank)

Kirkuk, Iraq
(Station or Ship)

BY
GENERAL COURT-MARTIAL

CONVENED BY COMMANDING GENERAL
(Title of Convening Authority)

Headquarters, 1st Infantry Division
(Unit/Command of Convening Authority)

TRIED AT

FOB Danger, Tikrit, Iraq
(Place or Places of Trial)

ON

3-5 August 2004
(Date or Dates of Trial)

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¹ Insert "verbatim" or summarized" as appropriate. (This form will be used by the Army and Navy for verbatim records of trial only.)

² See inside back cover for instructions as to preparation and arrangement.

DD FORM 490, MAY 2000

PREVIOUS EDITIONS ARE OBSOLETE.

FRONT COVER

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1 TC: The witness has indicated the right side.
2 MJ: Right, the right, rear part of the head.
3 Q. All right so, if I recall then, you said that you saw his
4 shoulders but you weren't--well were you able to see if his hands
5 were behind his back?
6 A. I couldn't tell, Ma'am.
7 Q. Did you see his hands restrained?
8 A. You mean flex-cuffed? No, Ma'am.
9 MJ: All right, if you would give that back to the trial counsel
10 please.
11 [The witness gives PE 9 for ID to the TC.]
12 Q. Now I would like you to describe for me what movement that
13 you saw that you interpreted as he jumped you?
14 A. It was two different motions in one going at the same time,
15 Ma'am. At the same time he was rotating his body, say like he was
16 facing this way, at the same time he was facing his body to face
17 [turning to his left] this way, he was also moving his entire body
18 that way so, it was as if he was turning to face that way but it was
19 a lot faster than that.
20 Q. Okay, so you saw his body moving?
21 A. Yes, Ma'am.
22

1 Q. And you saw----

2 A. I saw his shoulders moving right there in that, but yes,

3 Ma'am.

4 Q. And was he turning--which direction was he turning?

5 A. I was off to his right so he was turning to his left and he

6 was going towards Sergeant [REDACTED] He eventually ended up facing

7 Sergeant [REDACTED] (5)(b)-2

8 Q. Did you see Sergeant [REDACTED] holding his left arm and

9 helping him turn?

10 A. No, Ma'am.

11 Q. And that is the movement that you interpreted that he was

12 going after Sergeant [REDACTED]

13 A. Yes, Ma'am.

14 Q. And prompted you to fire?

15 A. Yes, Ma'am.

16 MJ: Any other questions from members of the panel?

17 [Negative response from all members.]

18 MJ: Apparently, not.

19 Any questions based on those defense?

20 TC: Your Honor, I would----

21 MJ: Defense first.

22

1 DC: No, Your Honor.

2 TC: Your Honor, I do have one clarification question.

3 **RECROSS-EXAMINATION**

4 **Questions by the trial counsel:**

5 Q. You are stating that--it is your testimony that you were
6 using the sight, you stated that when you opened your left eye, you
7 did not see Sergeant [REDACTED]

8 A. Roger, Sir. (b)(6)-2

9 MJ: All right PFC Richmond, if you would go ahead and have a
10 seat back at your counsel table.

11 [The accused did as directed.]

12 MJ: Defense, do you have any other witnesses or evidence to
13 present?

14 DC: Yes, Your Honor. The defense calls Sergeant First Class

15 [REDACTED] (b)(6)-2

16 MJ: Members of the panel, I am going to rely on you to ask me
17 for a break if you need a break.

18 DC: Your Honor, the defense would actually like just a brief
19 comfort break.

20 MJ: Okay.

21

1 DC: Thank you.

2 MJ: Court is in recess.

3 [The court-martial recessed at 1755, 4 August 2004.]

4 [The court-martial was called to order at 1808, 4 August 2004.]

5 MJ: Court is called to order.

6 All parties present when the court recessed are again
7 present.

8 You are calling Sergeant First Class [REDACTED] right?

9 DC: Yes, Your Honor. The defense calls Captain [REDACTED] (b)(6)-2

10 Your Honor.

11 MJ: Okay.

12 CAPTAIN [REDACTED], U.S. Army, was called as a witness for the

13 defense, was sworn, and testified as follows: (b)(6)-2

14 DIRECT EXAMINATION

15 Questions by the trial counsel:

16 Q. Would you state your name, your rank, and your unit,
17 please? (b)(6)-2

18 A. Captain [REDACTED], HHC, 1-27 Infantry.

19 TC: Your witness.

20

1 **Questions by the defense counsel:**

2 Q. Captain [REDACTED], how do you know PFC Richmond?

3 A. I was PFC Richmond's platoon leader for--since February of
4 2003.

5 Q. Did you know him prior to February 2003?

6 A. No, I did not.

7 Q. How much interaction did you have with him during the time
8 that you were his platoon leader?

9 A. Back at Schofield Barracks, I would see him everyday, field
10 exercises and things like that, so 5 days a week.

11 Q. Would you also get reports on his duty performance from his
12 NCOs?

13 A. Yes, I would.

14 Q. Other than the field training exercises, what other kind of
15 daily interaction would you have with him back in garrison?

16 A. There is about 28 people in my platoon so I really wouldn't
17 specify one particular private so, I would see him in the morning
18 during PT, depending on what we had going on during the day, I would
19 see him with the rest of the Soldiers. So, nothing--nothing too
20 special in particular.

21

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1 Q. How often--how much would you interact with him during
2 field exercises?

3 A. Depends on what was going on during the field exercises and
4 if I needed him for something in particular then I would, you know,
5 get with him or if I needed him to do something then I would interact
6 with him, but no more than any other Soldier in the platoon.

7 Q. How much did you interact with him during EIB?

8 A. An extreme amount.

9 Q. Captain ^{(b)(6)-(7)} [REDACTED], do you have an opinion as to Private
10 Richmond's characteristics as a good Soldier?

11 A. Yes, I do.

12 Q. And what is that opinion?

13 A. Technically--well, Private Richmond's technical--his
14 technical competency of his job was very good. He was a very
15 good--he was very good at his job at what he did.

16 DC: Thank you. Nothing further.

17 MJ: Government, any questions?

18 TC: Yes, Your Honor.

19 MJ: Okay.

20

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CROSS-EXAMINATION

Questions by the trial counsel:

Q. Captain [REDACTED] the questions asked about basically is he a good Soldier, is that correct? (b)(6)-2

A. Yes, Sir.

Q. And would you agree that there is more to being a Soldier than technical competence?

A. Yes, Sir.

Q. And you have had an opportunity to observe PFC Richmond in other areas besides technical competence?

A. Yes, Sir.

Q. Dealing with leaders, PT, things like that?

A. Yes, Sir.

Q. Isn't it true that PFC Richmond failed a PT test when----

DC: Objection, Your Honor.

MJ: What is your objection?

DC: 404(b), Your Honor.

MJ: Okay.

TC: Your Honor, failing a PT test is not a prior criminal act.

MJ: Well it could be. Dereliction of duty is a crime under the Uniform Code of Military Justice and it is our duty to maintain fitness.

1 TC: Your Honor, she has opened the----

2 MJ: Members of the panel, you are instructed not--the fact that
3 he failed a PT test can not be used by you to determine that PFC
4 Richmond is a bad person, all right?

5 The purpose of asking the question was to test this
6 witness' opinion of whether he still believes PFC Richmond is a good
7 Soldier given that. It is admitted only for that limited purpose,
8 all right?

9 The objection is overruled.

10 Q. And to your knowledge, PFC Richmond is a PT failure?

11 A. Correct, Sir.

12 Q. Or was a PT failure?

13 A. Correct, Sir.

14 Q. And he is 20-years old and he failed his run on the PT
15 test?

16 A. Correct, Sir.

17 Q. Sometimes PFC Richmond has problems with authority, doesn't
18 he?

19 A. He has--he has had some problems in the past before, yes,
20 Sir.

21

1 Q. Now in those problems he has had problems with questioning
2 authority?

3 A. Yes, Sir.

4 TC: No further questions.

5 MJ: Any redirect?

6 DC: Yes, Your Honor.

7 MJ: Go ahead.

8 **REDIRECT EXAMINATION**

9 **Questions by the defense counsel:**

10 Q. Captain (b)(6)(b)(7)(C) didn't Private Richmond, after he failed his
11 PT test, turn around and take it the next day?

12 A. It was either the next day or shortly thereafter, yes.

13 Q. Did he pass?

14 A. Yes, he did.

15 Q. Do you know if he was on profile at the time that he took
16 that PT test, the second PT test?

17 A. No, I do not.

18 Q. You have never had any instances where Private Richmond has
19 disobeyed you in the past, have you?

20 A. Not that I can think of, No.

21

1 Q. And even though he may question authority, you've never had
2 any instances where he has disobeyed authority?

3 A. With myself, no.

4 Q. And generally you think that he is sometimes just too smart
5 for his own good.

6 A. Yeah that would be a safe assumption.

7 Q. He's made, or he has indicated to you--expressed his
8 opinion to you and said, "Even though I am just a PFC, Sir, I want to
9 throw this idea out there to you."

10 A. Yeah he has used that expression to me many times.

11 DC: Okay. Nothing further, Your Honor.

12 MJ: Government?

13 TC: No questions.

14 MJ: Members of the panel, do you have any questions for Captain

15 [REDACTED]?

16 (b)(6)-2

[END OF PAGE]

17

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EXAMINATION BY THE COURT-MARTIAL

Questions by the military judge:

Q. Captain [REDACTED] how would you characterize PFC Richmond's character in terms of the Army values? (b)(6)-2

A. PFC Richmond, he was a good Soldier. He was a good Soldier in some aspects and in some aspects he needed more work. Did he live fully up to all seven of the Army values? At times yes, and at times, no. Probably need a little more direction in terms of anything in particular.

MJ: Does that answer your question, Colonel [REDACTED]? (b)(6)-2

PRES: Dignity and respect. That is why I classified it in terms of the Army values.

MJ: All right.

Q. Well as to dignity and respect, what is your opinion of him?

A. Like I said before, PFC Richmond had some problems with authority at times. Not particularly with me. He never disobeyed an order that I gave but he did have some problems with my subordinate leaders. There were some issues where he did have problems with respect to authority.

1 Q. Okay.

2 A. Dignity, I don't think he ever had an issue with that, that
3 Army value, Sir./

4 MJ: Any other questions for Captain [REDACTED]?

5 Apparently not. Permanent? (S)(6)-2

6 DC: Your Honor, actually I have a follow up based on that, Your
7 Honor.

8 MJ: You may.

9 DC: Thank you.

10 **REDIRECT EXAMINATION**

11 **Questions by the defense counsel:**

12 Q. Captain [REDACTED], approximately how many junior-enlisted
13 Soldiers do you think you have encountered during your time in the
14 military? (S)(6)-2

15 A. Probably between 1 and 200.

16 Q. Is it normal sometimes for 20-year old privates to have
17 trouble adjusting to authority in the military?

18 A. I guess you could say it is normal, yes, but----

19 Q. You have seen it happen with other Soldiers?

20 A. Yes, I have.

21

1 Q. Okay, and again Private Richmond had never disobeyed you or
2 disrespected you?

3 A. Correct.

4 DC: Thank you, Your Honor.

5 MJ: Permanent or temporary?

6 DC: Permanent, Your Honor.

7 MJ: Any objection?

8 TC: No objection, Your Honor.

9 [The witness was duly warned, permanently excused, and withdrew from
10 the courtroom.]

11 **SERGEANT FIRST CLASS [REDACTED], U.S. Army, was called as a**
12 **witness for the defense, was sworn, and testified as follows:** (b)(6)-2

13 **DIRECT EXAMINATION**

14 **Questions by the trial counsel:**

15 Q. Sergeant First Class [REDACTED] please state your full name,
16 rank, and your unit. (b)(6)-2

17 A. My name is [REDACTED], I am a Sergeant First
18 Class, my unit is HHC, 1-27 Infantry.

19 TC: Your witness.

20

1 **Questions by the defense counsel:**

2 Q. Sergeant [REDACTED] how long have you spent on active duty?

3 A. Thirteen years, Ma'am. (b)(6)-2

4 Q. Briefly, to what other units have you been assigned in that
5 time?

6 A. I have been assigned to the 101st Airborne on two different
7 occasions, the 82d Airborne Division, 2nd Infantry Division, and 25th
8 Infantry Division.

9 Q. And what deployments have you been on with these units?

10 A. I have--I was in the first Persian Gulf War. I have
11 deployed to Panama, a 6-month rotation to the Sinai, Cobra Gold,
12 Thailand.

13 Q. How do you know PFC Richmond?

14 A. PFC Richmond is a Soldier in my platoon, Ma'am.

15 Q. How long have you been his platoon leader?

16 A. I have been his platoon sergeant for 2 and a half years,
17 Ma'am.

18 Q. Correction on that, sorry. How often have you interacted
19 with Private Richmond since you have been his platoon sergeant?

20 A. I have interacted with him the same I as I would with any
21 other Soldier in my platoon, Ma'am.

22

1 Q. Okay.

2 A. I wouldn't necessarily say everyday I talked to him or
3 interacted with him but I see him everyday.

4 Q. Do you get reports on his performance?

5 A. Yes, Ma'am.

6 Q. Good reports and bad reports?

7 A. Yes, Ma'am.

8 Q. Any kind of reports?

9 A. Yes, Ma'am.

10 Q. Did you get reports on his performance during Lightening
11 Thrust Warrior?

12 A. Yes, Ma'am. Lightening Thrust Warrior was a Brigade FTX
13 and during the Brigade FTX, PFC Richmond was given an AAM for his
14 good performance during that field problem.

15 Q. And did you also receive reports about his performance in
16 EIB?

17 A. Yes, Ma'am. During the EIB, PFC Richmond earned his EIB.

18 Q. Is Private Richmond a good Soldier?

19 A. Yes, Ma'am.

20 Q. Is he one of the best?

21 A. He is one of the better Soldiers in my platoon, yes, Ma'am.

22

1 Q. But he is still just a young kid sometimes?

2 A. Yes, Ma'am.

3 Q. Sergeant [REDACTED], did you have any issues or concerns with
(S)(b)(2)
4 deploying Private Richmond with your platoon?

5 A. No, Ma'am.

6 DC: Nothing further, Your Honor.

7 MJ: Government?

8 TC: Yes, Ma'am.

9 **CROSS-EXAMINATION**

10 **Questions by the trial counsel:**

11 Q. Sergeant [REDACTED] when you just said that you didn't have any
(S)(b)(2)
12 issues with PFC Richmond deploying with your platoon, you were
13 talking about 6 months ago when you deployed to Iraq, right?

14 A. Yes, Sir, and the time up to the shooting I never had a
15 problem with him, Sir.

16 Q. Would you agree that a good Soldier does not ordinarily
17 fail a PT test?

18 MJ: We've heard enough about PT tests.

19 Q. Would you agree that Soldiers alleged to be good Soldiers
20 have to be a good Soldier on duty and off duty?

21 A. Yes, Sir.

22

1 Q. Are you aware that around 2002 that----

2 DC: Objection, Your Honor. I anticipate a question and the

3 defense objects based on discovery, Your Honor, that this wasn't

4 disclosed.

5 TC: It is cross-examination, Your Honor.

6 DC: And I----

7 MJ: Members of the panel, I don't know the question is going to

8 be but I suspect that I need to talk to counsel outside of your

9 hearing, so if I could excuse you for just a moment.

10 [The court-martial recessed at 1825, 4 August 2004.]

11 [END OF PAGE]

12

1 [The Article 39(a) session was called to order at 1825, 4 August
2 2004.]

3 MJ: The members have departed the courtroom and Sergeant First
4 Class ⁽⁵⁾⁶⁻² [REDACTED] has departed the courtroom.

5 What is this all about guys?

6 TC: Your Honor, sometime about 2002 or 2003, PFC Richmond was
7 in downtown Waikiki and he said something to a girl, got into a
8 fight, got his jaw broken, and the government alleges that good
9 Soldiers don't do that.

10 MJ: The government alleges what?

11 TC: The government alleges that good Soldiers don't put
12 themselves in those types of positions and they don't do that. All
13 we are doing is rebutting the good Soldier defense and we can
14 basically do that in terms of impeaching the witnesses through pretty
15 much anything that passes 403, Ma'am.

16 MJ: Is that what you were objecting to?

17 DC: Your Honor, I have never been on notice for this from the
18 government at all.

19 TC: Your Honor, I am not trying to introduce it. I am not even
20 offering it for the truth of the matter asserted.

21

1 MJ: Okay, but why would you require notice? It is not Section
2 III notice?

3 DC: I know.

4 MJ: It is----

5 DC: I know, Your Honor. It is 404(b), Your Honor. It is a
6 prior bad act.

7 MJ: All right, well here is the deal guys, you are able to test
8 the knowledge, government, but you didn't tie up any of the questions
9 that you made with Captain ^{(b)(6)-(7)} [REDACTED] as to testing the knowledge. So, I
10 am not much interested in hearing about all the bad acts. Make it
11 relevant to testing the knowledge of the witness. There is no notice
12 requirement of 404(b) that I am aware of.

13 DC: Your Honor, I believe it is required under Section III. I
14 would defer to the court on that.

15 MJ: All right. I disagree. Section III is required for
16 particular statements by the accused and specifically required by
17 rules, but just general bad acts information is not required.

18 So government, I will allow limited inquiry, but make it
19 relevant because I now intend to instruct thoroughly on uncharged
20 misconduct to make sure that the panel uses this in the correct
21 manner, all right?

22

1 DC: Your Honor.

2 TC: Yes, Your Honor, and it is my understanding that once the
3 defense puts on good Soldier evidence I can ask the did you know
4 questions with----

5 MJ: Yes.

6 TC: ----without even a predicate.

7 MJ: Yes, you can.

8 DC: Your Honor, defense has a follow up objection based on that
9 ruling. It is a 403, Your Honor, that given the nature of the case,
10 that it is in fact a violent crime, to bring up some barroom brawl
11 that happened back in Hawaii, it is just too----

12 MJ: I completely agree with you defense. That is why I cut off
13 the bad PT test because I think that is kind of absurd in a murder
14 case. But, I will allow limited inquiry into this and I have
15 considered it under 403 grounds and will allow the government to test
16 the basis of knowledge for the opinion that the accused is a good
17 Soldier that has been given by Sergeant First Class (S)(b)-2

18 DC: Your Honor, prior to the panel coming back in, I just
19 request that the government proffer just exactly what is going to
20 come out after this one bad act, after the other, after the who
21 initiated the fight after the----
22

1 MJ: Is there anything else government?

2 TC: I will just ask the one question. If the witness doesn't
3 know----

4 MJ: No she is asking if there are any other bad PT tests or bad
5 counselings or anything else that you intend to go in to?

6 TC: One second, Your Honor. Not on good Soldier, but if law
7 abidingness becomes an issue then we will probably have to have
8 another 39(a).

9 MJ: Well I didn't hear anything about law abidingness. Okay
10 recall Sergeant ^{(b)(6)-2} [REDACTED] Your objection is overruled on both grounds.
11 Recall the members.

12 [The Article 39(a) session adjourned at 1830, 4 August 2004.]

13 [END OF PAGE]

14

1 [The court-martial was called to order at 1830, 4 August 2004.]

2 MJ: The members have reentered the courtroom and Sergeant First
3 Class [REDACTED] is still on the stand.

4 (b)(6)-2
Sergeant, I remind you that you are still under oath.

5 WIT: Yes, Ma'am.

6 MJ: Members of the panel, I have overruled the objection.

7 Please proceed.

(b)(6)-2

8 Q. Sergeant First Class [REDACTED], did you know that PFC Richmond
9 was involved in an altercation in which he was--in which he had an
10 altercation with a female that resulted in a fight with other males
11 in Waikiki in 2002, 2003?

12 A. Yes, Sir.

13 TC: No further questions.

14 MJ: Defense, anything further?

15 DC: Yes, Your Honor.

16 **REDIRECT EXAMINATION**

17 **Questions by the defense counsel:**

18 (b)(6)-2
18 Q. Sergeant [REDACTED], as a result of that altercation in Waikiki,
19 PFC Richmond's jaw was actually broken, is that right?

20 A. Yes, Ma'am.

21

1 Q. And is it your understanding that that was done by a local
2 Samoan national, a local Hawaiian national?

3 A. One of the two, Ma'am. I am not sure which.

4 Q. Okay.

5 A. But it was a local Hawaiian national.

6 Q. Sergeant (b)(6)-2 [REDACTED] generally is there bad blood among some of
7 the Soldiers that are stationed there and the locals?

8 A. Well on the island of Hawaii, there are some locals who do
9 not like the military and often what we tell them--well what we do
10 tell them, the new Soldiers when they arrive at the unit is if they
11 are going to go downtown to go in buddy teams and I tell my Soldiers
12 that there are certain parts of the island that you just don't want
13 to go to period.

14 Q. And sometimes Soldiers get targeted and get picked on.

15 A. Yes, Ma'am.

16 DC: Nothing further, Your Honor.

17 MJ: All right, members of the panel, again, as to this
18 evidence, this evidence is offered only for your use to determine for
19 the limited purpose of his tendency, if any, to test the opinion of
20 Sergeant First Class (b)(6)-2 [REDACTED] that the accused is a good Soldier.
21

1 MJ: You may not consider the evidence for any other purpose and
2 you may not conclude from the fact that he went downtown and had a
3 fight that he is a bad person or has general criminal tendencies and
4 therefore he must have committed the crime of murder on the 28th of
5 February.

6 Can you all follow that instruction?

7 [Affirmative response from all members.]

8 MJ: Temporary or permanent?

9 DC: Permanent, Your Honor.

10 [The witness was duly warned, permanently excused, and withdrew from
11 the courtroom.]

12 MJ: Defense.

13 MEMBER [COL (b)(6)-2]: Your Honor, a question. What if
14 we have a question for a previous witness?

15 MJ: Go ahead and fold it up. Trial counsel. That is a great
16 question, Colonel (b)(6)-2

17 Members of the panel, just so you know, when both sides
18 have rested and finished their cases, I will turn to you all and ask
19 if you want any witness recalled or if you want any other witnesses
20 called, and so we will probably handle it at that time. All right?

21

1 MEMBER [COL ██████████]: Thank you.

2 MJ: Roger. (b)(6)-2

3 STAFF SERGEANT ██████████, U.S. Army, was called as a witness for
4 the prosecution, was sworn, and testified as follows:

5 DIRECT EXAMINATION

6 Questions by the trial counsel:

7 Q. Staff Sergeant ██████████, please state your full name, your
8 rank, and your unit. (b)(6)-2

9 A. My name is Staff Sergeant ██████████. My unit
10 is HHC, 1st of the 27th Infantry.

11 TC: Your witness.

12 Questions by the defense counsel:

13 Q. Staff Sergeant ██████████ (b)(6)-2, how long have you been on active
14 duty?

15 A. For 11 years and a few months.

16 Q. Briefly, what have some of your prior duty assignments been
17 prior to your current duty assignment with Schofield Barracks?

18 A. I have been stationed at Fort Benning, Georgia, Korea, back
19 to Fort Benning Georgia, 101st Airborne, Fort Campbell, Kentucky,
20 Schofield Barracks.

1 Q. And certainly you are not currently stationed Schofield
2 Barracks?

3 A. Stationed at FOB McHenry.

4 Q. When did you get up to FOB McHenry?

5 A. At the beginning of February.

6 Q. Which platoon were you with when you got up there in
7 February?

8 A. The mortar platoon.

9 Q. How do you know PFC Richmond?

10 A. Um--I met PFC Richmond January 13th 2003 at Schofield
11 Barracks.

12 Q. How often did you interact with him when you were at
13 Schofield?

14 A. On a daily basis.

15 Q. How much contact did you have with him during the day?

16 A. Very limited considering that I was a section sergeant and
17 he had a squad leader so maybe about a quarter of a day.

18 Q. Did you interact with him at all during the Brigade FTX,
19 Lightening Thrust Warrior?

20 A. Yes, Ma'am, I did.

21

1 Q. How often did you interact with him during that brigade
2 exercise?
3 A. Daily, all day, constantly.
4 Q. Did you receive performance reports on PFC Richmond?
5 A. Yes, Ma'am, I did.
6 Q. Okay and did those reports include his performance during
7 the EIB?
8 A. Yes, Ma'am.
9 Q. Did you also have an opportunity to interact with PFC
10 Richmond in social settings on certain occasions?
11 A. Yes, I did.
12 Q. Sergeant [REDACTED] do you have an opinion as to PFC Richmond
13 as a Soldier? (S)(b)-2
14 A. Yes, I do have an opinion, Ma'am.
15 Q. What is that opinion?
16 A. He is an outstanding young Soldier.
17 Q. Sergeant [REDACTED], how many members--how many Soldiers are in
18 the mortar platoon? (S)(b)-2
19 A. Currently right now we have 23 members.
20 Q. Do you know Sergeant [REDACTED]
21 A. Yes, I do.
22

1 Q. Is he also a member of that platoon?

2 A. He used to be a member?

3 Q. What platoon is he a member of now?

4 A. Basically right now he is just attached to the medic

5 platoon.

6 Q. I am sorry, the mech platoon?

7 A. The medic platoon.

8 Q. Is the 23 members of the mortars platoon fairly close would

9 you say?

10 A. Yes, Ma'am.

11 Q. A close-knit group?

12 A. Yes, Ma'am.

13 Q. Um--do you know if the 23 members of the mortars platoon

14 know Sergeant [REDACTED] (S)(b)-2

15 A. Yes, they do.

16 Q. And does Sergeant [REDACTED] have a reputation for truthfulness

17 among the members of the mortars platoon?

18 A. No, he doesn't, Ma'am.

19 Q. Do you--how often have you interacted with Sergeant [REDACTED]

20 during your time with the platoon? (S)(b)-2

21 A. I have interacted with Sergeant [REDACTED] since late October

22 2002.

23

(b)(6)-2

1 Q. Sergeant [REDACTED] let me clarify, I think I might have
2 confused you with one of my questions.

3 Does he have a reputation within that platoon for
4 truthfulness in general, for trustworthiness? Does he have a
5 reputation?

6 A. Yes, he does, Ma'am.

7 Q. What is that reputation?

8 A. He lies a lot.

9 Q. And during the time that you interacted with him, have you
10 had the opportunity to form an opinion for his character for
11 truthfulness?

12 A. Yes, I do, Ma'am.

13 Q. And what is your opinion?

14 A. My opinion of Sergeant [REDACTED] is that he is a compulsive
15 liar. (b)(6)-2

16 DC: Thank you. Nothing further, Your Honor.

17 MJ: Government, cross?

18 TC: Yes, Ma'am.

19 MJ: Go ahead.

20

017563

1 **CROSS-EXAMINATION**

2 **Questions by the trial counsel:**

3 Q. Staff Sergeant [REDACTED] on the 28th of February, you were
4 not present during this incident, were you? (b)(6)-2

5 A. No, Sir, I wasn't.

6 TC: No further questions.

7 DC: Subject to any questions by the panel, temporary excusal,
8 Your Honor.

9 MJ: Any questions?

10 [Negative response from all members.]

11 [The witness was duly warned, temporarily excused, and withdrew from
12 the courtroom.]

13 MJ: Defense.

14 **SERGEANT** [REDACTED], U.S. Army, was called as a witness for
15 the defense, was sworn, and testified as follows: (b)(6)-2

16 **DIRECT EXAMINATION**

17 **Questions by the trial counsel:**

18 Q. Sergeant [REDACTED], please state your full name, your rank,
19 and your unit. (b)(6)-2

20 A. Sergeant [REDACTED] HHC, 1-27 Infantry.

21 TC: Your witness.

22
017570

1 **Questions by the defense counsel:**

2 Q. Sergeant [REDACTED] how long have you served in the active
3 duty Army? (S)(G)-2

4 A. For 5 years 8 months, Ma'am.

5 Q. Where have you previously been assigned?

6 A. Fort Hood, Texas.

7 Q. How do you know PFC Richmond?

8 A. He is a member of my platoon.

9 Q. When did you first meet him?

10 A. I don't know the date, Ma'am.

11 Q. Approximately how long do you think that you have known
12 him?

13 A. Approximately a year and a half.

14 Q. How much interaction have you had with him in that year and
15 half time?

16 A. Just about everyday I would see him, interact with him.

17 Q. Would you interact with him also on field exercises in
18 Hawaii?

19 A. Yes, I would.

20

1 Q. How much interaction would you have with him during the
2 field exercise.

3 A. I would interact with him during the day, during the
4 evenings. I am more of a supervisor type. I oversee the squads and
5 he is within a squad.

6 Q. And in the supervisory position would you also receive
7 reports on his duty performance?

8 A. Yes, I would.

9 Q. And also receive reports on his ability as a Soldier as
10 well?

11 A. Yes, I would.

12 Q. Do you have an opinion as to PFC Richmond's Soldierly
13 characteristics?

14 A. Do you want to know what my opinion of him is?

15 Q. If you have an opinion, I would like you to share that with
16 the panel, yes.

17 A. Okay, Richmond is a Soldier that can pick up information
18 really quickly. When we give him a task he finishes it. When he
19 doesn't know an answer to something, he will usually go and find it
20 and come back and tell us just to prove that he did it.

21

1 Q. Is he a good Soldier?

2 A. Yes, he is.

3 Q. Was he a leader among other Soldiers within the squad?

4 A. No, he wasn't.

5 Q. Did he assist his fellow members of his squad?

6 A. Yes, he did.

7 Q. Do you know he would help them if--when you said yes, that

8 he would help them, what do you mean by that?

9 A. If they had a question on how to do something, or if they

10 had a problem with something, they would ask Richmond and he would

11 help them.

12 Q. Do you ever--did he ever have any qualms about helping

13 them?

14 A. No.

15 Q. Who did he go through EIB with?

16 A. He went through EIB with PFC [REDACTED] Specialist (S)(6)-2 [REDACTED]

17 Captain [REDACTED], Specialist (S)(6)-2 [REDACTED], I don't remember the other

18 Soldiers. (S)(6)-2

19 Q. And those Soldiers are members of his squad?

20 A. Yes.

21

1 Q. And they looked up to him as a Soldier?

2 A. Yes, except for Captain [REDACTED].

3 Q. Sergeant [REDACTED], do you know Sergeant [REDACTED] (S)(b)-2

4 A. Yes, I do.

5 Q. How do you know him?

6 A. He was previously my direct supervisor.

7 Q. Where were you living on the evening of the 27th of

8 February 2004?

9 A. I lived in connex 1089.

10 Q. Who did you live with?

11 A. I lived with Sergeant [REDACTED], I believe PFC [REDACTED], and

12 Staff Sergeant [REDACTED] (S)(b)-2

13 Q. Were you present for a briefing that Sergeant [REDACTED] gave

14 on that evening?

15 A. Yes, I was.

16 Q. Why were you present if you weren't going on the mission

17 the next day?

18 A. Because I lived in the connex.

19 Q. What information did Sergeant [REDACTED] put out about the ROE

20 that was to be followed the next day?

21 A. The information that he briefed?

22

1 Q. Yes.

2 A. Was that they were going to be going through a town. They
3 were going to be on a checkpoint. If anybody were to try to escape,
4 they were to try to stop them of any means necessary. If they felt
5 it was deemed necessary.

6 Q. Did he indicate to the Soldiers that they were authorized
7 if people were fleeing the village to shoot them?

8 A. Yes, if they tried to run from them.

9 Q. And did he also indicate that if anybody resists to shoot
10 them?

11 A. Yes.

12 Q. Was it your impression that on that mission they were to be
13 cocked to rock?

14 A. Yes.

15 DC: Nothing further, Your Honor.

16 MEMBER [COL ██████████] I am sorry. What was that last
17 question? (S)(G)-2

18 DC: Was it his impression that they were to be cocked to rock
19 on that mission? Those were--Sergeant ██████████ can you explain that
20 to the panel. (S)(G)-2

21

017575

1 WIT: Sir, when we are getting hyped up for a mission that we
2 have to do, have you ever head of the term, "balls to the wall." Or,
3 "We are going to be cocked to rock." Meaning that we are going to be
4 on top of our Ps and Qs and ready to go and ready for anything that
5 happens.

(S)(b)-2

6 DC: Thank you, Sergeant [REDACTED] Nothing further.

7 MJ: Government, any questions?

8 TC: Just a question.

9 MJ: Okay.

10 **CROSS-EXAMINATION**

11 **Questions by the trial counsel:**

12 Q. You stated that you--that Sergeant [REDACTED] put out in the
13 ROE, and please think very carefully, did he actually say that if
14 anyone resists, that you can shoot him?

15 A. Yes.

16 Q. What was the context of this?

17 A. The context?

18 Q. The context of this?

19 A. In the situation of the mission was that they were to stop
20 anybody no matter what. It didn't matter who they were.

21

1 Q. If they resist--I mean, it they resist what?

2 A. If they try to run away, if they try to avoid being

3 captured by the guards who are on the end of the road, they were to

4 stop them at all means.

5 Q. Okay.

6 A. No one was to get out.

7 Q. Did anyone talk--isn't it true that he wasn't talking

8 anything about detainees and detention operations? Is that right?

9 A. Excuse me?

10 Q. Sergeant [REDACTED] wasn't addressing detention operations at

11 the time, he was talking about fleeing, people fleeing from the

12 village.

13 A. Anyone.

14 Q. Anyone?

15 A. Anyone.

16 Q. So it was your understanding that in this briefing that

17 Sergeant [REDACTED] gave, that if someone has a person detained and that

18 person is detained and they resist detention, you can shoot them?

19 A. If you feel that person can inflict any harm on you or a

20 fellow Soldier.

21

1 Q. You are saying that Sergeant (b)(6)-2 [REDACTED] actually said, that,
2 because I am going to call on the other Soldiers?
3 A. Excuse me?
4 Q. Are you sure he said those exact words?
5 A. The exact words in that manner?
6 Q. Yes.
7 A. No.
8 Q. What did he say about resisting and shooting?
9 A. If anyone resists, you may use any means necessary to stop
10 them.
11 Q. Okay, what time of the night was this?
12 A. It was late in the evening around 2200?
13 Q. And who was there?
14 A. Who was there?
15 Q. Yes.
16 A. Sergeant [REDACTED], myself, Sergeant [REDACTED], Sergeant [REDACTED]
17 Specialist (b)(6)-2 [REDACTED], Sergeant (b)(6)-2 [REDACTED], I believe, and I don't know who
18 the rest were, if they were all there or not.
19 Q. How many other people were there?
20 A. Approximately?
21

1 Q. Yes.

2 A. I can't say for exact who was there.

3 Q. And this was in a hooch?

4 A. Yes.

5 Q. Approximately how many people were there. You have named

6 five.

7 A. Name five?

8 Q. You have named five.

9 A. Okay.

10 Q. Are there more?

11 A. I do not remember.

12 Q. And was this the mission that Sergeant [REDACTED] was talking

13 about, was he giving the mission briefing? (b)(6)-2

14 A. Yes.

15 Q. And he was giving it to the Soldiers that were going to go

16 on the mission with him?

17 A. Yes.

18 Q. Do you know any of the Soldiers that went on the mission

19 with Sergeant [REDACTED] besides PFC Richmond? (b)(6)-2

20 A. Yes, I do.

21

1 Q. Who were they?

2 A. PFC [REDACTED], Corporal [REDACTED], PFC Richmond, of course,
3 Specialist [REDACTED] (S)(b)-2 and I believe at the time it was PFC [REDACTED]
4 now Specialist [REDACTED] (S)(b)-2

5 Q. And it is your testimony that Sergeant [REDACTED] told them
6 that if anyone resists you can shoot them?

7 A. Yes.

8 TC: No further questions.

9 MJ: Defense?

10 DC: No, Your Honor.

11 MJ: Okay, members of the panel, do you have any questions for
12 Sergeant [REDACTED]
13 [A question from COL [REDACTED] (S)(b)-2 was marked as AE XXIV, inspected by both
14 counsel, and handed to the military judge for questioning.]

15 **EXAMINATION BY THE COURT-MARTIAL**

16 **Questions by the military judge:** (S)(b)-2

17 Q. Sergeant [REDACTED] (S)(b)-2 during this briefing that Sergeant [REDACTED]
18 gave to the members that were going to go on the mission, the mission
19 the next day.

20 A. Yes, Ma'am.

017580

1 Q. Initially, you used the words, "If anyone resists, you can
2 shoot them." Then when asked by the trial counsel you said, "If
3 anyone resists, you may use any means necessary to stop them." Do
4 you recall which it was?

5 A. No, Ma'am.

6 Q. Do you remember specifically whether Sergeant (S)(b)-2 said
7 that you can shoot them? I mean understand that that's what you kind
8 of took from it, but did he use those words, "You can shoot."

9 A. I can't recall that he used those exact words, Ma'am.

10 MJ: Okay, any other questions for Sergeant (S)(b)-2 Apparently,
11 not. Temporary or permanent?

12 DC: Temporary, Your Honor.

13 MJ: Very well.

14 [The witness was duly warned, temporarily excused, and withdrew from
15 the courtroom.]

16 MJ: Defense, anything further?

17 DC: Yes, Your Honor.

18 [END OF PAGE]

19

1 SPECIALIST [REDACTED] U.S. Army, was called as a witness for the
2 defense, was sworn, and testified as follows:

3 DIRECT EXAMINATION

4 Questions by the trial counsel:

5 Q. Specialist [REDACTED] please state your name, your rank, and your
6 unit. (b)(6)-2

7 A. My name is [REDACTED]. I am a specialist and um I
8 go to the--I am in the HHC, 1-27.

9 TC: Your witness.

10 Questions by the defense counsel:

11 Q. Good evening Specialist [REDACTED]

12 A. Hi. (b)(6)-2

13 Q. Specialist [REDACTED], how long have you been in the Army?

14 A. About 2 years, Ma'am.

15 Q. How long have you known Private Richmond?

16 A. The whole time I have been in since I landed in Hawaii.

17 Q. Was he already in Hawaii before you got there?

18 A. Roger.

19 Q. He is one of your best friends, isn't he?

20 A. Yes, Ma'am.

21

017582

1 Q. How much time did you spend together in Hawaii?

2 A. Um, basically the whole time at work. I seen him everyday

3 'cause he was in my squad, so it was that.

4 Q. Would you go out together after work also?

5 A. Sometimes.

6 Q. What did you think of PFC Richmond as a Soldier?

7 A. He was a good solider. We both collaborated together to

8 get the job done, you know, get the job done and try to get off work

9 and make things easy.

10 Q. Work smarter, not harder?

11 A. Yes, Ma'am.

12 Q. Did you go through EIB with him?

13 A. Yes, Ma'am.

14 Q. Did anything significant happen in terms of you and Private

15 Richmond working together on EIB?

16 A. Yes, Ma'am. There was a couple of stations like I forget

17 about, and we'll go over them at night and in the tent and you know

18 rephrase on what we got to do the next day. You know, just rehearse

19 and practice and stuff.

20 Q. Did Private Richmond do the 12-mile road march with you?

21 A. Yes, Ma'am.

22 Q. And was that the second time he had done the 12-mile road

23 march?

1 A. Yes, Ma'am.

2 Q. Why did he do it twice?

3 A. Well I didn't want to go by myself and I was the only one
4 because everyone else had done the first one. I missed the first one
5 because my wisdom teeth got pulled out. So, he volunteered to go and
6 I--so he came.

7 Q. Did that help you?

8 A. Yes, Ma'am.

9 Q. How was your morale during that?

10 A. It was good, you know, just having a friend by me, you know
11 all the way to keep me going.

12 Q. Specialist [REDACTED], during your time in Iraq with your unit,
13 has the ROE changed? (b)(6)-2

14 A. A couple of times.

15 Q. Looking back to the end of February of this year, between
16 February 18th and February 28th, did the ROE change at all during
17 that time period?

18 A. Yeah.

19 Q. How did it change?

20 A. Just simple stuff like when to point the weapon, make sure
21 you got a PID, just who to look at. It is just so many stuff I can't
22 barely remember it but it has changed.

23

1 Q. Okay.

2 A. A couple of times.

3 Q. Okay, was there any kind of focus on whether or not you

4 should take aimed shots?

5 A. Yeah, yes, Ma'am. We asked questions like, if the enemy

6 has a weapon and he runs away and drops it, do we shoot? Do we not

7 shoot or who is considered to be an enemy, and mainly just stuff like

8 that.

9 Q. And didn't the ROE flip-flop so many times in that

10 February, March time period that Soldiers were really sick and tired

11 of it?

12 A. Yes, Ma'am.

13 Q. And some of them joked about not even carrying weapons

14 anymore it was so confusing?

15 A. Yes, Ma'am. I know I did. It had changed so many times I

16 was like, "Man, I don't even know who to aim the weapon at. I might

17 not even take it out on the mission."

18 Q. Did Private Richmond seem to understand the ROE?

19 A. He knew it like the back of his hand because I had to ask

20 him some things because I wasn't real sure about it so he knew it

21 like it was nothing.

22

1 Q. Did you feel like he was able to give you a pretty accurate
2 answer on the questions?

3 A. Yes, Ma'am. (b)(6)-2

4 Q. Specialist [REDACTED], you are a member of the mortars platoon, is
5 that right?

6 A. Yes, Ma'am.

7 Q. There are about 23 members of that platoon?

8 A. Yes, Ma'am. (b)(6)-2

9 Q. Do you know Sergeant [REDACTED]?

10 A. Yes, Ma'am.

11 Q. How often--well how long have you known him, during what
12 time period?

13 A. Um, I don't know when exactly what month he came into the
14 platoon, but ever since then I kind of known him but I don't know him
15 that well.

16 Q. Do you have an opinion as to Sergeant [REDACTED] reputation
17 for truthfulness? (b)(6)-2

18 A. Well he will come to work, said some things off the wall
19 like----

20 TC: Objection. Non-responsive.

21

1 MJ: Sustained.

2 Q. Do you have an opinion as to whether or not he is truthful?

3 A. Yes, Ma'am.

4 Q. What is that opinion? If you could just give that opinion
5 without any specific instances.

6 A. That he don't tell the truth most of the time.

7 Q. And did you form that opinion as far back as February 2004?

8 A. Uh huh.

9 Q. Is your opinion of Sergeant (S) 61-2 [REDACTED] truthfulness just
10 because Private Richmond is one of your best friends?

11 [Negative response from the witness.]

12 DC: Nothing further, Your Honor.

13 MJ: Negative response from the witness. If he doesn't answer,
14 then you need to state it for the record.

15 DC: Yes, Your Honor.

16 MJ: Government?

17 TC: No questions, Your Honor.

18 MJ: Members of the panel, any questions for Specialist (S) 61-2 [REDACTED]

19 [Negative response from all members.]

20 MJ: Apparently not. Permanent?

21 DC: Temporary, Your Honor.

22

017587

1 [The witness was duly warned, temporarily excused, and withdrew from
2 the courtroom.]

3 MJ: Defense?

4 DC: May I have a moment, Your Honor.

5 MJ: You may.

6 [Long pause.]

7 DC: Your Honor, the defense rests.

8 MJ: Government, do you have any rebuttal?

9 TC: One moment, Your Honor.

10 MJ: The court members at the very least would like to recall
11 Sergeant [REDACTED] (b)(6)-2

12 Members of the panel, why don't we do this, why don't we
13 take a short recess while the government determines whether or not
14 they are going to present any evidence in rebuttal.

15 During that time, please think about whether you want to
16 recall any witnesses that have previously testified or call any
17 witnesses of your own. When we reconvene, we will hear that,
18 evidence.

19 Again, my preference is to get all the evidence in tonight,
20 recess you all tonight, and you come back for instructions and
21 arguments tomorrow morning.

22

017588

1 MJ: Hopefully we can still do that while the DFAC is still
2 open, all right? Court is in recess.

3 [The court-martial recessed 1905, 4 August 2004.]

4 [The court-martial was called to order at 1915, 4 August 2004.]

5 MJ: Court is called to order. All parties when the court
6 recessed are again present.

7 Members of the panel, the government intends to call two
8 witnesses, one of whom is Sergeant [REDACTED] for matters in rebuttal.
9 Do you all want any other witnesses recalled? (b)(6)-2

10 Apparently not.

11 MJ: Okay, government.

12 SERGEANT [REDACTED] (b)(6)-2 U.S. Army, was recalled as a witness for the
13 prosecution, was reminded of his oath, and testified as follows:

14 DIRECT EXAMINATION

15 Questions by the trial counsel:

16 Q. Sergeant [REDACTED] (b)(6)-2 do you know Staff Sergeant [REDACTED] (b)(6)-2 a
17 member of your platoon that testified earlier here already today?

18 A. Yes, I do, Sir.

19 Q. How would you describe your relationship with him?

20 A. We don't get along, Sir.

21

017589

1 TC: No further questions.

2 MJ: Any questions on that?

3 DC: No, Your Honor.

4 **EXAMINATION BY THE COURT-MARTIAL**

5 **Questions by the military judge:**

6 Q. Sergeant (b)(6)-2, returning to the events of 28 February out
7 in the field with you, Mr. (b)(6)-4, and PFC Richmond, if I recall your
8 testimony earlier it was that when Mr. (b)(6)-1 was standing with his
9 arms out, you then patted him down in the back and then moved his
10 arms to the back in order to put the flex-cuffs on him. Is that
11 right?

12 A. Yes, Ma'am.

13 Q. At some point, you told the accused to raise his weapon or
14 something like that, is that right?

15 A. Yes, Ma'am.

16 Q. What did you say exactly? Do you recall?

17 A. I told him to put his weapon up, Ma'am.

18 Q. You told him to put his weapon up?

19 A. Yes, Ma'am.

20 Q. And what did you mean by that?

21 A. To point his weapon, just put it up as a show of force,
22 Ma'am.

23

017590

1 Q. Did you tell him to point at Mr. (b)(6)-(b)(7)(C) chest or his head
2 or anywhere else?

3 A. No, I did not.

4 Q. So you just said, "Put your weapon up."

5 A. Yes, Ma'am.

6 Q. Did the accused comply with that order?

7 A. Yes, he did, Ma'am.

8 Q. Where did he put his weapon?

9 A. At the shoulder and chest level, Ma'am.

10 Q. And when exactly did you tell him to do that? When in
11 sequence of events?

12 A. When Mr. (b)(6)-(b)(7)(C) first started to resist me, Ma'am.

13 Q. Okay, when he was resisting with his hands behind his back
14 then?

15 A. Already out to the sides, when I tried to pull them down.
16 I had----

17 Q. Okay.

18 A. ----pulled a few times. He started to show signs that he
19 was going to start fighting with me. I looked at Richmond and told
20 him to put his weapon up.

21

1 Q. All right. Now when PFC Richmond put his weapon up, did
2 Mr. (b)(6)(b)(7)(C) do anything?
3 A. No, Ma'am. He continued with what he was doing.
4 Q. Okay, so he was still resisting?
5 A. Yes, Ma'am.
6 Q. Now did you ever tell the accused, "Shoot him if he fucking
7 moves?"
8 A. No, Ma'am.
9 Q. Did you say anything like that?
10 A. No, Ma'am.
11 Q. Did you give him any further instructions after you told
12 him to raise his weapon?
13 A. No, Ma'am. Not that I recall.
14 Q. So the next thing that you said to PFC Richmond was, "He's
15 good. Let's go." Or something like that?
16 A. Yes, Ma'am.
17 Q. Okay, nothing else was said between the two of you between
18 the, "Put your weapon up," and "He's good. Let's go."
19 A. Yes, Ma'am.
20 MJ: Members of the panel, any other questions?
21

017592

(S)(b)-2

1 MEMBER [COL ██████████] Yes, Your Honor. About the flex-
2 cuffs and the----

3 MJ: Okay, go ahead and write it out so that I give the counsel
4 an opportunity to object if they need to. Thank you.

(S)(b)-2

5 [Questions from COL ██████████ and COL ██████████ were marked as AE XXV,
6 XXII, and XXVI, respectively, inspected by both counsel, and handed
7 to the military judge for questioning.]

(S)(b)-2

8 Q. All right, Sergeant ██████████ to the best of your
9 recollection, right after you heard the shot, what happened?

10 A. I squatted down and Mr. ██████████ fell forward.

11 Q. They can barely hear you.

(S)(b)-4

12 A. I squatted down. I ducked down. I saw Mr. ██████████ fall
13 forward and I turned around and looked at Richmond. I looked back
14 behind me and Richmond was behind me.

15 Q. Did you say anything to PFC Richmond?

16 A. I said something along the lines of, "What happened? What
17 the hell was that?"

18 Q. And that is when he said----

19 A. "He jumped at you."

(S)(b)-4

20 Q. Now did you say anything to him about Mr. ██████████ being in
21 flex-cuffs?

22 A. No, I did not, Ma'am.

23

017593

1 Q. Did you say, "Didn't you know he was in flex-cuffs?"
2 A. Not that I recall, Ma'am.
3 Q. Did you say, "Wasn't he in flex-cuffs?"
4 A. No, I did not, Ma'am.
5 Q. Or anything like that?
6 A. No, I did not, Ma'am.
7 MJ: All right. Here is what I would like to do. Sergeant
8 (b)(4)-2 the members have asked for a demonstration of what happened
9 that day, all right. So what I would like to do is, Trial Counsel,
10 you are going to demonstrate and Captain [REDACTED] you are going to
11 demonstrate, all right.
12 TC: Yes, Ma'am.
13 ADC: Yes, Ma'am. (b)(4)-2
14 MJ: Come on up. Sergeant [REDACTED], if you would step off the
15 witness stand please. Trial counsel, if you would take Prosecution
16 Exhibit 9 for identification.
17 Is that one marked?
18 TC: It is Prosecution Exhibit 10 for identification.
19 MJ: Okay, hand Prosecution Exhibit 10 for identification to
20 Sergeant [REDACTED] please.
21

017594

1 MJ: Captain [REDACTED] you are playing the part of Mr. [REDACTED] Major (b)(6)-4
(b)(6)-2
2 [REDACTED] you are playing the part of PFC Richmond. Sergeant [REDACTED] (b)(6)-2
3 I want you to describe where everybody was and how they were holding
4 their weapons when you and Richmond came up on them. All right?
5 WIT: Yes, Ma'am.
6 MJ: Where was your weapon? All right, so your weapon is slung
7 and your weapon is actually pointed down at about a 45-degree angle
8 and your weapon is on safe, correct?
9 WIT: Yes, Ma'am.
10 MJ: All right, and PFC Richmond was told by you to pull
11 security?
12 WIT: Yes, Ma'am.
13 MJ: And how was he holding his weapon?
14 WIT: He was holding his weapon how Major [REDACTED] (b)(6)-2 is holding it
15 now, Ma'am.
16 MJ: All right, so you have got it at a low-ready position, is
17 that fair?
18 WIT: Yes, Ma'am.
19 MJ: All right. Lets start from you and PFC Richmond coming up,
20 if you would start over here. Where was Richmond in relation to you
21 as you all came up on Mr. [REDACTED]
(b)(6)-4
22

017595

1 WIT: Over here.

2 MJ: All right, so Richmond was to your right, correct?

3 WIT: Yes, Ma'am.

4 MJ: All right, and what did you do?

5 WIT: We started to approach Mr. [REDACTED]

6 MJ: His back was to you. (b)(6)-4

7 WIT: We approached Mr. [REDACTED] We were about 50 meters away

8 before he first realized that we were approaching him.

9 MJ: And his back was to you?

10 WIT: Yes, Ma'am.

11 MJ: Okay.

12 WIT: And he turned around and noticed that I had flex-cuffs in

13 my hand at this time.

14 MJ: If you would hand him the flex-cuffs please. Not the ones

15 that he has already used. Has that been marked?

16 TC: It has been marked as Prosecution Exhibit 14 for

17 identification.

18 MJ: All right, Prosecution Exhibit 14 for identification is the

19 same as Prosecution Exhibit 11 for identification, is it not?

20 TC: Yes, Your Honor. They are exactly the same.

21

017596

1 MJ: All right. Please proceed.

2 WIT: So we were about 50 meters away approaching Mr. (S)(b)-7 and
3 he noticed we were coming.

4 [The witness continues the demonstration.]

5 MJ: Okay, so the second time when you raised your hands raised
6 your hands, (b)(4)-2 you made an up and down movement and you meant by that to
7 keep your hands up?

8 All right, so he held them in a T position directly out
9 from his shoulders?

10 WIT: Yes, Ma'am.

11 MJ: Okay, then what did you do?

12 [The witness continues the demonstration.]

13 MJ: Okay, so you told him where to stand. Pull security right
14 here?

15 WIT: Yes, Your Honor.

16 MJ: All right, then what?

17 [The witness continues the demonstration.]

18 MJ: All right, so you made a circular motion above your head
19 for him to turn around, is that right?

20 WIT: Yes, Your Honor.

21

017597

1 MJ: Okay.

2 [The witness continues the demonstration.]

3 MJ: Okay so you started the flex-cuff at that point?

4 WIT: Yes, Ma'am.

5 MJ: All right, do that please.

6 [The witness did as directed.]

7 MJ: Can I ask you to wait just a minute. Right now the PFC

8 Richmond was about a meter and a half behind you and to the right.

9 Is that about right where he was?

10 WIT: It is about like this.

11 MJ: All right, so almost parallel with you but to your right?

12 WIT: Yes, Ma'am. He was a few feet back from me.

13 MJ: All right, and about 2 meter--well, about a meter and a

14 half away?

15 WIT: Yes, Ma'am.

16 MJ: Okay, go ahead.

17 [The witness continued the demonstration.]

18 MJ: Okay, now he has put his weapon up but not all the way up,

19 at the high ready but not with his eye in the scope, is that right?

20 WIT: Yes, Ma'am.

21

017598

1 MJ: Okay. You were okay with that? All right.
2 [The witness continues the demonstration.]
3 MJ: Well, before you do that, explain to me how he was
4 resisting?
5 [The witness continues the demonstration.]
6 MJ: Was he moving his shoulders back and forth?
7 [The witness continues the demonstration.]
8 MJ: He just wouldn't lower himself?
9 WIT: Yes, Ma'am.
10 MJ: Okay, go ahead and proceed.
11 [The witness continues the demonstration.]
12 MJ: Can you all see?
13 [Affirmative response from all members.]
14 MJ: Okay, go ahead.
15 [The witness continues the demonstration.]
16 MJ: All right, so you got him in and you raised his arms
17 approximately 12 inches behind his back and tightened the flex-cuffs,
18 is that right?
19 WIT: Yes, Ma'am.
20 MJ: All right, then what?
21

1 [The witness continues the demonstration.]
2 MJ: All right, so you stepped to his left and put your right
3 hand on his right shoulder.
4 WIT: Yes, Ma'am. Then I looked at Richmond and said, "He's
5 good. Let's go."
6 MJ: All right, so you said to Richmond, "He's good. Let's go."
7 Then you patted him.
8 [The witness continues the demonstration.]
9 MJ: Okay.
10 WIT: At that time he started to relax. I grabbed him and pulled
11 him up to start walking.
12 [The witness continues the demonstration.]
13 MJ: All right and how many steps did you walk?
14 WIT: Two steps, Ma'am.
15 MJ: And then what?
16 WIT: The weapon discharged.
17 MJ: All right, was that a good enough demonstration?
18 MEMBER [COL ██████████: (b)(6)-2] How close. Show me your body
19 position exactly with the Iraqi.
20 [The witness continues the demonstration.]
21

1 MJ: Okay, if I could describe that. So, he stumbled on,
2 presumably uneven ground or something and leaned his left shoulder
3 into your right chest, is that right?

4 WIT: Yes, Ma'am.

5 MJ: And your right arm was bent at 90-degree angle still
6 holding his left arm, is that right?

7 WIT: Yes, Ma'am.

8 MJ: All right, so you guys were right next to each other?

9 WIT: Yes, Ma'am.

10 MJ: And there was no air between his shoulder and your
11 shoulder?

12 WIT: Yes, Ma'am.

13 MJ: And that is when the shot rang out?

14 WIT: Yes, Ma'am.

15 MJ: Okay.

16 WIT: Mr. [REDACTED] was leaning up against me and that is when the
17 shot rang out. (b)(6)-(b)(7)

18 MJ: And that is when Mr. [REDACTED] fell to his knees and you said
19 that you squatted down? (b)(6)-(b)(7)

20 WIT: Yes, Ma'am. After the shot rung, Mr. [REDACTED] dropped to his
21 knees.

22

1 [The witness continues the demonstration.]
2 MJ: Okay, so you squatted down and turned to your right to look
3 at Richmond?
4 WIT: Yes, Ma'am.
5 MJ: Okay, and did you put your hands over your ears or anything
6 else?
7 WIT: No, Ma'am. I thought that we were being fired on. I
8 didn't think it was Richmond. I didn't know what it was actually. I
9 just looked back to see.
10 MJ: Okay, because the sound came from behind you?
11 WIT: Yes, Ma'am.
12 MJ: Okay, anything else members of the panel, on that?
13 [Negative response from all members.]
14 MJ: Okay, if you would just place the weapons back, and does
15 anyone have a knife or scissors.
16 [All parties returned to their tables.]
17 MJ: All right, your objections are overruled.
18 [END OF PAGE]
19

017602

1 **EXAMINATION BY THE COURT-MARTIAL CONTINUED**

2 **Questions by the military judge:**

3 Q. Are you aware that there are some members from the mortars
4 platoon that believe that you are not a truthful person?

5 A. No, Ma'am.

6 Q. Why do you think they might think that?

7 A. I don't get along with two members of the mortar platoon,
8 Ma'am.

9 Q. Okay, so that is why they may think that you are not
10 truthful?

11 A. I am assuming so, Ma'am.

12 Q. You have been reassigned to another platoon right?

13 A. Yes, Ma'am.

14 Q. Why is that?

15 A. Captain [REDACTED] reassigned me to the medical platoon,
16 Ma'am. (5)(6)-2

17 MJ: Any other questions?

18 DC: Yes, Your Honor.

19 MJ: Go ahead.

20

017603

1 **CROSS-EXAMINATION**

2 **Questions by the defense counsel:**

3 Q. Why would Captain [REDACTED] reassign you?

4 A. You would have to ask Captain (b)(6)-2 [REDACTED], Ma'am.

5 Q. Didn't he tell you why?

6 A. I didn't--no, Ma'am, actually he didn't.

7 Q. Don't you think you have an idea why?

8 A. I have my own ideas, Ma'am.

9 Q. Okay, and what ideas are those?

10 A. Because of the stress of the whole incident, it would be a
11 little better for me if I was in a more relaxed environment out on
12 the FOB.

13 Q. And that is partially from the stress of the February 18th
14 incident where you killed an Iraqi? (b)(6)-5

15 TC: Objection.

16 MJ: Overruled.

17 Q. That is partially from the stress from the February 18th
18 incident where you killed an Iraqi civilian?

19 A. No, Ma'am.

20 Q. Solely the stress of this incident with PFC Richmond that
21 happened 10 days later?

22 A. Yes, Ma'am.

23 017604

1 Q. Certainly you are aware of your nickname among the platoon
2 as Shady Jay?

3 A. Yes, Ma'am.

4 MJ: I am sorry, what?

5 DC: I said, certainly he is aware of his nickname around the
6 platoon, that is, Shady Jay.

7 Q. You are aware of that?

8 A. Yes, Ma'am.

9 Q. You searched Mr. (b)(6)-2 around the collar?

10 A. Yes, Ma'am, or over his shoulders and down his neck.

11 Q. Down his neck around his shoulders?

12 A. Yes, Ma'am.

13 Q. Sergeant (b)(6)-2 you gave several statements during the
14 course of the investigation of this incident, didn't you?

15 A. Yes, Ma'am.

16 Q. You in fact gave five written statements, is that correct?

17 A. I think so, Ma'am.

18 Q. And you also gave verbal testimony at an Article 32
19 hearing, isn't that right?

20 A. Yes, Ma'am.

21

017605

1 Q. You have reviewed each and every one of those statements
2 prior to your testimony here today?

3 A. Yes, Ma'am.

4 Q. And you have practiced your testimony with the government
5 prosecutor several times, haven't you?

6 A. No, I have not practiced my testimony, Ma'am.

7 Q. Well you have been interviewed by Major [REDACTED] again,
8 haven't you?

9 A. I have talked to Major (b)(6)-2 [REDACTED], Ma'am.

10 Q. And he has rehearsed and practiced with you the questions
11 that he would ask you today, didn't he?

12 A. No, Ma'am.

13 Q. And you had a chance to review your Article 32 testimony,
14 isn't that right?

15 A. Yes, Ma'am.

16 Q. And you were under oath for that Article 32 testimony,
17 isn't that right.

18 A. Yes, Ma'am.

19 Q. And for at least two of the sworn statements that you gave,
20 you signed those under oath also, isn't that right?

21 A. Yes, Ma'am.

22

017606

1 Q. A statement to CID was one of them?

2 A. Yes, Ma'am.

3 Q. And also a statement to Major (b)(6)-2 [REDACTED] isn't that right?

4 A. Yes, Ma'am.

5 Q. And isn't it true that the first time that you were

6 mentioning in any kind of written statement or testimony that Mr.

7 (b)(6)-4 [REDACTED] raised his hands 12 inches behind him is here in court today?

8 A. I was never asked that question before, Ma'am.

9 Q. So you never volunteered that information either?

10 A. No, I didn't, Ma'am.

11 Q. But you spent several hours with CID when they talked to

12 you, did you?

13 A. I did, Ma'am.

14 Q. And you spent several hours under oath at an Article 32

15 investigation, didn't you?

16 A. It was about an hour, Ma'am.

17 Q. And you described at the Article 32 exactly what happened

18 on the day of February 28th, isn't that right?

19 A. Yes, I did, Ma'am.

20 Q. And you never mentioned him raising his arms 12 inches up

21 behind, isn't that right?

22 A. I raised his arms, Ma'am, he didn't.

23

1 Q. But you never mentioned that to anyone during this whole
2 investigation, isn't that right?

3 A. Yes, Ma'am.

4 DC: Nothing further, Your Honor.

5 MJ: Government, anything else?

6 TC: No, Your Honor.

7 MJ: Members of the panel, any questions for Sergeant (5)(6)-2

8 [Negative response from all members.]

9 Apparently not.

10 MJ: Sergeant (5)(6)-2 you--temporary or permanent?

11 TC: Temporary, Your Honor.

12 [The witness was duly warned, temporarily excused, and withdrew from
13 the courtroom.]

14 MJ: Government, anything else in rebuttal?

15 TC: Yes, Your Honor.

16 MJ: Proceed.

17 [END OF PAGE]

18

017608

(S)(b)-2

1 SPECIALIST [REDACTED] U.S. Army, was called as a witness for
2 the prosecution, was sworn, and testified as follows:

3 DIRECT EXAMINATION

4 Questions by the trial counsel:

5 Q. State your name, your rank, and your unit.

6 A. Specialist [REDACTED] (S)(b)-2 HHC, 1-27 Infantry.

7 Q. And what do you do in HHC, 1-27?

8 A. I am a squad leader in a mortar platoon, Sir.

9 Q. This is the mortar platoon at FOB McHenry?

10 A. Roger, Sir.

11 Q. Were you part of the mission on 28 February 04?

12 A. Yes, Sir, I was.

13 Q. Did you attend Sergeant [REDACTED] (S)(b)-2 operation order on 9
14 April?

15 A. Yes, Sir, I did.

16 Q. Did Sergeant [REDACTED] (S)(b)-2 say anything about males fleeing from
17 the village in terms of ROE?

18 A. Yes, he did, Sir.

19 Q. What did he say?

20 A. Sergeant [REDACTED] (S)(b)-2 stated that in Captain [REDACTED] (S)(b)-2 briefing
21 on rules of engagement that if we were to see on the initial raid any
22 males fleeing from the village that they were to be shot.

23

1 A. And if we were to see any women or children fleeing from
2 the village that we were to just call from higher for guidance then,
3 Sir.

4 Q. On another subject from ROE, did Sergeant (S)(b)-2 say
5 anything about what to do if someone were to resist?

6 A. No, Sir.

7 Q. Do you recall if he said anything about if someone resists,
8 you can shoot them?

9 A. No, Sir.

10 TC: No further questions.

11 MJ: Defense?

12 DC: Yes, Your Honor.

13 **CROSS-EXAMINATION**

14 **Questions from the defense counsel:**

15 Q. Corporal (S)(b)-2 have you ever heard PFC Richmond state that
16 he wanted to kill an Iraqi?

17 A. No, Ma'am, I have not.

18 DC: Nothing further, Your Honor.

19 MJ: Members of the panel, any questions for Specialist (S)(b)-2
20 [Negative response from all members.]

21

017610

1 MJ: Apparently not.
2 Temporary or permanent?
3 TC: Permanent, Your Honor.
4 [The witness was duly warned, permanently excused, and withdrew from
5 the courtroom.]
6 MJ: Government, anything else in rebuttal?
7 TC: No, Your Honor.
8 MJ: Counsel, anything else in surrebuttal?
9 DC: Yes, Your Honor.
10 MJ: Court is in recess.
11 [The court-martial recessed at 1947, 4 August 2004.]
12 [The court-martial was called to order at 2100, 4 August 2004.]
13 MJ: Court is called to order.
14 All parties present when the court recessed are again
15 present.
16 Defense, any matters in surrebuttal?
17 DC: Yes, Your Honor.
18 [END OF PAGE]
19

(S)(b)-2

1 SERGEANT [REDACTED], U.S. Army, was called as a witness for the
2 defense, was sworn, and testified as follows:

3 DIRECT EXAMINATION

4 Questions by the trial counsel:

5 Q. Please state your name, your rank, and your unit?

6 A. [REDACTED], Sergeant, and I am with HHC, 1-27
7 Infantry. (S)(b)-2

8 TC: Your Witness.

9 Questions by the defense counsel:

10 Q. Sergeant [REDACTED] to what platoon are you assigned to under
11 HHC?

12 A. I am with the 81 millimeter mortar platoon right now.

13 Q. And how long have you been with the mortars?

14 A. Almost 3 years, Ma'am. (S)(b)-2

15 Q. Do you know Sergeant [REDACTED]

16 A. Yes, Ma'am.

17 Q. How long have you known him?

18 A. I have known him since he came to our platoon from 1-21.

19 Q. Approximately how long ago was that?

20 A. Probably a little over a year, Ma'am.

21

1 Q. So you have known him for about a year?

2 A. Yes, Ma'am.

3 Q. And you are actually friends with Sergeant (b)(6)-2 [REDACTED] aren't

4 you?

5 A. Yes, Ma'am.

6 Q. Do you hang out with him sometimes?

7 A. Sometimes, Ma'am.

8 Q. What kinds of things do you do together?

9 A. We did motorcycle riding together. I have gone out with

10 him to bars a couple of times.

11 Q. Within the mortars platoon, does Sergeant (b)(6)-2 [REDACTED] have a

12 reputation for truthfulness or does he have a reputation for

13 truthfulness or untruthfulness, if you could just answer if you know

14 if he has reputation first?

15 A. He does have a reputation.

16 Q. And what is that reputation?

17 A. Being untruthful, Ma'am.

18 DC: Thank you. Nothing further, Your Honor.

19 MJ: Government, anything?

20 TC: Yes, Ma'am.

21

CROSS-EXAMINATION

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Questions by the trial counsel:

Q. I am sorry, I must have missed something. Did you testify to reputation only?

A. Yes, Sir.

TC: No further questions.

MJ: Temporary or permanent?

DC: Your Honor, may I do a brief follow up, Your Honor.

MJ: No.

DC: Permanent excusal, Your Honor.

MJ: Thank you. Any objection?

TC: No, Your Honor.

[The witness was duly warned, permanently excused, and withdrew from the courtroom.]

MJ: Defense, anything further?

DC: Your Honor, there was a stipulation of fact which the parties had discussed prior to court. I don't know if this is an appropriate time for this.

MJ: It is. Members of the panel I was informed during the last recess that the trial counsel and defense counsel and the accused have entered into an additional stipulation of fact.

1 MJ: May I see it.

2 TC: Your Honor, I believe it is number five.

3 MJ: All right, counsel, is it okay with you if I do the inquiry
4 with PFC Richmond after?

5 DC: Yes, Your Honor, that is fine.

6 MJ: Members of the panel, the two pieces of evidence that you
7 will have with you when you close to deliberate include the
8 stipulation of fact that was entered into earlier essentially to the
9 fact that the person who was shot and killed was [REDACTED]
10 (S)(b)-7 [REDACTED]

11 And the packet of pictures, which is 10 pictures that
12 Lieutenant (S)(b)-7 [REDACTED] testified to earlier today. At page five of that
13 there are two vehicles in the upper-left hand corner of the picture
14 that the accused, the trial counsel, and the defense counsel agree is
15 the sight of the TCP that you have heard testimony about.

16 So, you will have this, it is number five of ten. Counsel
17 if you would like to direct your attention to it with the copy that
18 you have.

19 DC: Roger, Your Honor. Like this? [Points to the vehicles in
20 the exhibit.]

21

1 MJ: Yeah, just like this. In fact come up and show it to them.

2 It is so tiny that you have to point to it.

3 [The defense counsel did as directed.]

4 MJ: And again, you will have these pictures when you close to
5 deliberate tomorrow.

6 And again, when counsel for both sides with the consent of
7 the accused agree to a fact, it becomes a fact which you may consider
8 along with all the other evidence in the case, all right?

9 Anything else, defense?

10 DC: No, Your Honor.

(b)(6)-2

11 MJ: Very well. Colonel [REDACTED] Members of the panel, you now
12 have all of the evidence. This is a great time to recess since I
13 have a lot of work to do to prepare my written instructions for you.
14 It is my practice to send in written instructions on the law so that
15 you have them with you when you close to deliberate.

16 So, court is in recess.

17 [The court-martial recessed at 2110, 4 August 2004.]

18 [END OF PAGE]

19

1 [The Article 39(a) session was called to order at 2110, 4 August
2 2004.]

3 MJ: The members have departed the courtroom. All other parties
4 are present.

5 All right counsel, let me tell you which instructions I
6 anticipate giving. Start with preparatory instructions, go
7 immediately into the elements of unpremeditated murder. Counsel
8 believe that voluntary manslaughter is fairly raised by the evidence?

9 TC: Your Honor, in the government's opinion it has not.

10 MJ: What is your position defense?

11 ADC: Yes, Ma'am, we think it is.

12 MJ: Why?

13 ADC: Your Honor, there is enough evidence. The fact that this
14 was a combat mission. There was something stressful about the
15 environment therefore they could find, potentially, that PFC Richmond
16 was acting under some sort of stress or excitement. Therefore, we
17 think that it is at least raised.

18 TC: I have no objection.

19 MJ: Well I have to tell you that I think it is raised by the
20 testimony of "I was shocked." And that it happened in 5 to 10
21 seconds, so I intend to instruct on it.

22

017617

1 MJ: So I will instruct on unpremeditated murder, voluntary
2 manslaughter. I did not see any other LIOs. Do you all agree?

3 ADC: Ma'am, the defense believes that negligent homicide is
4 raised. There may be--the jury could potentially believe that PFC
5 Richmond did not notice the flex-cuffs but that he should have. That
6 is a--that is something that I think they could conclude from the
7 evidence, therefore they could think that frankly he was negligent.

8 MJ: But the negligence is not failure to--government, what is
9 your position?

10 TC: The negligence goes towards unlawfulness.

11 MJ: It goes to the act itself.

12 TC: Yes, Ma'am. The only issue is intent. The difference
13 between the two crimes in intent. It is intent under murder and it
14 is negligent standard under negligent homicide.

15 MJ: Well I will look at it defense, but I have to tell you that
16 I don't think it is raised by the evidence at all. I think that the
17 act itself has to be negligent and your client himself said, "No, it
18 was an intentional act. I fired. I had the intent to pull the
19 trigger."

20 So the negligence of not seeing the flex-cuffs may go
21 toward a defense, but it doesn't go toward the elements of negligent
22 homicide.

23

1 ADC: Your Honor-----

2 MJ: At least that is my gut. Like I said, I will take a look
3 at it tonight.

4 ADC: I understand the court's position, Ma'am. My understanding
5 is that essentially the decision to fire was negligent.

6 MJ: Well yea, if you look at the elements it says that the act
7 of the accused or the failure of the act of the accused which caused
8 the death amounted to simple negligence. Under the definition of
9 simple negligence there is no issue that he fell and his finger
10 accidentally hit the trigger or something like that.

11 ADC: Well-----

12 MJ: And his weapon happened to be off safety.

13 ADC: Ma'am-----

14 MJ: His testimony said, "I flipped the weapon off of safety and
15 then I pulled trigger."

16 ADC: Right, well again, I don't want--I certainly wouldn't go
17 around in circles, Ma'am, but our belief and understanding of
18 negligence is that the language in the instruction talks about
19 frankly a failure to act with due care. And so for example, firing
20 without adequate justification because of the lack of observation or
21 the lack of thought could be negligent.

22

1 MJ: I will----

2 ADC: I don't want to go around in circles with this.

3 MJ: I will allow you to take as much time as you need tonight
4 to research that issue and to see if you can find a case on it but I
5 can tell you that my gut says I am not buying it.

6 The--if he fired at random, spraying, and somebody happened
7 to die, that might be a negligent act. On the other hand, I am not
8 sure that would because frankly, he intended to fire, so, I will take
9 a look at it.

10 ADC: Yes, Ma'am.

11 MJ: Do some research and find some case law and I am happy to
12 consider it.

13 ADC: Yes, Ma'am.

14 MJ: I am going to follow that with defense of another at 5-3-1.
15 I do not see any of the other self-defense instructions at 5-2-6 to
16 apply in this case. Do you all?

17 TC: Your Honor, I only have a computer bench book and I do not
18 have it with me. What is 5-2-6?

19 MJ: It is the general quote other instructions. It has things
20 like opportunity to withdraw, presence of others, accused is not
21 required to pause at his peril, mutual combatant, and that sort of
22 thing.

23

1 DC: Your Honor, I could certainly hand my copy over to Major
2 [REDACTED] for ease of the court, although the defense does feel that
3 (5)(b)-2 note three, state of mind instruction, would be appropriate in this
4 case.

5 MJ: Okay is this--I looked at it earlier and I will take
6 another look at it and see if that applies.

7 Now since none of the statements are in evidence, I am no
8 longer going to instruct on polygraph or voluntariness, all right?

9 DC: Correct, Your Honor.

10 MJ: Do you have a position on that?

11 TC: I am still digesting it, Your Honor.

12 MJ: All right. Okay I don't see any other defenses raised, do
13 you?

14 ADC: One moment, Your Honor.

15 MJ: Okay.

16 TC: Your Honor, it may be covered using the defense of another
17 instruction but mistake of fact, I am not sure if that was raised or
18 not? I thought that was the defense that the defense would use
19 initially. I ask them to take a look at that and to see if that
20 applies.

21

1 MJ: In terms of his belief?

2 TC: About the lunge.

3 MJ: About the what?

4 TC: About the lunge. The evidence was introduced that no lunge
5 occurred, and if--it might be relevant that PFC Richmond saw a lunge
6 or believes he saw a lunge. There are two types of mistake of fact
7 instructions, Your Honor. The mistake of fact instruction, if you
8 decide it should apply, the mistake of fact would be that----

9 MJ: Specific intent, right.

10 TC: The instruction goes to element--the element of intent,
11 Your Honor.

12 MJ: Well, no. The instruction on specific intent goes to the
13 element of intent. You are saying that because this goes toward the
14 defense?

15 TC: The mistake of fact instruction, there are two different
16 types of instructions. One is involving an element with a specific
17 intent to it and the other is an element that involves a general
18 intent element. There is case law that crosses back over it. The
19 case law is a little confusing. I do have one case, Your Honor. I
20 believe it is McDonald. The case in Panama.

21

1 MJ: Do you have a site for it?

2 TC: I am sorry, McMonagle, M-little c-M-O-N-A-G-L-E. It is at
3 34 MJ 852. And, in that case it talks about--it is an instruction
4 case. I believe this is the case. I am trying to make sure. It was
5 a murder charge of 118 and also a lesser included under 119 and the
6 military judge in the case instructed on mistake of fact but did not
7 instruct on 119 and the court found that was error, however, in the
8 instructions in this particular case, they described them and the
9 instructions that applied to the general intent element.

10 The government's argument is the mistake of fact goes to
11 unlawfulness in this case which is general intent as opposed to the
12 specific intent of the intent to fire.

13 MJ: All right. I understand that part of it. I am just
14 wondering if it is substantively different from defense of another
15 because with a general intent crime you have got to have both the
16 objective standard and the subjective standard----

17 TC: Yes, Your Honor.

18 MJ: ----which we have in defense of another.

19 TC: Yes, Your Honor.

20 MJ: What do you think?

21

1 ADC: Ma'am, we think that the statement of fact is raised.

2 MJ: Right, but I mean, is it any different than the defense of
3 another? Because it is to the same element as the unlawfulness,
4 because, if he was acting in defense of another then he has a defense
5 and he should be found not guilty.

6 And so that is the same thing as--I will take a look at it.
7 It may be a matter of just following the defense of another if the
8 mistake of fact as to the particular action by the victim and the
9 accused's interpretation of that act.

10 TC: Yes, Your Honor. Your Honor, I was mistaken. I gave you
11 the lower court opinion site. The site of the COMA case is 38 MJ 53
12 and I have a copy of that.

13 MJ: Okay.

14 ADC: Ma'am, I think the mistake of fact requires--is whether or
15 not Mr. (S)(b)-7 was flexi-cuffed. That was offered as a fact that is
16 perceptually tied to the situation.

17 MJ: In terms of what?

18 ADC: Part of why he perceived Mr. (S)(b)-7 as a threat is precisely
19 because he did not know that he was flexi-cuffed. I am quite sure
20 the government is going to argue the opposite in their closing.

21

1 MJ: All right. Let me think about it. I have written them
2 both down.

3 All right after the defense of another and the mistake of
4 fact, I will talk about circumstantial evidence and proof of intent,
5 stipulations of fact, credibility of witnesses, character evidence of
6 the accused.

7 Excuse me, after the credibility of witnesses will go prior
8 inconsistent statements, and I am not going to summarize, I am just
9 going to say that you have heard evidence that Sergeant (S) (b)(2) and
10 the accused made statements prior to trial that may be inconsistent
11 with their testimony at trial. You each can argue the specific
12 inconsistencies to the extent that you would need to.

13 Then I will follow that with the character evidence, both
14 on the accused's good character or being a good Soldier and Sergeant
15 (S) (b)(2) bad character for truthfulness.

16 I will follow that with a combination basically of the
17 uncharged misconduct instruction along with the have you heard
18 questions. Then the closing and substantive instructions, argument
19 by counsel, and procedural instructions.

20 Anything else or any objection to those?
21

1 ADC: No objection from the defense.

2 Correction, Ma'am, now that I think of it, I think there
3 was some evidence of a prior consistent statements with PFC Richmond.
4 When he was being cross-examined I believe there were some evidence
5 of when you said this and when you said that and then you said that,
6 or something along those lines. I think there was some cross-
7 examination that----

8 MJ: But it has to be consistent with his in-court testimony.

9 ADC: Right. I am sorry, I can't remember the testimony well
10 enough to try and get to what you are asking.

11 MJ: Well----

12 ADC: I understand the court's----

13 MJ: ----that is a double-edged sword counsel, because if I give
14 the instruction it would be something to the effect of "There was
15 testimony that PFC Richmond's sixth statement he said something
16 consistent with his in-court testimony." Do you see what I am
17 saying?

18 ADC: Yes, Your Honor.

19 MJ: So I am not sure that----

20 ADC: Actually, Ma'am, I think you are right.

21

1 MJ: And I think that is how it came out. So are you sure that
2 you want that?

3 ADC: No, on second thought, Ma'am, unless my memory is jogged on
4 another detail, I would defer to that, so we will not request that
5 instruction.

6 MJ: I am not sure that is fairly raised. Let me look at it.
7 Well, I don't know, you may still want it. Basically it says, "You
8 have heard evidence that PFC Richmond made a statement prior to trial
9 that may be consistent with his in-court testimony. If you believe
10 that this consistency was made, you may consider it for its tendency
11 to refute the charge or recent fabrication. You may also consider
12 the prior consistent statement as evidence to the truth of matter."

13 ADC: Ma'am, I think we can do without the instruction.

14 MJ: If you change your mind, let me know, but I am not going to
15 put in there all right?

16 ADC: Yes, Ma'am.

17 MJ: Anything else?

18 ADC: Well, Ma'am, to be honest, we are considering 5-2-5, which
19 is excessive force to deter. I will just be honest, we are
20 considering--I am not saying we want---
21

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1 MJ: I don't think it fits.

2 ADC: Oh, I am sorry, Ma'am. It doesn't apply.

3 MJ: No, it has to--he fired. It has to have not been used.

4 ADC: Right, exactly, Ma'am.

5 MJ: Anything else?

6 ADC: No, Ma'am.

7 MJ: Government?

8 TC: Your Honor, the government objects to the note three, state
9 of mind instruction. It requires a fast moving situation or an
10 immediate attack. The way this has all been described is that it is
11 not a fast moving situation and it is--this alleged attack is a
12 movement towards Sergeant (b)(7) a lunge, not really meeting the
13 threshold of an immediate attack. Note three, under 5-2-6, Ma'am.

14 MJ: Right, okay, here is the deal. First of all note three is
15 never given unless note two is given, so it is never a stand alone.
16 And, it seems to me--have we heard any evidence of the accused's
17 ability to leave or move away? (b)(7)

18 TC: Neither the accused or Sergeant (b)(7)

19 MJ: I mean, I guess we could assume it given that they are out
20 in a field and there is only the two of them with the farmer.

21

1 TC: Your Honor, under that theory that it is the defense of
2 Sergeant [REDACTED] the evidence is from Sergeant [REDACTED] (S)(b)-2 that he didn't
3 need--he wasn't under attack. He had no idea. So, the actual
4 opportunity to withdraw really wouldn't be applicable.

5 ADC: Ma'am.

6 MJ: Yes.

7 ADC: May I?

8 MJ: Yeah.

9 ADC: Well first of all, Ma'am, the defense would request that it
10 is not permissive that that instruction requires--we are not sure
11 that note has to be given in conjunction with note two all the time.
12 So, the defense would ask for note three standing alone. The
13 perception of--or the fast moving situation is exactly what PFC
14 Richmond talked about. It was his perception of the threat from Mr.

15 [REDACTED]
16 (S)(b)-4 That said, Ma'am, if the court believes that note two must
17 be applicable before note three is applicable, then in that case, we
18 could argue from the evidence that PFC Richmond had been ordered to
19 provide security for Sergeant [REDACTED] (S)(b)-2 that he did not have any option
20 of leaving the situation, that he had to stay there and deal with it
21 then.

22

1 ADC: There was no retreat from the threat to himself at that
2 moment, but again, we would request note three standing alone, Your
3 Honor. But we do think that a state of mind instruction is
4 appropriate.

5 TC: Your Honor, it is apparent that note three was written to
6 support or to be in conjunction with note two. As a stand alone
7 instruction it makes the government's burden too high.

8 ADC: I don't want to quibble over semantics but a note to note
9 three does say----

10 TC: Yes, Your Honor it----

11 MJ: Go ahead.

12 DC: For what it is worth, it does say that this instruction
13 should normally be given in conjunction with. Normally implies that
14 there are exceptions to that rule.

15 MJ: Or implies that you don't always have to give it when you
16 give note two. I mean----

17 ADC: Yes, Ma'am.

18 MJ: ----I am not sure. I will do some research on it. If I
19 gave it, it would be at the end of defense of another.

20 ADC: Yes, Ma'am, I think that would be an appropriate place for
21 it.

22

1 MJ: Anything else?

2 TC: No, Your Honor.

3 ADC: Not from the defense, Your Honor.

4 MJ: All right, court is in recess.

5 [The session recessed at 2134, 4 August 2004.]

6 [The session was called to order at 2135, 4 August 2004.]

7 MJ: Court is called to order. All parties when the court

8 recessed just seconds ago, are again present.

9 All right, PFC Richmond, what I neglected to go over with,

10 is if you recall just before we recessed with the panel, we went over

11 the additional stipulation of fact, that is, that in picture 5 of 10,

12 at Prosecution Exhibit 7, the two vehicles that are in the upper-left

13 hand corner of the horizon are in fact the TCP that we have heard

14 testimony about.

15 Do you recall that?

16 ACC: Yes, Ma'am.

17 MJ: Now, since this was a matter that was brought up by your

18 counsel during her case in surrebuttal, I assume that that is

19 something that you wanted to voluntary enter into, that stipulation

20 of fact. Is that right?

21

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1 ACC: Yes, Ma'am.

2 MJ: So again, the same as that other stipulation of fact that I
3 talked about earlier. You can't be forced to enter into it but if
4 you believe that it is in your best interest to do so, then certainly
5 we can take that into evidence the way we just did.

6 Is that something that you wanted to do?

7 ACC: Yes, Ma'am.

8 MJ: And do counsel for both sides agree to that stipulation of
9 fact?

10 TC: Yes, Your Honor.

11 DC: Yes, Ma'am.

12 MJ: Good enough. All right, court is in recess.

13 [The session recessed at 2136, 4 August 2004.]

14 [END OF PAGE]

15

1 [The session was called to order at 0812, 5 August 2004.]

2 MJ: This Article 39(a) session is called to order. All parties
3 present when the court recessed are again present.

4 All right counsel, you have a copy of my instructions on
5 your desk. I have decided to instruct the court on the lesser
6 included offense of negligent homicide as requested by the defense.

7 While thinking about this issue, the accused's testimony
8 was that he intentionally shot Mr. (S)(b)-7 and that he intended to kill
9 Mr. (S)(b)-7 thus the act itself would be seen, even taken in the light
10 most favorable to the defense, without regard to credibility, was an
11 intentional act, not a negligent act, and so negligent homicide
12 appears not to be fairly raised.

13 However, after reading many military cases regarding
14 negligent homicide and especially in light of United States versus
15 Perruccio, which is at 15 CMR 28, it is a 1954 case but it is still
16 good law.

17 (S)(b)-7 The court could find that the accused's act of shooting Mr.
18 (S)(b)-7 was predicated upon his negligent failure to confirm that the
19 aggressive act he perceived was indeed a threat to cause death or
20 great bodily harm against Sergeant (S)(b)-7

21

1 MJ: In that regard, the accused's negligent act is inextricably
2 entwined with his act of shooting which ultimately caused Mr. [REDACTED]
3 death, and so, in an abundance of caution, and in fairness to the (5)(6)-7
4 accused, I am going to instruct them on negligent homicide.

5 Now, the defense of another and mistake of fact, which I
6 have also added in, in light of United States versus McMonagle, are a
7 complete defense to any of those, whether it is the charged offense
8 of murder, or the lesser included offenses of voluntary manslaughter
9 or negligent homicide.

10 You will note that I did add note three to the end of
11 defense of another and I believe that takes into account of
12 everything there.

13 ADC: Yes, Ma'am.

14 MJ: Defense, have you had an opportunity to review Appellate
15 Exhibit XXVII, which is the findings worksheet?

16 ADC: Yes, Ma'am.

17 MJ: Any objection?

18 ADC: No, Ma'am.

19 MJ: Is there anything else that we need to take up?

20 TC: No, Your Honor.

21

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1 MJ: Defense?

2 ADC: No, Ma'am.

3 MJ: Okay, court is in recess.

4 [The Article 39(a) session adjourned at 0815, 5 August 2004.]

5 [END OF PAGE]

6

017635

1 [The court-martial was called to order at 0816, 5 August 2004.]

2 MJ: Court is called to order. All parties present when the
3 court recessed last evening are again present.

4 Good morning Members. This morning what will happen, is I
5 will give you the substantive instructions on the law of this case.
6 Then you will hear closing arguments by trial counsel, defense
7 counsel, and possibly rebuttal argument by trial counsel since they
8 have the burden of proof.

9 I will then close with procedural instructions on how you
10 vote in your deliberations. As I told you before, it is my practice
11 to give you a written copy of the instructions, so my recommendation
12 is, you are certainly welcome to take notes, but more importantly,
13 listen closely. I am required to give you my instructions in open
14 court so that the counsel can object to them or request additional
15 instructions if they think that is appropriate.

16 What I would like you to do is that if you have questions
17 about the instructions; ask them before we close the court, okay?

18 When you close to deliberate and close on the findings,
19 each of you must resolve the ultimate question of whether the accused
20 is guilty or not guilty based upon the evidence presented in court
21 and upon the instructions which I give you.

22

1 MJ: My duty is to instruct you on the law. Your duty is to
2 determine the facts, apply the law to the facts, and determine the
3 guilt or innocence of the accused. The law presumes the accused to
4 be innocent of the charge against him.

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

11 During the trial some of you took notes. You may take your
12 notes with you into the deliberation room, however, your notes are
13 not a substitute for the record of trial and may not be shown to any
14 other members.

15 I would advise of the elements of the offense charged.
16 In the Specification of the Charge, the accused is charged with the
17 offense of murder, in violation of Article 118, UCMJ. To find the
18 accused guilty of this offense, you must be convinced by legal and
19 competent evidence beyond a reasonable doubt of the following
20 elements:

21

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(S)(b)-7
1 MJ: First, that [REDACTED] is dead;

2 Second, that his death resulted from the act of the accused
3 in that the accused shot him in the head with a rifle at or near Taal
4 Al Jal, Iraq, on or about 28 February 2004;

(b)(b)-7
5 Third, that the killing of [REDACTED] by the
6 accused was unlawful; and

7 Fourth, that at the time of the killing, the accused had
8 the intent to kill or inflict great bodily harm upon [REDACTED]
9 [REDACTED]

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

12 The intent to kill or inflict great bodily harm may be
13 proved by circumstantial evidence, that is, by facts or circumstances
14 from which you may reasonably infer the existence of such an intent.
15 Thus, it may be inferred that a person intends the natural and
16 probable results of an act he purposely does.

17 Therefore, if a person does an intentional act which is
18 likely to result in death or great bodily harm, it may be inferred
19 that he intended to inflict death or great bodily harm. The drawing
20 of this inference is not required.

1 MJ: "Great bodily harm" means serious bodily injury. "Great
2 bodily harm" does not mean minor injuries such as a black eye or
3 bloody nose, but does mean fractured or dislocated bones, deep cuts,
4 torn parts of the body, serious damage to internal organs, and other
5 serious bodily injuries.

6 The lesser offense of voluntary manslaughter is included in
7 the crime of unpremeditated murder. Voluntary manslaughter is the
8 unlawful killing of a human being, with an intent to kill or inflict
9 great bodily harm, done in the heat of sudden passion caused by
10 adequate provocation. Acts of the accused which might otherwise
11 amount to murder constitute only the lesser offense of voluntary
12 manslaughter if those acts were done in the heat of sudden passion
13 caused by adequate provocation.

14 "Passion" means a degree of anger, rage, pain, or fear
15 which prevents cool reflection. The law recognizes that a person may
16 be provoked to such an extent that in the heat of sudden passion
17 caused by adequate provocation, he strikes a fatal blow before he has
18 had time to control himself. A person who kills because of passion
19 caused by adequate provocation is not guilty of murder. Provocation
20 is adequate if it would cause uncontrollable passion in the mind of a
21 reasonable person. The provocation must not be sought or induced as
22 an excuse for killing or doing harm.

23

1 MJ: If you are not satisfied beyond a reasonable doubt that the
2 accused is guilty of murder but you are satisfied beyond a reasonable
3 doubt that the killing, although done in the heat of sudden passion
4 caused by adequate provocation, was done with the intent to kill or
5 inflict great bodily harm, you may still find him guilty of voluntary
6 manslaughter.

7 The intent to kill or inflict great bodily harm does not
8 have to exist for any measurable or particular time before the act
9 which causes the death. All that is required is that it exist at the
10 time of the act which caused the death.

11 You are further advised that another lesser-included
12 offense of the charged offense is negligent homicide in violation of
13 Article 134, UCMJ. If you find the accused not guilty of
14 unpremeditated murder, and not guilty of voluntary manslaughter, you
15 should then consider whether the accused is guilty of negligent
16 homicide.

17 In order to find the accused guilty of this lesser-included
18 offense, you must find that following elements beyond a reasonable
19 doubt:

20 First, that [REDACTED] is dead;

21 b(c)-4

1 MJ: Second, that his death resulted from the act of the
2 accused, that is that at or near Taal Al Jal, Iraq, on or about 28
3 February 2004, the accused shot [REDACTED] in the head with
4 a rifle; (S)(b)-7

5 Third, that the killing by the accused was unlawful;

6 Fourth, that the act of the accused which caused the death
7 amounted to simple negligence; and

8 Fifth, that under the circumstances, the conduct of the
9 accused was to the prejudice of good order and discipline in the
10 armed forces or was of a nature to bring discredit upon the armed
11 forces.

12 Conduct prejudicial to good order and discipline is conduct
13 which causes a reasonably direct and obvious injury to good order and
14 discipline.

15 Service discrediting conduct is conduct which tends to harm
16 the reputation of the service or lower in public esteem.

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

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

1 MJ: The offense of negligent homicide differs from
2 unpremeditated murder and voluntary manslaughter primarily in that it
3 does not require that you find beyond a reasonable doubt that the
4 accused had the intent to kill or inflict great bodily harm. It also
5 does not require that you find beyond a reasonable doubt that the
6 accused was acting in a sudden heat of passion caused by adequate
7 provocation.

8 The evidence has raised the issue of defense of another in
9 relation to the offenses of either unpremeditated murder, or
10 voluntary manslaughter, or negligent homicide. There has been some
11 evidence that the accused may have shot Mr. (b)(6)-5 after Mr. (b)(6)-5
12 lunged or took some aggressive act toward Sergeant (b)(6)-2

13 A person may use force in defense of another only if that
14 other person could have lawfully used such force in defense of
15 himself under the same circumstances.

16 Therefore, if Sergeant (b)(6)-7 could lawfully have used
17 force in defense of himself, the accused could also have defended
18 Sergeant (b)(6)-2 in the same manner.

19 For defense of another to exist, the accused must have had
20 a reasonable belief that death or grievous bodily harm was about to
21 inflicted on Sergeant (b)(6)-2 and the accused must have actually
22 believed that the force he used was necessary to protect Sergeant

23 (b)(6)-2

1 MJ: In other words, the defense of another has two parts.
2 First, that the accused must have had a reasonable belief that death
3 or grievous bodily harm was about to be inflicted on Sergeant [REDACTED] (b)(6)-2
4 The test here is whether, under the same facts and circumstances, a
5 reasonably prudent person, faced with the same situation, would have
6 believed that death or grievous bodily harm was about to be
7 inflicted.

8 Second, the accused must have actually believed that the
9 amount of force he used was necessary to protect against death or
10 grievous bodily harm. To determine the accused's actual belief as to
11 the amount of force necessary, you must view the situation through
12 the eyes of the accused.

13 In addition to what was known to the accused at the time,
14 the accused's age, intelligence, and emotional control are all
15 important factors to consider in determining his actual belief as to
16 the amount of force necessary to protect Sergeant [REDACTED] (b)(6)-2

17 As long as the accused actually believed that the amount of
18 force he used was necessary to protect against death or grievous
19 bodily harm, the fact that the accused may have used such force or a
20 different type of force than that used by the attacker does not
21 matter.

22

1 MJ: The accused, under the pressure of a fast moving situation
2 or immediate attack, is not required to pause at his or Sergeant
3 (b)(6)-2 [REDACTED] peril to evaluate the degree of danger or the amount of
4 force necessary to protect Sergeant (b)(6)-2 [REDACTED] In deciding the issue of
5 defense of another, you must give careful consideration to the
6 violence and rapidity, if any, involved in the incident.

7 The rapidity of the situation impacts both upon the
8 accused's actual belief as to the amount of force necessary and as to
9 whether a reasonably prudent person, faced with the same situation,
10 would have believed that death or grievous bodily harm was about to
11 be inflicted on Sergeant (b)(6)-2 [REDACTED]

12 The burden is on the prosecution to establish the guilt of
13 the accused. Unless you are satisfied beyond a reasonable doubt that
14 the accused did not act in defense of another, you must acquit the
15 accused of the offenses of either unpremeditated murder, or voluntary
16 manslaughter, or negligent homicide.

17 If you are convinced beyond a reasonable doubt that the
18 accused did not act in defense of another under the law, you may find
19 him guilty of unpremeditated murder or another lesser-included
20 offense.

21

1 MJ: The evidence has raised the issue of mistake on the part of
2 the accused concerning whether Mr. (b)(6)-7 was about to inflict death
3 or great bodily harm on Sergeant (b)(6)-2 in relation to the offenses
4 of unpremeditated murder, voluntary manslaughter, and negligent
5 homicide. You should consider that evidence in determining whether
6 the government has proved beyond a reasonable doubt that the
7 accused's acts were unlawful.

8 The accused is not guilty of these offenses if:

9 One, he mistakenly believed that Mr. (b)(6)-7 was about to
10 inflict death or great bodily harm on Sergeant (b)(6)-2 and two, if
11 such belief on his part was reasonable.

12 To be reasonable the belief must have been based on
13 information, or lack of it, which would indicate to a reasonable
14 person that Mr. (b)(6)-7 was about to inflict death or great bodily harm
15 on Sergeant (b)(6)-2. Additionally, the mistake cannot be based on a
16 negligent failure to discover the true facts.

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

20

1 MJ: The burden is on the prosecution to establish the accused's
2 guilt. If you are convinced beyond a reasonable doubt that, at the
3 time of the charged offense or its lesser-included offenses, the
4 accused was not under the mistaken belief that Mr. (b)(6)-4 was about to
5 inflict death or great bodily harm on Sergeant (b)(6)-2 the defense of
6 mistake does not exist.

7 Even if you conclude that the accused was under the
8 mistaken belief that Mr. (b)(6)-4 was about to inflict death or great
9 bodily harm on Sergeant (b)(6)-2 if you are convinced beyond a
10 reasonable doubt that, at the time of the charged offense or its
11 lesser-included offenses, the accused's mistake was unreasonable, the
12 defense of mistake does not exist.

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

18 On the other hand, circumstantial evidence is evidence
19 which tends to prove some other fact from which, either alone or
20 together with some other facts or circumstances, you may reasonably
21 infer the existence or nonexistence of a fact in issue.

22

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1 MJ: If there was evidence the street was wet in the morning,
2 that would be circumstantial evidence from which you might reasonably
3 infer it rained during the night.

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

7 I have instructed you that either premeditated--excuse me,
8 unpremeditated murder or voluntary manslaughter, the accused's
9 specific intent to kill or inflict great bodily harm must be proved
10 beyond a reasonable doubt. Direct evidence of intent is often
11 unavailable. The accused's intent, however, may be proved by
12 circumstantial evidence.

13 The parties to this trial have stipulated or agreed that
14 that the name of the Iraqi man who was shot and killed in this case
15 was (b)(6)-(b)(7)(C) [REDACTED] They have also stipulated that the two
16 vehicles in the left horizon background of the picture which is 5 of
17 10, in Prosecution Exhibit 7, are where the TCP was during the
18 mission of 28 February 2004. When counsel for both sides, with the
19 consent of the accused, stipulate and agree to a fact, the parties
20 are bound by the stipulation and the stipulated matters are facts in
21 evidence to be considered by you along with all the other evidence in
22 this case.

23

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

8 In weighing a discrepancy between witnesses, you should
9 consider whether it resulted from an innocent mistake or deliberate
10 lie. Taking all these matters into account, you should then consider
11 the probability of each witness' testimony and the inclination of the
12 witness to tell the truth.

13 The believability of each witness' testimony should be your
14 guide in evaluating testimony and not the number of witnesses called.
15 These rules apply equally to the testimony given by the accused.

16 You have heard evidence that Sergeant (S)(b)-2 and the
17 accused made statements prior to trial that may be inconsistent with
18 their testimony at this trial. If you believe that an inconsistent
19 statement was made, you may consider the inconsistency in evaluating
20 the believability of the testimony of either the accused or Sergeant
21 [REDACTED] or both.

22 (S)(b)-2

1 MJ: You may not, however, consider the prior statement as
2 evidence of the truth of the matters contained in that prior
3 statement.

4 To show the probably of his innocence, the defense has
5 produced evidence of the accused's character for good duty
6 performance. Evidence of the accused's good character may be
7 sufficient to cause a reasonable doubt as to his guilt.

8 On the other hand, evidence of the accused's good character
9 may be outweighed by other evidence tending to show the accused's
10 guilt.

11 Evidence has been received as to Sergeant ^{(s)(b)-2} [REDACTED] bad
12 character for truthfulness. You may consider this evidence in
13 determining Sergeant ^{(b)(6)-2} [REDACTED] believability.

14 You may consider evidence that the accused may have failed
15 a PT test or gotten into a fight at a club in Hawaii for the limited
16 purpose of its tendency, if any, to test the basis' of the opinion of
17 the witnesses who testified to the accused's character for being a
18 good Soldier.

19 Those questions and answers may enable you to assess the
20 weight you accord to that testimony.

21

1 MJ: You may not consider this evidence for any other purpose,
2 and you may not conclude from this evidence that the accused is a bad
3 person or has general criminal tendencies and that he, therefore
4 committed the offense charged.

5 You are further advised:

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

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

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

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

19 By "reasonable doubt" is intended not a fanciful or
20 ingenious doubt or conjecture, but an honest, conscientious doubt
21 suggested by the material evidence or lack of it in the case.

22

1 MJ: It is an honest misgiving generated by insufficiency of
2 proof of guilt. Proof beyond a reasonable doubt means proof to an
3 evidentiary certainty, although not necessarily an absolute or
4 mathematical certainty. The proof must be such as to exclude every
5 not every hypothesis or possibility of innocence, but every fair and
6 rational hypothesis except that of guilt.

7 The rule as to reasonable doubt extends to every element of
8 the offense, although each particular fact advanced by the
9 prosecution, which does not amount to an element, need not be
10 established beyond a reasonable doubt.

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

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

22

1 MJ: The final determination as to the weight or significance of
2 the evidence and the credibility of the witnesses in this case rests
3 solely upon you.

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

11 At this time you will hear argument by counsel. As the
12 government has the burden of proof, trial counsel may open and close.

13 Trial counsel?

(b)(6)-2

14 TC: Good morning Colonel [REDACTED] members of the panel. You
15 recall the distinct sound, the sound that you don't hear anywhere
16 else from the zip-cuff. This is true physical evidence in this case
17 that proves that Richmond knew Mr. [REDACTED] was flex-cuffed.

(b)(6)-7

18 The zip-cuff, the sound of the zip-cuffs, it is
19 unmistakable. The bottom line up front is you have an innocent,
20 unarmed, flex-cuffed civilian noncombatant with a hole in his head.

21

017652

1 TC: Dead because the accused shot him. At the beginning of the
2 trial I asked if you could find that an American Soldier, if I proved
3 it, beyond a reasonable doubt, that an American Soldier could kill an
4 Iraqi, and you all shook your heads yes.

5 I proved it yesterday. With the help of PFC Richmond's
6 testimony, I proved it even better. Even further past beyond a
7 reasonable doubt.

8 Recall that I asked him, "What was the name of the man you
9 killed?" If you recall, Mr. (b)(6)-7 And then he said, "Well I
10 haven't memorized his first names." And then he gingerly said, kind
11 of mumbling, [REDACTED]

12 He had heard the name 20 or 30 times already in the trial.
13 What does that tell you? You will reach your own conclusions about
14 that, but the government submits that he didn't remember his name
15 because he was an Iraqi and PFC Richmond is allowed to kill an Iraqi,
16 even an innocent one.

17 You saw his demeanor yesterday. It is very consistent. He
18 can kill an innocent Iraqi and that is okay no matter what, no matter
19 what the facts are.

20 Why did Richmond shoot (b)(6)-4 [REDACTED] Before he left Hawaii he
21 said things like, "I'm going to kill and Iraqi. I am going to get a
22 bayonet kill. I am going to get me one." Things like that.

23

1 TC: Do infantry Soldiers do that before going to war, of course
2 they do. They are killers. That is what we train them to do, to
3 kill lawfully.

4 He said that and some other Soldiers said that, however,
5 when he gets to Iraq, he keeps saying things like that. Before going
6 out on missions, "I am going to get me one today." That shows an
7 intent to kill an Iraqi.

8 On the day of the killing, he pointed to a child with
9 sheep, "Can I shoot that person? Can I shoot that kid?" It was
10 perceived as a joke by Specialist ^{(b)(6)-2} [REDACTED]. But, considering all the
11 other circumstances, and consider it along with pointing out to Mr.
12 ^{(b)(6)-7} [REDACTED] who is walking into the field, not fleeing, no matter what your
13 definition of fleeing is. Obviously he wasn't fleeing anything, he
14 was walking with his cows.

15 "Can I shoot him? Can I shoot that man?" The man is doing
16 nothing. Not fleeing anything. He was--his crime was he is an Iraqi
17 and that is the way PFC Richmond saw him.

18 There is no dignity and respect in wanting to kill an
19 Iraqi. Wanting to kill an insurgent, wanting to kill an enemy, that
20 is okay. We want our Soldiers to do that, but wanting to kill an
21 Iraqi, just wanting to kill someone. There is no dignity and respect
22 there.

23

1 TC: What did you see yesterday? Well first the government put
2 on its case. You saw a number of different witnesses.

3 First, Lieutenant (b)(6)-2 Lieutenant (b)(6)-2 basically set
4 the stage for you and provided you with the pictures that we are
5 going to go over in a few minutes. He basically told you about the
6 mission going on inside the village. The mission was ending up when
7 a shot rang out outside the village and they moved out there and
8 Lieutenant (b)(6)-2 took the pictures.

9 Also significant from Lieutenant (b)(6)-2 said was the size
10 and the likeness of Mr. (b)(6)-4 a very small man, very thin, but you
11 don't have to judge from his testimony, you will be able to judge
12 easily from the pictures how little this guy was, how little Mr.
13 (b)(6)-2 was.

14 (b)(6)-4 And, although you can't really tell from the face, but you
15 can overall--body, but that is up to you, that he is pretty young
16 too.

17 The next witness was Sergeant (b)(6)-2. Sergeant (b)(6)-2, his
18 head, was just inches from Mr. (b)(6)-7 head when PFC Richmond shot.
19 Sergeant (b)(6)-7 could have been killed as well. Sergeant (b)(6)-2
20 testified several times yesterday. His testimony was consistent
21 throughout.

22

1 TC: He had to testify once with my direct examination and then
2 a full demonstration later on and everything was consistent. There
3 is no reason to doubt his credibility. Sergeant (b)(6)-2 gave
4 testimony that was reasonable and it is backed up by all the physical
5 evidence in the case. There was evidence, which I will talk about in
6 a few seconds, from the defense, that it is easily negated.

7 The next witness was Specialist (b)(6)-2 As you can tell I
8 stumbled with him. He couldn't really take a hint with my direct
9 examination because you can't lead a witness on direct examination.
10 So I was asking questions that he didn't know what I was asking
11 about. Eventually though, it was beautiful, this kid just suddenly
12 remembered.

13 What were the significant things that he remembered? First
14 he remembered that Richmond asked, maybe jokingly, to kill a child.
15 And the other thing that he remembered was looking out in a field and
16 seeing the Iraqi's arms behind his back and flexi-cuffed. That is
17 what his testimony was. There is absolutely zero reason to doubt
18 Specialist (b)(6)-2 testimony.

19 If you can see him from 200 meters away, shouldn't someone
20 be able to see that from 1 to 2 meters away?

21

(S)(b)-2

1 TC: The next witness was Specialist [REDACTED] This specialist
2 was on the mission and he heard PFC Richmond say, when the Iraqi man
3 walked outside the village, he heard him say, "Can I shoot him?" And
4 he heard Sergeant [REDACTED] say, "No."

(S)(b)-2

5 What significance is that? First, Richmond wanted to kill
6 an Iraqi, now he wants to kill this Mr. [REDACTED] But the witness,
7 [REDACTED] also testified, and you could tell, he also testified about
8 Richmond saying early, and you could tell from his demeanor that he
9 believed Richmond was serious about killing an Iraqi.

(S)(b)-2

10 [REDACTED] also testified, as well did [REDACTED], as well did
11 Richmond, as well did [REDACTED] about Mr. [REDACTED]. Mr. [REDACTED] walked out,
12 just after daybreak, walked with his cows. Was he an insurgent? Was
13 he a combatant? Was he a bad guy? Obviously not. That is an easy
14 one. Any indication at all, there was no indication at all that this
15 was a bad guy. He was an innocent Iraqi doing his job of watching
16 cows.

(S)(b)-4

17 The final government witness called on rebuttal was
18 Specialist [REDACTED]. And [REDACTED] I just called him to prove that one of
19 the defense witnesses was lying about the OP order from the night
20 before.

(S)(b)-2

21

017657

1 TC: That was the government case that proved every element
2 beyond a reasonable doubt.

3 Then PFC Richmond helped the government's case by
4 testifying. He started it out misleading you. The first four or
5 five questions he was purposely misleading you. I asked the question
6 about his education, "Dropped out in the tenth grade, got my GED, and
7 joined the Army." It wasn't until about 30 minutes later when I was
8 asking him questions, "Didn't you go to LSU?" "Yeah I went for a
9 semester but dropped out."

10 He started out misleading you. I am not a smart Soldier.
11 I can't get into college and he tells you when I ask a question,
12 "Yes, I was in college." He continued to mislead you throughout.
13 But he did say that he hears well and that he sees well. There is no
14 reason to doubt that because he wasn't--it wasn't really a self-
15 serving statement, so he admitted that he could see and hear well.

16 What was he talking about what he did that day with the
17 shot? He talked about just before he shot Mr. (b)(6) and all the
18 steps that he took before he shot. He says that he is at high ready
19 with his nose to the charging handle on the M4 with about 4 to 6
20 inches between his eye and the scope.

21

017658

1 TC: He says that he thought--he didn't he say he lunged, he
2 said he thought he saw him lunge, so he said he could only see the
3 head and shoulders of Mr. [REDACTED] through the scope.

4 (b)(6)-4
All of these steps that he says just don't make sense of
5 what he is talking about what he says he has to do next. I thought I
6 saw a lunge and I had to keep reaiming because he moved. I had to
7 reaim, I had to place it off safe, and because I had one eye closed,
8 my left eye closed, I opened my eye, my left eye and made sure that I
9 wouldn't see [REDACTED] that I wouldn't shoot [REDACTED] I opened my eye
10 and I didn't see [REDACTED] (b)(6)-2

11 How can you prove that he was misleading? This is easy.
12 All the testimony indicates that Mr. [REDACTED] was on the right side of
13 Sergeant [REDACTED] and Sergeant [REDACTED] as leading him on Mr. [REDACTED] (b)(6)-4
14 left side. (b)(6)-2

15 Even if you believe the accused's story that he was just
16 looking through his scope and he couldn't see anything else, and all
17 he saw was the head and shoulders, if you are looking at the red
18 circle and the demonstration that I am drawing for you, you are
19 looking at the head of the shoulder--he says he is looking at the
20 head and shoulders of [REDACTED] and [REDACTED] and [REDACTED] are right next to
21 each other. (b)(6)-4 (b)(6)-2

22

1 TC: He says, just before he shoots, he doesn't want to shoot
2 Sergeant [REDACTED], he wants to shoot the Iraqi, just before he shoots,
3 and he can't see anything but inside of what is in the scope, just
4 before he shoots he opens his left eye and doesn't see [REDACTED] and
5 shoots.

6 This is physically impossible. If he is looking exactly as
7 you are looking at this demonstration right now, and seeing only what
8 is in the circle, and he is looking straight on in this picture and
9 he opens up his eye, [REDACTED] is right there. He was misleading you
10 throughout.

11 Also interesting in PFC Richmond's testimony in helping the
12 government prove its case was the testimony about the weapon, or the
13 lack of a weapon in Mr. [REDACTED]. All of the witnesses testified Mr.
14 [REDACTED] had nothing on him. They had no indication whatsoever that he
15 had a weapon.

16 He came out of the field with nothing. He was approached
17 by the two NCOs or the Sergeant or the Soldiers. He had nothing in
18 his hands, no indication whatsoever that he had a weapon at all.
19 Patted down a little bit in the front, patted down a little bit in
20 the back, no indication of a weapon.

21

1 TC: When I was asking him on cross-examination, what if any
2 indication was there that the accused--that Mr. [REDACTED] had a weapon?
3 I asked him that question 5 to 10 times. He never answered. There
4 was no indication that Mr. [REDACTED] had a weapon, nothing, zero.
(S)(G)-7

5 The saying that I thought he had a weapon because he was an
6 Iraqi, that is ridiculous. It is unreasonable for anyone to think
7 that this weapon had a weapon at all. That's the entire case.

8 You will see the pictures. You will see the man in the
9 pictures. It is obvious that he doesn't have a weapon, and I ask you
10 to make that specific finding up in your mind that Mr. [REDACTED] never
11 had a weapon, never indicated that he had a weapon.
(S)(G)-7

12 The--also with PFC Richmond, his evasiveness in helping the
13 government prove its case was that--the discussion about fleeing. It
14 wasn't even a semantics argument. Everyone knows that fleeing means
15 running away. Fleeing means escaping and getting away. He wouldn't
16 admit that Mr. [REDACTED] was not fleeing. He wouldn't admit it. It is
17 obvious that he wasn't fleeing.
(S)(G)-7

18 So the accused helped the government's case. Then the
19 defense called several good character witnesses, uh, good Soldier
20 witnesses if you will.

21

017661

1 TC: Some testified that he was a good Soldier. Some testified
2 that he was an okay Soldier. Some didn't really know him in terms of
3 testifying whether he was a good a Soldier and the first one didn't
4 help him at all, and that was Captain [REDACTED], from his platoon, and
5 the only officer to testify. (b)(6)-2

6 He stated that PFC Richmond was technically proficient, but
7 on cross-examination he said more about him beyond his technical
8 proficiency. It is being a good Soldier means much more than that.
9 Soldier has problems with authority. This Soldier is not that great
10 of a Soldier outside the technical proficiency.

11 Then his platoon sergeant, Sergeant [REDACTED] testified.
12 Sergeant [REDACTED] his testimony was little more. He said he was a good
13 Soldier. He came in and told what he said, told what he thought and
14 walked out. The government submits that that was Sergeant [REDACTED]
15 honest opinion about the Soldier while he worked for him in that
16 platoon. The government has no problems with that. It was just a
17 lukewarm, he was a good Soldier. (b)(6)-2

18 Now Staff Sergeant [REDACTED] though, the next witness,
19 obviously had an ax to grind. Did you see his face and then he kind
20 of beaded his eyes up a little bit. You could tell that he wanted to
21 say it so badly. "Sergeant [REDACTED] is a compulsive liar."
22 (b)(6)-2

1 TC: He had an ax to grind. He and (S)(b)(1)-2
(S)(b)(1)-2
2 told you that. It was pretty--it was pretty obvious from
3 Sergeant (S)(b)(1)-2 testimony, and you can also add in the fact that
(S)(b)(1)-2
4 Sergeant (S)(b)(1)-2 likes Richmond a lot.

5 What does it prove or disprove to the case at all, really
6 nothing. The good Soldier defense in this case really doesn't hold
7 enough water to get him acquitted or murder in this type--in this
8 type of a case.

9 Then there is Sergeant (S)(b)(1)-2 Sergeant (S)(b)(1)-2 was the one
(S)(b)(1)-2
10 who said that Sergeant (S)(b)(1)-2 had briefed the ROE about males fleeing
11 from the village and about someone resists, shoot them. I asked
12 him--you saw me ask him several questions about that and he kept--he
13 kept saying yes, shoot him, shoot him, shoot him, and finally, I
14 believe one of the members questions that the military judge asked,
15 he said, I don't know--don't know if I said that--or if Sergeant
16 (S)(b)(1)-2 said that. So he lied to me--he lied to me, but he didn't lie
(S)(b)(1)-2
17 to the military judge.

18 This brings us back to Specialist (S)(b)(1)-2 and I brought
19 Specialist (S)(b)(1)-2 back later on rebuttal just to say that what
(S)(b)(1)-2
20 Sergeant (S)(b)(1)-2 said was wrong and it never happened.

21

1 TC: So, Sergeant [REDACTED] is [REDACTED]ally a nonentity in this case,
2 his testimony is. (S)(b)-2

3 Then there is Specialist [REDACTED] (S)(b)-2 one of which is Richmond's
4 best friends. Best friends testify for best friends, good Soldier,
5 great guy. Okay, what value does that hold to you? You will be
6 judge of that.

7 He said [REDACTED] (S)(b)-2 was a liar, but he also said, "I don't know
8 [REDACTED] (S)(b)-2 very well." He said a few things about ROE too. He was the
9 Soldier that talked about PID. We all know what that means. We've
10 all had the briefings, positive identification. This Soldier knew
11 about PID, we all knew about PID. Basically it means that you need
12 to know that you are shooting at a legitimate military target before
13 you shoot at that target. That is ROE.

14 Richmond never had PID in this--when he shot Mr. [REDACTED] (S)(b)-4
15 never. Not even close. He didn't even check to see if had PID,
16 never.

17 Finally, defense called Sergeant [REDACTED] (S)(b)-2, who came in and
18 said, "Yes, in the platoon, Sergeant [REDACTED] has a reputation for
19 untruthfulness." Well, [REDACTED] (S)(b)-2 is a member of the platoon, along
20 with other members.

21

017664

1 TC: Well if the platoon sergeant and platoon leader say
2 anything negative about Sergeant [REDACTED] would have defense attorney
3 have asked if the platoon leader and platoon sergeant would be able
4 to say anything bad about [REDACTED] (b)(6)-2 Defense attorney did not ask
5 because they would not say anything bad about Sergeant [REDACTED] (b)(6)-2

6 That is it. That was the testimony. Testimony is
7 evidence, basically, and you evaluate that and the judge has already
8 instructed you on how to evaluate testimony.

9 What else do you have in the case? You have physical
10 evidence. There are only--there is only one real exhibit and a
11 couple of stipulations, but that one exhibit, the 10 photographs that
12 are actually in evidence, many things have been marked, but the
13 actual evidence of the photographs is something that you will
14 actually be able to take back, and look at, and study, and evaluate,
15 and evaluate scientifically, or in evaluate for just general facts.

16 So, I ask you to take a look at these pictures. This is
17 the first picture, what does it show? Mr. [REDACTED] (b)(6)-4, obviously. He is
18 on his back. This is the way he fell, or this is the way he ended up
19 after he fell. He is on his back. You see, in this picture how
20 little this guy is, how thin he is, how the sweat suit that he has on
21 caves in to his thin little body.

22

017665

1 TC: You see that it was probably chilly outside because he a
2 jacket on and a scarf. Now I ask you, when you go back to
3 deliberate, look at the scarf that defense is saying is behind his
4 back and obstructing his view. Where is the long tip of the scarf
5 at? It is in his front. It is in his front. You will see later,
6 later when he is rolled over what it looks like when it is in his
7 back. This proves that the shooting occurred, scarf in front, that
8 there is no weapon, and you don't see his arms.

9 Next slide please. A different angle, the same picture, on
10 the back you see the raised area and it doesn't look as high as the
11 defense is alleging. You will be the judge of that. Also you can
12 see the scarf is in front.

13 Next slide please. This--scientifically, this picture will
14 show that it basically proves that Mr. (S)(b)(7) was shot in the back of
15 the head. What happened, scientifically, the government asserts is
16 that the pressure from the bullet going into the back of his head
17 pushed out part of his brain and blood out the front.

18 Next slide please. I ask you not to be misled by this
19 picture, picture number 4, the M4 in the picture is not Richmond's
20 M4. The M4 is Lieutenant (S)(b)(7) M4. I ask you not to consider that.

21 (S)(b)(7)

017666

1 TC: I ask you to consider the berm, I don't ask you to consider
2 the boot. The important thing in this picture is the point 556
3 casing. There was only one shot fired in the field that day and that
4 is obviously Richmond's point 556 bullet casing. That is to show
5 that Richmond fired that weapon.

6 You can see a couple possibilities--if you were evaluating
7 where he stand, there are a couple possibilities are there. You have
8 all fired M16s and you know where shell casings go. Sometimes they
9 go in different areas but generally they go outside the ejection
10 port, so if that helps you, we ask you to take a look at it.

11 Next slide please. In this photograph, number 5 of 10, it
12 shows a picture of Mr. [REDACTED] now on his front in the distance. There
13 are more pictures later of Mr. (S)(b)-7 [REDACTED] but this what this is
14 significant for is, in the distance, you see the village of Tall Al
15 Jal, how far away they were from the--how far away Mr. (S)(b)-7 [REDACTED] was from
16 the village with his cows that morning.

17 Next slide please. Flex-cuffs. Proves that he was flex-
18 cuffed. Also, the scarf. This is picture number six. If you recall
19 Lieutenant (S)(b)-2 [REDACTED] testimony, he turned Mr. (S)(b)-7 [REDACTED] over to the left,
20 and you will be able to evaluate the pictures in a second.

21

1 TC: He turned his body over as he was facing his feet and he
2 turned the body over with one hand to the left. So he is on his back
3 and he turned him over to the left. Now that is consistent and you
4 can see the scarf faces where it fell. You can see the blood marks
5 on the scarf and that is the same scarf that you saw on the front on
6 the previous picture. So, if you just go through the motions in your
7 mind, the scarf was in front. There was no scarf in back.

8 Next slide please. Similar view from a different
9 perspective, Mr. (S)(b)(1)-(4) on his front showing that his arms are flex-
10 cuffed on his back and he had no weapons.

11 Next slide please. Flex-cuffed. Yes, he was flex-cuffed.
12 Yes, it was tight. He couldn't have gone anywhere. He couldn't have
13 done anything with his hands.

14 Next slide. This is from your evaluation, if you choose to
15 use this, to determine the--obviously it is the cause of death, that
16 is why the government entered it in the first place, but if you
17 decide to look at it if it is important to you, which way the bullet
18 may have come in and which way the bullet either may have come out or
19 the pressure cause blood to come out.

20 Next slide please. This is PFC Richmond the morning of the
21 murder, just after he was told to sit down. He is sitting there.

22

1 TC: He is dressed like an American combat Soldier. He has got
2 his jacket on. He has got his kevlar on. He has got his IBA on.
3 And if you look on his left shoulder, there is the ASP that he was
4 talking about, the baton that extends that you can use in whatever
5 you situation you needed to to defend yourself.

6 But he has got that baton, and on his right, it looks like
7 a Gerber knife or a Leatherman knife on his right shoulder, unless it
8 is a regular knife, I can't really tell. But if you see he described
9 he had a big knife, you see that he had something that is either a
10 Leatherman or something or a knife on his left leg. But that is just
11 to show you what this Soldier looked like that morning.

12 If you take a look at his face, you can make your own
13 conclusions from the look on his face. The importance of this is
14 that this Soldier and another one that is taller than him, dressed
15 like that, American Soldiers, the best Soldiers in the world,
16 approached Mr. [REDACTED] with their IBA on, with their weapons.

17 Mr. [REDACTED] (S)(b)(7) raised his hands, he fidgeted a little bit until
18 he was flex-cuffed and then he relaxed. Mr. [REDACTED] (S)(b)(7) was not stupid
19 enough to attack two American Soldiers, with weapons and with one of
20 them pointing a weapon at him.

21

017669

1 TC: What did the accused do when he testified? I asked him
2 some--I read some questions to him if you recall. What I was doing
3 was I was getting him to confess to as much as I could make him--get
4 him to confess to in terms of the elements of the crime of
5 unpremeditated murder.

6 I asked him element one, did you--do you admit that [REDACTED]
7 [REDACTED] is dead? He confessed, "Yes."

8 (S)(b)(7) Element two, do you admit that his death resulted from your
9 act, in that you shot him in the head with your M4 rifle in the
10 vicinity of Taal Al Jal village around 9 o'clock on 28 February 2004?
11 He confessed, "Yes."

12 Element four, do you admit that at that time of the killing
13 you had the intent to kill [REDACTED] He confessed,
14 "Yes." (S)(b)(7)-4

15 Now please recall that, because intent is important later
16 on in some of the other instructions.

17 I didn't ask him the third element, the element being that
18 the killing of [REDACTED] by the accused was unlawful.
19 That is the issue in the case. Whether or not the killing was
20 unlawful.

21

017670

1 TC: Well, was it unlawful? An unarmed, flex-cuffed, innocent,
2 noncombatant had a hole in his head. How can that not be unlawful?
3 How did the man get dead, with flex-cuffs on, without an unlawful
4 act?

5 Well I would ask you to consider some facts about the
6 lawfulness. First, he was flex-cuffed. It is easy. It is proven.
7 It is physical evidence. You don't have to rely on any witness to
8 tell you that, you have pictures.

9 Second, he was shot in the back of the head.

10 Third, and this goes to his, PFC Richmond's knowledge that
11 the flex-cuffs were on him. Not only did he see it, he heard it. An
12 unmistakable sound that he testified--I believe he testified that he
13 has detained individuals before. He had to know what flex-cuffs
14 sounds like.

15 It doesn't matter, the first time you hear and no flex-
16 cuffs are in the area, you understand that those are flex-cuffs. The
17 zip that you hear, that you heard yesterday, a couple of times, was
18 the same zip that PFC Richmond heard and is now saying he did not
19 hear on the 28th February.

20 Talk about his hearing a little bit. He says he can not
21 hear. The defense elicited evidence of noise coming from the
22 village.

23

1 TC: Maybe this noise got in the way, however, everyone says
2 that they are 200 meters away from the village, so what kind of noise
3 is coming from there that would stop anyone from hearing a zip one to
4 two meters away. It is obvious, he heard the zip.

5 Can I shoot? Sergeant [REDACTED] can I shoot that man for
6 walking out of the village? Sergeant (S)(b)-2 [REDACTED] says, "No." If he would
7 have shot him, that would have been an unlawful shooting. Then 45
8 minutes later he shot him, and it is still an unlawful shooting.

9 The next couple of facts that I ask you to consider when
10 you are looking at the defense's---the defense that the accused is
11 trying to raise.

12 First, no weapon. We discussed that already, no weapons on
13 the body.

14 Second, noncombatant. All this stuff we have been hearing
15 about the ROE, we are dealing with a noncombatant. We are dealing
16 with a civilian. According to the ROE we protect civilians, you
17 don't shoot them in the back of the head. Mr. [REDACTED] was a
18 noncombatant. (S)(b)-7

19 No threats. He struggled a little when the flex-cuffs were
20 being put on. That is reasonable. He didn't want to be arrested.
21 Who does?

22

1 TC: Finally, no lunge. The evidence elicited is that Mr. (S)(b)-7
2 may have stumbled, may have leaned into Sergeant (S)(b)-2 but the
3 facts are that he did not lunge. He did not lunge. And shooting him
4 for leaning or stumbling is unlawful.

5 You look--when you put everything away, you still have an
6 unarmed, innocent, flex-cuffed, Iraqi noncombatant, with a hole in
7 his head.

8 I ask you to find PFC Richmond guilty of unpremeditated
9 murder because that is what--because the elements all fit. All four
10 elements are proven beyond a reasonable doubt.

11 Thank you.

12 MJ: Defense. (S)(b)-2

13 DC: Colonel (S)(b)-2, members of the panel, this was not a
14 murder. It was a tragic accident that happened in a time of combat.
15 That is what it is today, and it is exactly what it was on February
16 28th.

17 The burden of proof in this case doesn't shift. The
18 government has to prove beyond a reasonable doubt each and every one
19 of the elements of the offense. There is only one element that is
20 even at issue, and that is whether or not the killing of Mr. (S)(b)-7
21 was unlawful.

22

1 DC: I attest that this is a he said, he said, case. And what
2 it depends on is who you believe. Take a careful look at the
3 evidence and think about what makes sense.

4 Sergeant [REDACTED] testified to you that when he was
5 approaching the Iraqi man, (b)(6)-2 he said nothing. Sergeant (b)(6)-2 [REDACTED] didn't
6 say two words. He just approached the man and did the hands up and
7 hands down. That doesn't make sense.

8 Sergeant [REDACTED] testified that he didn't speak Arabic. He
9 also told you that he didn't say anything in English because the guy
10 didn't understand English. He didn't know that. How could he
11 possible know that?

12 What makes sense is that he did say to him, "Put your hands
13 up." And that he did say that. And why? Because even if you can't
14 understand the words that are being said, you get it by the tone of
15 his voice.

16 That is what makes sense. That when you are going to
17 detain someone that you don't know if they are a combatant or a
18 noncombatant, the tone of your voice, not the words that you use is
19 going to be just as much of an indicator to that person, what you
20 want them to do.

21

017674

(b)(6)-2
1 DC: Sergeant [REDACTED] tells you that he just said nothing. He
2 just walked up and approached the man. That just does not make
3 sense.

(b)(6)-4
4 Sergeant [REDACTED] also told you that when Mr. [REDACTED] was
(b)(6)-2
5 resisting, he said nothing. He had told Private Richmond where to
6 stand. Private Richmond was moving into position to pull security
7 and during this whole time, again, Sergeant [REDACTED] says nothing. So
8 he has, what he admits is an angry Iraqi man resisting being
9 detained, and Sergeant [REDACTED] says nothing.

(b)(6)-2
10 What makes sense to you? He is struggling with this man
(b)(6)-2
11 that is resisting. Private Richmond told you that Sergeant [REDACTED]
12 seemed scared. He seemed nervous. What does make sense is that he
13 said, "Shoot him if he fucking moves." Again, the tone of his voice
14 is going to mean something to Mr. [REDACTED] whether or not he can
15 understand him. And that is what he said.

(b)(6)-7
16 The defense's position is not that Mr. [REDACTED] went "poof"
17 and moved like a small child when, Mom said, "Now don't touch that."
18 And they put a finger on it and touch it. That is not what the
(b)(6)-2
19 defense's position is. What we are saying is that by Sergeant [REDACTED]
20 even saying that, that is one of many factors that goes into Private
21 Richmond's state of mind and that is one of the events that is going
22 on at this time.

23

017675

(b)(6)-2

1 DC: So, to believe Sergeant [REDACTED] when he says, "I said
2 nothing the whole time." And the he says he told Richmond, "He's
3 good. Let's go." That was it. It doesn't make sense. That is not
4 the way that it works.

(b)(6)-2

5 Sergeant [REDACTED] during his direct testimony, his first
6 testimony, talked about the pat down and he talked about how it was a
7 quick pat down in the front and a quick pat down in the back, upper
8 arms and torso.

9 That isn't what he showed you when he did the demonstration
10 because he had time to reflect and he had time to elaborate, and he
11 had time to put on his own show for the panel. So what he did was
12 carefully show you how he patted down each arm, and then the front,
13 and then all around the waist.

14 And the other thing that he showed you was how he patted
15 around the neck and he felt around his neck. But when he did that,
16 there is no mention of his scarf that is so very clearly--that was
17 around Mr. [REDACTED] neck. Why? Because Sergeant [REDACTED] hadn't
18 practiced enough to remember that that scarf was around his neck.
19 The other thing that he put on in his little show for you, that was
20 inconsistent with his initial testimony, and in fact inconsistent
21 with every statement of his six statements that he gave up until
22 today, was this dramatic hands lifting behind the back.

23

(S)(b)-2 (S)(b)-7
1 DC: Sergeant [REDACTED] testified that Mr. [REDACTED] hands were
2 behind in back and he was struggling while he tried to flex-cuff him.
3 On his direct testimony, he said that his arms were lifted no more
4 than 12 inches. That is what he said. He said that to the
5 government and he confirmed it on cross-exam. No more than 12
6 inches.

7 This is not a big deal, but when he came in here and showed
8 you, he did this: He ripped his arms up with an elaborate pull of
9 the zip strip. That is not at all what happened. That is Shady Jay
10 putting on his show for the panel. That is not what happened on
11 February 28th.

(S)(b)-2
12 Sergeant [REDACTED] is also inconsistent on where he says
13 Private Richmond was standing. On his direct testimony, he tells you
14 that Private Richmond is kind of off to the side. The he also tells
15 you that Private Richmond was behind him.

16 When you look at the evidence, and you look at the
17 photographs, the TCP is up here, and this is Prosecution Exhibit 7, 5
18 of 10, the TCP is up here. Sergeant [REDACTED] explained to you how they
(S)(b)-2
19 walked from the TCP out here, the vehicle is not there at the time,
20 it came later, they walked from the TCP out here to the berm. Take a
21 look at the photographs when you are back in the deliberation room.

22

1 DC: This berm is where Mr. [REDACTED] was standing on, and the same
2 berm that Private Richmond was standing on, and that is what makes
3 sense. Private Richmond was pulling security and so he got up to be
4 at least on equal footing with Mr. [REDACTED]

5 He is not going to stand below him next to Sergeant [REDACTED]
6 with him facing him on the berm. He is going to stand on the berm
7 facing this way with Sergeant [REDACTED] in about this area. That is
8 what happened and that is what makes sense in the context.

9 It also makes sense because Private Richmond told you in
10 his testimony that when he had to be on Mr. [REDACTED] he was looking at
11 this part of his head. He was looking at the side of his head. That
12 is why he could only see from here up and he didn't have a clear view
13 of the back.

14 What Private Richmond also told you, which is very
15 different than Shady Jay's story, is that he saw Mr. [REDACTED] lunge, and
16 that makes sense because Mr. [REDACTED] is on the berm, and we know now
17 that he is flex-cuffed. He is obviously unsteady and you can see
18 along side here, you can see the unsteady ground and the mounds of
19 dirt. So he is up on that berm and it is not just a lunge on flat
20 ground, it is not a controlled benefits of the courtroom, with a flat
21 floor, no uneven terrain, no heightened elevations, people that are
22 all the same size and stature.

23

(S)(b)-4

1 DC: What it is, is Mr. [REDACTED] on a berm lunging. Why? Because
2 he is going at a downward movement off the berm as he turns. The
3 shot then goes into this part of his head, and you can take a look at
4 that in the photographs. That is what makes sense.

(S)(b)-4

5 Private Richmond is standing from the berm, Mr. [REDACTED] is
6 standing on the berm. They are very close together. It is a close
7 aimed shot. Mr. [REDACTED] turns this way. Sergeant [REDACTED] we found out
8 later, is leading him away. Private Richmond doesn't know that then.
9 He think he is lunging because he is coming off the berm this way and
10 that makes sense because the shot comes from the back of his head in
11 this direction.

(S)(b)-2

12 Sergeant [REDACTED] testimony is also inconsistent with what
13 he told Private Richmond to do with his weapon. He must not have
14 practiced that part just enough to get it right.

15 He tells him that--he is at the low ready, then he says he
16 told him to go to the high ready. Then he adjusts later on when
17 questioned by the military judge and says, no, that he told him to
18 put his weapon up. Well what Sergeant [REDACTED] did tell you of what
19 his understanding of what a high ready was, was that the weapon was
20 up and your eye is looking through the scope.

21

1 DC: So he is inconsistent as to whether he tells him to put it
2 up, go to high ready, don't go to high ready, or what he will say is
3 that high ready is with your eye through the scope, and certainly he
4 wouldn't accept that if he would have known that he was trapping
5 himself in his own testimony.

6 Sergeant [REDACTED] never said, "He's good. Let's go." He
7 never said it. Sergeant (b)(6)-2 [REDACTED] has bias against Private Richmond.
8 And it is not specific bias against Private Richmond. They hadn't
9 worked together enough before hand to know each other. He in fact
10 had never supervised Private Richmond before and Private Richmond had
11 never worked for him.

12 So where does the bias come from? The bias comes from the
13 fact that Sergeant (b)(6)-2 [REDACTED] had shot three (b)(6)-5 Iraqi civilians 10 days
14 earlier and one of those civilians, a female, was killed because of
15 his shot.

16 So on February 18th, this happens to Sergeant (b)(6)-2 [REDACTED] He
17 has every bias in the world and every motivation in the world on the
18 28th of February to minimize his involvement, to pass the blame on to
19 someone else, to change his facts later to fit his own version of the
20 story to minimize his own involvement.

21

1 DC: Now--and if you look at Sergeant [REDACTED] story, whether
2 you believe it or not, Sergeant (S)(b)-2 [REDACTED] didn't do anything wrong.
3 Look carefully at what he has told you. No, no, he was an NCO. He
4 did everything right, every step along the way. He flex-cuffed him,
5 he did this dramatic flourish, he told him, "He's good. Let's go."
6 He told Richmond that. He got confirmation. He did everything that
7 an NCO was supposed to do. Why? Because the focus was already on
8 him from this incident 10 days earlier.

9 Private Richmond's story isn't so clean cut. Private
10 Richmond was honest with you on the stand and told you what he
11 remembered. He didn't claim to be a perfect soldier. He told you he
12 remembered things or didn't remember things. He talked to you about
13 the fleeing and not fleeing and fleeing is running but he could have
14 been leaving and he didn't know at the time.

15 (S)(b)-7 Private Richmond never made a determination as to whether
16 Mr. [REDACTED] was a combatant or a noncombatant. He is an infantryman.
17 He was a 20-year old PFC. He was doing what he thought was right at
18 the time.

19 (S)(b)-2 You have Sergeant [REDACTED] in hindsight, nope, checked the
20 box on that one, did that, did that, I'm not going down for this one.
21 I am going to minimize my involvement.
22

1 DC: The truth of the matter is, even if Sergeant (S)(b)(2) had
2 made a mistake somewhere along the way, Private Richmond still shot
3 Mr. (S)(b)(4) so why lie about it now? Because he's got every reason to
4 deceive the jury and to push the blame off on to his PFC.

5 There were several witnesses that talked about the
6 reputation within the mortars platoon for an E5's reputation for
7 truthfulness. Not just Sergeant (S)(b)(2), who they don't get along,
8 but one of his own friends that he hangs out with says yeah,
9 reputation for truthfulness; really not so good.

10 How many witnesses testified about the reputation for
11 truthfulness for PFC Richmond? Just as the defense certainly would
12 have presented evidence if we had it, the government gave you no
13 evidence, and no indication, and no reason at all to question PFC
14 Richmond's reputation for truthfulness.

15 So what do you believe? Do you believe, as the government
16 argues, that this was a crime of opportunity, that this was the best
17 target, and that PFC Richmond wanted to kill an Iraqi?

18 Think about if you really, truly, honestly believe that.
19 If you believe that; does this make sense that this would be the time
20 that he would do it?

21

1 DC: If you believe the government's version of events, Private
2 Richmond knew that Mr. [REDACTED] was flex-cuffed. He knew he was out in
3 a wide-open field. He knew he left his buddies at the TCP. He
4 didn't know if they were watching him. He didn't know if these other
5 farmers that were out in the field were watching him. He didn't
6 know.

7 So what the government wants you to believe is that he so
8 badly wanted to kill an Iraqi, that he shot a man who was flex-cuffed
9 in clear sight where his NCO would be in danger and there may have
10 been multiple witnesses around.

11 It doesn't make sense. If he wanted to kill an Iraqi,
12 wouldn't he have done it when the farmer was just walking by and then
13 said after the fact, "Oh, I thought he was fleeing the village so I
14 shot." Doesn't that make more sense?

15 But that is not what Private Richmond did. He is a 20-year
16 old combat arms Joe. That is what he does for a living and he has
17 gotten this conflicting ROE that says to shoot all males fleeing the
18 village. So he asks about it. And why does he ask about; because
19 Sergeant [REDACTED] and Captain [REDACTED] told you, yeah, he is a good
20 soldier, but he questions authority.
21

017683

1 DC: He is a PFC that questions authority, and that is what he
2 was doing. He was acting completely consistent with who he was.
3 "Hey, Sergeant (S)(b)-2 you want me to shoot these guys? Is this what
4 you mean by this crazy ROE of shoot everybody that is fleeing the
5 village?"

6 So that is what he was doing. He clarified. It doesn't
7 make sense that knowing Mr. (S)(b)-4 was flex-cuffed, knowing that his
8 NCO was so close that he put two lives in danger, that he would take
9 this shot.

10 The government also puts great weight in the fact that PFC
11 Richmond had made statements and on that day and on earlier occasions
12 about killing an Iraqi. Well the other witnesses, Specialist (S)(b)-2
13 and Specialist (S)(b)-2, told you that they did that, they have all
14 done that in the mortars platoon, and that they joke about it all the
15 time.

16 Right or wrong, that was the pervasive attitude among them.
17 The government itself concedes that we train these infantrymen to
18 kill. We gear them up and we get them ready for battle. The Army
19 does that. His platoon did that. They told you that this mission,
20 it was balls to the wall and that they were cocked to rock.

21

1 DC: They were pumped and ready to go. So to come back now, 5
2 months later and use that as the only reason really to convict
3 Private Richmond of murder is not right. It is not fair to the
4 soldier and it is not fair to the system. They were joking around
5 and they were preparing for battle and that is what the witnesses
6 have consistently said.

7 Again, it just doesn't fly, the government's theory, that
8 he just so desperately wanted to kill an Iraqi that he told everyone,
9 "I want to kill an Iraqi." To set himself up for a murder
10 conviction, just doesn't make sense. They talked about it. They
11 joked about it. They didn't take him seriously.

12 So what do we know today? What did we know then? Evaluate
13 the two. Private Richmond, on the 28th of February was a 20-year old
14 infantry soldier. He had been in Iraq for 3 weeks. He had not been
15 in Iraq for over 5 months like he has today. The training
16 environment that he came from in Hawaii was a training environment
17 for an infantryman and the infantryman's job is to kill. The
18 witnesses told you that. They told you about the cadences. They
19 told you about the attitudes and the hyped up emotions that they felt
20 before these missions.

21

1 DC: Keep that in the back of your mind as one of the factors to
2 evaluate for who Private Richmond is and what was going through his
3 mind at the time of the killing.

4 Please consider the evidence that you learned on the ROE
5 and the rules for the use of force, and they are informed. They are
6 informed because like Private Richmond told you, he hadn't prejudged
7 Mr. [REDACTED] He hadn't judged him at all and he didn't have enough
8 (S)(b)-7 information to say he was a combatant, he is a noncombatant. So what
9 he had to work with were these standing rules of engagement that said
10 you could use self-defense, or defense of your buddy, and you never
11 lost that. None of these confusing ROE ever changed that. That is
12 undisputed.

13 What changed, were the rules for that mission. Between the
14 18th of February and the 28th of February, the battalion commander
15 and the command sergeant major briefed the mortars platoon on what
16 they could do and what they couldn't do. Take aimed shots only.
17 Identify their target, PID. That is what Private Richmond did.

18 The fact that after the fact that Mr. [REDACTED] didn't have a
19 (S)(b)-7 weapon, after the fact we know that he was flex-cuffed. That doesn't
20 change what was going through his mind at the time.

21

1 DC: He was doing what he was trained to do. He didn't take
2 warning shots, he took an aimed shot. He felt there was a threat, an
3 unknown threat to Sergeant [REDACTED] and that is what he did, and in
4 the 10 days prior to this mission, (S)/G1-2 he had been briefed again by no
5 less than the battalion commander and the command sergeant major.

6 Then, to confuse matters even further, on the night before
7 the mission on the 27th of February, you heard evidence that a
8 briefing was given at about 2200 or 2230 hours. Private Richmond
9 attended this briefing after a full day of duty up in Kirkuk. Hadn't
10 gone to bed, and was pulled to go to this briefing. At the briefing,
11 they were told, that Captain [REDACTED] put out to shoot all males
12 fleeing the village. That you could put them down. (S)/G1-2

13 Private Richmond, [REDACTED] all told you that this
14 was different than what their regular ROE was. This was Alpha
15 Company and this was Alpha Company's ROE for the mission and they
16 were part of that mission and that is what they were supposed to do.
17 So again, the defense's position is not that Mr. [REDACTED] was fleeing
18 the village, not the position at all, just that this is one of many
19 factors for you all to look at as to what was going through Private
20 Richmond's head at the time. (S)/G1-2

21

017687

1 DC: The other information that was put out at that meeting was
2 that it was a high priority mission. You heard Lieutenant [REDACTED]
3 talking about how it was Fedayeen terrorists that they were going (b)(6)-2
4 after. There were 10 individuals that they were supposed to get that
5 night. High priority missions.

6 So high priority that they weren't even fully briefed until
7 22 or 2230 for a mission with an SP time of somewhere about 0345 and
8 0410. So after minimal sleep, Private Richmond gets up and he is
9 ready to go. He is an infantry soldier. This is what they do. They
10 SP to the town.

11 They go to the village and they set up a traffic control
12 point. During the time that they are out at the traffic control
13 point, all on that very same morning of the 28th Private Richmond and
14 the other witnesses, Specialist [REDACTED] and Specialist [REDACTED] tell
15 you that they can hear a commotion coming from the village. (b)(6)-2

16 They can hear shotgun blasts going through doors. They can
17 hear yelling, shouting. They can hear women screaming, all from
18 where they are at the traffic control point compared to the distance
19 of the village. They can hear that from that far away, from the
20 traffic control point.

21

(S)(b)-2

1 DC: They have also told you and Sergeant [REDACTED] told you,
2 whether again you believe him, was that you could still hear these
3 sounds kind of lingering on, even at the time of the detention of Mr.

4 [REDACTED]
5 (S)(b)-4 What Private Richmond knew on that day was that Mr. [REDACTED]
6 had come from the village. He had seen him come from the village.
7 The other witnesses confirmed it. They too saw Mr. [REDACTED] (S)(b)-4 come from
8 the village, leave the village, walk away from the village with his
9 cows.

10 They saw him leave after daybreak. The testimony has shown
11 that the raid had started before daybreak. The raid was going on and
12 it began in darkness. It was only as the sun had started to come up
13 that Mr. [REDACTED] had left the village. The raid was still going on
14 when Mr. [REDACTED] (S)(b)-4 left the village.

15 What else did Private Richmond know? He knew that not all
16 of the subjects that they were hoping to detain, they had captured.
17 He knew that they hadn't gotten everyone. That came out over the net
18 call on the radio. The witnesses told you that. They were
19 monitoring the radio as the mission was going on because they were
20 all at the vehicles at that time and they knew that they had not
21 detained everyone.

22

017689

1 DC: They knew from the night before that all of the subjects
2 they were looking for were male. All male, and they knew on that
3 morning that they hadn't detained all of them.

4 The witnesses told you, Specialist [REDACTED] and
5 Richmond, all told you that Mr. [REDACTED] was the closest farmer to them (S)(b)-2
6 when they got to the call to detain all farmers, to detain all males
7 in the AO.

8 He didn't target Mr. [REDACTED] (S)(b)-2 It was Sergeant [REDACTED] who
9 picked Mr. [REDACTED] and said, "Richmond, come with me." This target of
10 opportunity, Private Richmond's big chance to get a kill. Sergeant
11 [REDACTED] (S)(b)-2 picked him and said, "Come with me." Private Richmond didn't
12 say, "Hey Sergeant, I'm going." And then take off. He was hanging
13 around and Sergeant [REDACTED] chose him. They didn't choose Mr. [REDACTED]
14 It was Sergeant [REDACTED] (S)(b)-2 that was making the choices and Private (S)(b)-2
15 Richmond that was following him.

16 The evidence shows you, and logic tells you, that Mr. [REDACTED]
17 could see their weapons. They both indicated, Private Richmond
18 indicated he had his weapon, was holding his weapon, and that
19 Sergeant [REDACTED] was slung in front of him. There is no dispute
20 about that, (S)(b)-2 that they had a clear line of sight with Mr. [REDACTED] so as
21 they are approaching him, he can see their weapons. (S)(b)-2
22

(S)(G)-2

1 DC: Sergeant [REDACTED] shouted at him. It is just inconceivable
2 that he would say nothing as he is approaching this man trying to
3 detain him. This NCO who has been out on a mission who is going to
4 show this young PFC the ropes, says nothing as he approaches Mr.
5 [REDACTED]?

6 (S)(G)-4 What is also undisputed is that there was resistance. That
7 Mr. [REDACTED] was angry, he appeared angry, he was yelling at them in
8 Arabic in a louder tone of voice, a tone of voice that Private
9 Richmond demonstrated for you. They saw him resisting and they saw
10 him and we know that because Private Richmond was told to move his
11 weapon up, to raise it up, to put it at the high ready. He was told
12 to go up. We know that this was this show of force and yet Mr. [REDACTED]
13 is still resisting. Sure, he doesn't want to be resisted. But what
14 if?

(S)(G)-4

15 They also saw Mr. [REDACTED] pointing to the village. We don't
16 know why he was doing that. Private Richmond says he doesn't
17 understand Arabic. He was pointing to the village, there that way,
18 or was it as a distraction to look that way, I am here, you look that
19 way. In any event, Mr. [REDACTED] was pointing towards the village. He
20 is doing things that are consistent with being uncooperative.

21

1 DC: You have an NCO who is yelling at Mr. (b)(6)-4 [REDACTED] You have an
2 NCO who is scared because the stress that he may be feeling.
3 He has told you under oath that this combat stress is due
4 solely to this incident with PFC Richmond. He has told you that is
5 solely because of this incident he has been moved from his platoon 5
6 months later. It is solely because of this incident that this has
7 happened. It is not at all anything to do with the fact that he shot (b)(6)-4
8 three Iraqi civilians killing one of the females 10 days before this
9 incident. That has nothing to do with Sergeant [REDACTED] combat
10 stress. (b)(6)-2

11 What else did Private Richmond know that day? You know
12 that he had an earplug in. You know, and Private Richmond knew that
13 Mr. (b)(6)-4 [REDACTED] had not had a full pat down. He knew that it was a rubbing
14 of the hands and because of the urgency and the quickness to get
15 Mr. [REDACTED] cuffed, and you know that it was the quick pat down and not
16 this because the whole incident only lasted 2 to 3 minutes. (b)(6)-4

17 There was no time for this lengthy pat down when someone is
18 resisting and struggling. Your main priority is to maintain positive
19 control and to put those flex-cuffs on. So, that is what the
20 testimony tells you and that is what you should know, is that this
21 full pat down did not happen.

22

1 DC: And this is what Private Richmond knew, because he didn't
2 know if Mr. [REDACTED] had a weapon at the time. Sure, he knows now, but
3 at the time, (S)(U-4) he didn't know that. There had been no affirmative
4 complete spread eagle pat down of Mr. [REDACTED].

5 The other important thing that Private Richmond knew was (S)(U-4)
6 that this mysterious Iraqi enemy, that he is here to fight in support
7 of Operation Iraqi Freedom was not going to walk up to him and
8 introduce himself. He was not going to invite him over for afternoon
9 tea. He was not going to be wearing any kind of military uniform.
10 He was going to look like every man because every man on the street
11 is more of a threat to the U.S. Soldier. They are not going to walk
12 up and identify themselves.

13 He knew that an enemy may not be displaying a weapon,
14 because if an enemy walks up displaying a weapon, then automatically
15 he is a combatant and Private Richmond knew that, and that is what he
16 had been trained by his platoon, that this mysterious enemy that he
17 is here to fight and train is not going to be an easy target.

18 If it was going to be an easy target, then there may not be
19 a need to have him here. Private Richmond never indicated during his
20 testimony that he saw Mr. [REDACTED] have a weapon.

21 (S)(U-4)

1 (S)(b)-2 DC: What he says is that he thought he was lunging at Sergeant
2 [REDACTED] "I thought he was going to attack him. I thought, maybe he
3 had a weapon." And those thoughts can all be based on the reasonable
4 mind of this 20-year old soldier and what he thought and knew at the
5 time.

6 So the evidence isn't quite as clear cut, and this burden
7 isn't quite as easily met as the government argues. Private Richmond
8 never said that. He said, based on everything he knew at the time,
9 based on what he had been trained, based on the baggy clothing, based
10 on the fact that a full search hadn't been done, and it was this
11 quick hands up and hands down for large weapons only, that is what he
12 had at the time on the 28th.

13 The whole thing happened in 2 to 3 minutes. No more than 3
14 minutes. All of this activity, which in hindsight, we are able to
15 break down little by little by little and look at each individual
16 fact.

17 (S)(b)-2 Immediately, immediately when Sergeant [REDACTED] was on his
18 knees, Private Richmond told him, "He lunged at you." Did Private
19 Richmond really have this whole story concocted up before they went
20 to the field? Did he really know that Mr. (S)(b)-2 [REDACTED], he was the guy, he
21 was going to be on a berm, and he was going to stumble and fall? No.
22

b(a)-4

1 DC: He thought that Mr. [REDACTED] lunged at Sergeant [REDACTED] and
2 that is what he told him immediately. They put him aside, as you saw
3 in the photograph, and they isolated him.

(b)(6)-2

4 Then when Specialist [REDACTED] came over, Specialist
5 [REDACTED] said, "What happened?" He told Specialist [REDACTED] within
6 that 2 to 3 minute time period after, he lunged at Sergeant [REDACTED]

7 Members of the panel, Private Richmond said that because
8 that is what happened. That was his reasonable belief at the time.

9 The judge has given you instructions that indicate that you
10 can look at fact as to whether Private Richmond was mistaken about
11 the lunge. And when you are looking at the fact of whether or not
12 Private Richmond was mistaken about the lunge, you are allowed to
13 take into account his age, his experience, his 3 weeks in Iraq, the
14 training that he received, and what was going on at the time and what
15 was reasonable in his mind.

16 Members of the panel, you have heard witness after witness
17 after witness tell you that common sense is brought to the battle
18 field with you. That soldiers are required on a daily basis to make
19 decisions without knowing all the facts. They can only make
20 decisions based on the fact that they have at the time.

21

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1 DC: They are not required to wait. They are not required to
2 seek higher when they think they or one of their buddies is in
3 danger, a fellow member of his platoon.

4 The witnesses have told you that the person that uses that
5 common sense is the individual soldier and they are the one to make
6 that judgment.

7 Members of the panel, you know more today on August 5th,
8 than Private Richmond did on the 28th of February. The defense asks
9 you to carefully consider what Private Richmond reasonably knew on
10 the 28th of February.

11 These soldiers talk about common sense and how they use it
12 with them on the battlefield and the defense respectfully asks each
13 and every one of you to bring your common sense with you in the
14 deliberation room and to think about what makes sense, and to make an
15 individual decision, and we are confident that you will come back
16 with a finding of not guilty.

17 MJ: Government, anything in rebuttal?

18 TC: Yes, Your Honor.

19 You will take the law back with you and the instructions.
20 The defense lawyer only gave you half of the instructions that cover
21 the defenses.

22

1 TC: The government differs with defense on a couple of issues
2 and I would like to talk about that.

3 First, the ROE. The ROE is an area in the case. You will
4 take the law back with you based on the judge's instructions. I ask
5 you to--to review them and in fact write them yourself.

6 But about the ROE, several soldiers spoke about it,
7 including Private Richmond. Talked about it and you--if someone is
8 coming at you with a stick, you don't shoot them. If someone is
9 pointing a weapon at you, you can shoot them. They all knew that.
10 That is part of the necessity and proportionality aspects of ROE.
11 The soldiers understand that. They may not be able to articulate it
12 very well but every soldier knows that. Every soldier that testified
13 yesterday and every soldier before us today.

14 Another issue the defense lawyer spoke of, PID, positive
15 identification. You know that positive identification is a
16 reasonable certainty that the target is a legitimate military target.
17 PFC Richmond did not evaluate PID here, he did not reasonable
18 certainty that there was a legitimate military target.

19 There was no escalation of force involved here. The
20 defense argued through the direct examinations that the shout and the
21 show took place during the actual--the resisting of the cuffs.

22

1 TC: But all that was already done. What could Richmond have
2 done? First, he could have looked, if you believed his story, he
3 could have looked to make sure there was an actual lunge, an actual
4 attack, look for a weapon or something like. But even if he did look
5 and see that an attack was occurring then there was no escalation of
6 force, no shouting, no shove, no taking your baton out and whacking
7 the guy, no but stroke. He didn't have to kill the man, even if you
8 believe his story.

9 She talked about the ROE from the battalion command and the
10 command sergeant major and we have one witness to testify to give us
11 the list of the new ROE. Aimed shots, you got to take aimed shots.
12 Do not fire unless fired upon and do not fire unless they are fired
13 on, which is another version of PID. If you apply that and if the
14 defense wants you to apply ROE to the case, then it is an easy one in
15 terms of unlawfulness.

16 The issue of shoot fleeing males, he was--that--that was--
17 that was totally irrelevant. The male wasn't fleeing number one, and
18 he asked if he could shoot him and he was told, "No,"

19 The issue that defense, we are already talked about it, of
20 attacking Sergeant [REDACTED] credibility is about the moving of the
21 arms in the back.

22

1 TC: Well, when he demonstrated it, you be the judge on how the
2 individual could have been flex-cuffed. How that flex-cuff could
3 have been tightened to make that zip noise. You saw it.
4 Automatically the arms go up when you tighten the zip-cuffs. The
5 only other way to do it is to push down with one hand and pull up
6 with the other but still you have to make an upward motion. The
7 distance, 12 inches, it is not even that far.

8 About those flex-cuffs, I asked you to look at the photo
9 and I neglected to mention this during my first argument. Take a
10 look at the length of those flex-cuffs that had already been through
11 the zipper. It is long.

12 Evidence that--when you are evaluating evidence and the
13 testimony, I ask you that you go on your memory of what the testimony
14 was. Defense counsel, during her argument stated that Sergeant
15 (b)(1)-2 [REDACTED] was conflicting her testimony talking about high ready is
16 looking through the scope. That--that in the government's view is
17 not the testimony. High ready is putting up the weapon with the butt
18 of the weapon or the stock of the weapon in your armpit but not
19 looking through the scope. The high ready has nothing to do with
20 looking through the scope.

21

1 TC: Defense counsel opened her argument with who do you believe
2 and that this case is a he said he said, well there is a problem with
3 that for the defense. Even if you believe everything that Richmond
4 said, he is guilty of unpremeditated murder. The government asserts
5 that is not true, that what he is saying is not the truth, the
6 government asserts that he was flex-cuffed, and there was no lunge,
7 and there was no reason to shoot the man.

8 But even if you believe everything that Richmond said, as
9 the defense has argued, he is still guilty. She makes a big deal of
10 the subjective nature of the defenses of what you will read about,
11 mistake of fact and defense of others.

12 She makes a big deal about what was going on in Private
13 Richmond's mind, his intent, his state of mind. Yes, that is part of
14 a defense, but it is an incomplete part of a defense. You will be
15 able to read the instructions for yourself.

16 The test for both of those defenses is first, that you have
17 to have a reasonable view of it, meaning that a reasonable prudent
18 person, not PFC Richmond, but a reasonable prudent person in that
19 particular situation and I will go over each of the defenses in a
20 second.

21

1 TC: The second element of those defenses is the subjective
2 nature, which the defense asserts that she has got. Even if she has
3 all of that, the reasonableness of all this, of the objective person,
4 of the prudent person, negates any use of these defenses.

5 When we look back at the instructions, the government
6 argues that there is no, the only issue in the case is of course
7 unlawfulness, that only one charge applies, the unpremeditated
8 charge.

9 You have also been instructed on two other crimes,
10 voluntary manslaughter, which involves rather the true intent to kill
11 it involves--done in the heat of passion or caused by quick
12 provocation. The government asserts that doesn't apply.

13 Even more so, the crime of negligent homicide doesn't
14 apply. The intent element of negligent homicide is simple
15 negligence. PFC Richmond himself told you that he intended to kill
16 Mr. (b)(6)-(b)(7) The government asserts that negligent homicide is not an
17 availability.

18 So basically, the government asserts that it is all or
19 nothing. The charge of unpremeditated murder because all of the
20 elements were met.

21

1 TC: Regarding the defenses, the defense of another, going into
2 the two parts, and the judge read this to you, she said that first
3 the accused must have had a reasonable belief that death or grievous
4 bodily harm was about to be inflicted on Sergeant [REDACTED] (b)(6)-2

5 The test here is whether under the same facts and
6 circumstances a reasonably prudent person faced with the same
7 situation would have believed that death or grievous bodily harm was
8 about to be inflicted. There is no--it is not reasonable. It is not
9 reasonable at all. No evidence of a weapon. The soldier had on IBA,
10 a little guy.

11 Even if you believe him, Mr. Richmond or Private Richmond
12 that he was being lunged at, it is not going to cause death or
13 grievous bodily injury. The death or grievous bodily injury
14 apprehension is what enables a person to use this defense to kill
15 another person. It is just not reasonable. It is not even close.

16 Now I ask when you look at--the instruction goes on into a
17 second element of a subjective portion. What went on in PFC
18 Richmond's mind. Now I ask that when you look at that second
19 instruction, that instruction on defense of another, there--the two
20 elements need to be looked at separately.

21

1 TC: The first element being the objective portion and the
2 second element being--everything after the word "first" is the first
3 element, and everything after the word "second" is the second element
4 of that. I ask you to read it in that respect. That is on the
5 defense called "defense of another."

6 On the mistake of fact defense, it is the same thing. The
7 instruction was--it is the accused is not guilty of the offenses if
8 he mistakenly believed that Mr. (b)(6)-7 was about to inflict death or
9 great bodily harm on Sergeant (b)(6)-2. That is the one element. That
10 is the subjective element. Even if what defense says is true then
11 they meet that element.

12 But the second was--the second element of this defense is
13 that if such belief on his part was reasonable. To be reasonable,
14 the belief must have been based on information or lack of it which
15 would indicate to a reasonable person that Mr. (b)(6)-7 was about to
16 inflict death or great bodily harm on Sergeant (b)(6)-2. Additionally
17 the mistake can not be based on negligent failure to discover the
18 true facts.

19 So the government asserts that he said he said, he is
20 guilty of unpremeditated murder under whichever he said.

21

1 TC: At the end of the day, it is an unarmed, flex-cuffed,
2 noncombatant, Iraqi civilian, with a hole in his head, and Private
3 Richmond put that bullet through his head.

4 That is the bottom line in the case, and as they say in
5 some parts of the United States with regard to Mr. [REDACTED] in this
6 case, "The man didn't need killing." (S)(Q-7)

7 Thank you.

8 MJ: Members of the panel, counsel have referred to instructions
9 that I gave you, and I would just note that if there is any
10 inconsistency between what counsel said about the instructions and
11 the instructions which I gave you, then you must accept my statement
12 as being correct. You will have these back in the deliberations with
13 you.

14 I would note that if you have questions about them, please
15 don't read into the instructions more than what I have put here, all
16 right? If you have questions about them, then reopen the court and
17 we will offer a further explanation, all right?

18 The following procedural rules will apply to your
19 deliberations and must be observed:

20 The influence of superiority in rank will not be employed
21 in any manner in an attempt to control the independence of the
22 members in the exercise of their own personal judgment.

23

1 MJ: Your deliberation should include a full and free discussion
2 of all the evidence that has been presented. After you have
3 completed your discussion, then voting on your findings must be
4 accomplished by secret, written ballot, and all members of the court
5 are required to vote.

6 If you find the accused guilty of the Specification of the
7 Charge, the finding as to that charge must be guilty. The junior
8 member will collect and count the votes. The count will then be
9 checked by the president, who will immediately announce the result of
10 the ballot to the members.

11 The concurrence of at least two-thirds of the members
12 present when the vote is taken is required for any finding of guilty.
13 Since we have 10 members, that means 7 members must concur in any
14 finding of guilty.

15 If you have at least seven votes of guilty of any offense
16 then that will result in a finding of guilty for that offense. If
17 fewer than seven members vote for a finding of guilty, then your
18 ballot resulted in a finding of not guilty bearing in mind the
19 instructions I just gave you about voting on the lesser-included
20 offenses of voluntary manslaughter, and negligent homicide.

21

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1 MJ: You may reconsider any finding prior to its being announced
2 in open court. However, after you vote, if any member expresses a
3 desire to reconsider any finding, open the court and the president
4 should announced only that reconsideration of a finding has been
5 proposed.

6 Do not state whether the finding proposed to be
7 reconsidered is a finding of guilty or not guilty, or whether a
8 finding as to unpremeditated murder, or as to voluntary manslaughter,
9 or as to negligent homicide is involved. I will then give you
10 specific further instructions on the procedure for reconsideration.

11 As soon as the court has reached its findings, and I have
12 examined the findings worksheet, the findings will be announced by
13 the president in the presence of all parties. As an aid in putting
14 your findings in proper form and making a proper announcement of the
15 findings, you may use Appellate Exhibit XXVII, the findings
16 worksheet.

17 Major [REDACTED], please come get this from me and hand it to
18 Colonel [REDACTED] (b)(6)-2
19 [The trial counsel did as directed.]

20 MJ: Colonel [REDACTED] if you look at that findings worksheet
21 follows along the lines of my instructions and gives you the options
22 available in this case.

23

1 MJ: Once you have finished filling in what is applicable,
2 please line out or cross out everything that is not applicable so
3 that when I check your findings I can ensure that they are in proper
4 form. Any questions about the findings worksheet, Sir?

5 PRES: No questions, Your Honor.

6 MJ: If during your deliberations, you have any questions, open
7 the court, and I will assist you. The Uniform Code of Military
8 Justice prohibits me and everyone else from entering your closed
9 session deliberations. As I mentioned at the beginning of the trial,
10 you must all remain together in the deliberation room during
11 deliberations.

12 While in your closed session deliberations, you may not
13 make communications to or receive communications from anyone outside
14 the deliberation room, by telephone or otherwise. I think I recall
15 seeing a laptop in your deliberation room. Obviously do not check
16 your email. Do not have any contact with anyone except each other.

17 If you have need of a recess, if you have a question, or
18 when you have reached findings, you may notify the bailiff, who will
19 then notify me that you desire to return to open court to make your
20 desires or findings known.

21

1 MJ: Further, during your deliberations, you may not consult the
2 Manual for Courts-Martial or any other legal publication unless it
3 has been admitted into evidence.

4 Do counsel object to the instructions given, or request any
5 additional instructions?

6 TC: No, Your Honor.

7 DC: No, Your Honor.

8 MJ: Does any member of the court have any questions concerning
9 these instructions?

10 [Negative response from all members.]

11 MJ: Apparently not.

12 If it is necessary and I mention this because there is no
13 latrine immediately adjacent to your deliberation room, your
14 deliberations may be interrupted by a recess. However, before you
15 may leave your closed session deliberations, you must notify us, we
16 must come into the courtroom, formerly convene and then recess the
17 court, and after the recess we must reconvene the court and formerly
18 close the again for your deliberations.

19 With that in mind, Sir, I recommend that we take a short
20 recess now before we close the court.

21

1 PRES: Concur, Your Honor.

2 MJ: Court is in recess.

3 [The court-martial recessed at 1005, 5 August 2004.]

4 [The court-martial was called to order at 1015, 5 August 2004.]

5 MJ: Court is called to order. All parties present when the
6 court recessed are again present. The members are also present.

7 Sir, on your desk are Prosecution Exhibits 7 and 8, they
8 are the only two formerly entered into evidence. In addition, you
9 have Appellate Exhibit 28, which is my finding instructions, all
10 right. Please don't mark on the exhibits and bring them back with
11 you when you come back from your closed session deliberations.

12 Court is closed.

13 [The court-martial closed at 1016, 5 August 2004.]

14 [END OF PAGE]

15

1 [The Article 39(a) session was called to order at 1016, 5 August
2 2004.]

3 MJ: The members have departed the courtroom. All other parties
4 remain present.

5 Private First Class Richmond, when the members return from
6 their deliberations, if you are acquitted or found not guilty of any
7 of the charges, of either the murder or the lesser included offenses,
8 then the trial is over, all right?

9 ACC: Yes, Your Honor.

10 MJ: If you are found guilty of either the charged offense or
11 its lesser included offenses, we will then go into the sentencing
12 proceedings.

13 ACC: Yes, Your Honor.

14 MJ: During that part of the trial you have the opportunity to
15 present matters in mitigation or extenuation of the offenses of which
16 you have been found guilty, or the offense of which you have been
17 found guilty, that is, matters about the offense or yourself, which
18 you want the court to use in considering an appropriate sentence.

19 ACC: Yes, Your Honor.

20

1 MJ: In addition to the testimony of witnesses and the offering
2 of documentary evidence you may yourself testify under oath as to
3 these matters, or you may remain silent in which case the court will
4 not draw any adverse inference from your silence.

5 On the other hand, you may make an unsworn statement.
6 Because the statement is unsworn, you can not be cross-examined on
7 it, however, the government may offer evidence to rebut any statement
8 of fact contained in an unsworn statement. The unsworn statement can
9 be made orally, or in writing or both, it can be made by you, by your
10 counsel on your behalf, or by both. Those are your rights at the
11 sentencing part of your trial. Do you understand them?

12 ACC: Yes, Your Honor.

13 MJ: All right. Counsel, on the front page of the charge sheet,
14 there are a couple of things that I noted. First of all, is the sea
15 or foreign duty pay correct, \$450.00?

16 DC: No, Your Honor, that is not correct. I believe it should
17 be \$250.00.

18 MJ: Government?

19 TC: Not sure, Your Honor. I will go with what the defense
20 counsel said.

21

1 MJ: I think that is right. I think that is the amount that
2 everybody is getting. Just wondering if maybe he was getting
3 something more.

4 DC: No, Your Honor.

5 MJ: Okay then \$250.00 is correct and correct block seven
6 charlie as well then. I recommend that in block eight, we insert the
7 words, "restricted tantamount to confinement" and in block nine we
8 insert "1 dash 30 April 2004."

9 That would be comporting with my findings [§] at to your motion
10 for appropriate relief the other day. Is that satisfactory to both
11 of you?

12 DC: Yes, Your Honor.

13 TC: Yes, Your Honor.

14 MJ: All right, then government, you are instructed to make
15 those particular changes to the original charge sheet please.

16 TC: Yes, Your Honor.

17 MJ: Any other changes to the front page of the charge sheet or
18 personal data?

19 DC: No, Your Honor.

20 MJ: Government?

21

1 TC: No, Your Honor.

2 MJ: All right then. This Article 39(a) session is terminated
3 to await the members' findings.

4 [The session adjourned at 1020, 5 August 2004.]

5 [END OF PAGE]

6

o

1 [The court-martial opened at 1145, 5 August 2004.]

2 MJ: Court is called to order. All parties present when the
3 court closed for deliberations on findings are again present.

4 Colonel [REDACTED] has the court reached its findings?

5 PRES: (b)(6)-2 Yes, Your Honor, we have.

6 MJ: All right, would you please fold it half. Bailiff would
7 you come get it please?

8 [The bailiff did as directed and the military judge reviewed the
9 findings worksheet.]

10 MJ: Please hand that back to Colonel [REDACTED]

11 [The bailiff did as directed.] (b)(6)-2

12 MJ: I have reviewed the findings worksheet and find the
13 findings to be in proper form.

14 Sir, if you would note, what I did is crossed out the other
15 stuff that you will not read when asked to announce the findings,
16 roger?

17 PRES: Roger.

18 MJ: Private First Class Richmond, counsel, please rise.

19 [The accused and his counsel did as directed.]

20 MJ: Sir, if you would announce the finding to the court please.

21

1 [The Article 39(a) session was called to order at 1147, 5 August
2 2004.]

3 MJ: The members have departed the courtroom. Counsel, are
4 there any documentary matters that we can go ahead and enter now in
5 their absence?

6 TC: Your Honor, the government will offer Prosecution Exhibit
7 15 for identification, the Accused's enlisted record brief, however,
8 there are a few changes made to it in pen that the three of us need
9 to initial.

10 MJ: Those changes were made by PFC Richmond and you, Captain
11 (b)(6)-Z
[REDACTED]

12 DC: Yes, Your Honor.

13 MJ: Okay.

14 TC: Your Honor, the government offers Prosecution Exhibit 15
15 for identification.

16 MJ: Any objection to Prosecution Exhibit 15 for identification?

17 DC: No, Your Honor.

18 MJ: Prosecution Exhibit 15 for identification is received into
19 evidence as Prosecution Exhibit 15.

20 Government, anything else?

21

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1 TC: Yes, Your Honor. The government has prepared a sentence
2 worksheet.

3 MJ: Well wait a minute, are there any documents that you would
4 like to have to marked?

5 DC: Your Honor, the defense requests that we do that at a 39(a)
6 session prior to calling the panel. We haven't had a chance to get
7 that to the government yet.

8 MJ: Okay.

9 DC: Thank you.

10 MJ: All right, let me see the sentencing worksheet then. Have
11 you had that marked yet?

12 Appellate Exhibit XXIX is the sentence worksheet. I note
13 that you do not have a fine on here. I infer from that that you do
14 not intend to argue for a fine.

15 TC: Your Honor, the government does not believe that a fine is
16 appropriate in this case.

17 MJ: All right, good. Any objection to Appellate Exhibit XXIX?

18 DC: Yes, Your Honor. In the section regarding punitive
19 discharge, it seems that the jury is limited by either giving a bad-
20 conduct discharge or a dishonorable discharge and they don't have the
21 option to give no discharge, Your Honor.

22

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1 MJ: Sure they do.

2 DC: Your Honor, it reads that----

3 MJ: They can line them both out.

4 DC: Okay, Your Honor. The defense would just request the court

5 to clarify that with them. The other ones it is clear that they

6 could put zero forfeitures, or zero confinement or zero restriction,

7 where you can fill that in, and to the left it just----

8 MJ: That is standard practice. I will make sure that my

9 instructions are clear, that they have that option. They have the

10 option to give anything or nothing, I mean, that is why we put "to no

11 punishment" at the top as well.

12 DC: Yes, Your Honor.

13 MJ: And you can certainly argue that. If they do not want to

14 give a discharge, a punitive discharge, then they normally line

15 through both lines 9 and 10.

16 DC: Yes, Your Honor.

17 MJ: And since I have got some time now, I probably will draft

18 sentencing instructions that we can hand to them written that they

19 can take back with them. In that regards, since, counsel you know

20 what evidence you intend to present during the case, if you want to

21 give me a list of the Wheeler factors to include with the written

22 sentencing instructions, I would appreciate that.

23

1 DC: Yes, Your Honor.

2 MJ: Anything else that we can take up right now?

3 TC: No, Your Honor.

4 DC: No, Your Honor.

5 MJ: Court is in recess.

6 [The session recessed at 1155, 5 August 2004.]

7 [The session was called to order at 1304, 5 August 2004.]

8 MJ: This Article 39(a) session is called to order. All parties
9 present when the court recessed are again present. The members are
10 absent.

11 Two things, one I told the trial counsel during the recess
12 that as I was preparing sentencing instructions, I realized that the
13 accused went over 2 for pay purposes in May and so the correct number
14 in block seven alpha is \$1,495.50 plus \$250 in block seven bravo for
15 a total in block seven charlie of \$1,745.50.

16 I have also been handed Defense Exhibits A, B, C, and D,
17 and E for identification. Have you had an opportunity to review
18 these, Government?

19 TC: Yes, Your Honor.

20 MJ: Any objection?

21

1 TC: No, Your Honor.

2 MJ: Defense Exhibits A through E are accepted into evidence.

3 Now defense, I note that there are lots of originals in terms of

4 letters, awards, cards and such, you are certainly welcome to

5 substitute Xerox copies for the record and return the originals to

6 PFC Richmond, all right?

7 DC: Yes, Your Honor.

8 MJ: Counsel, did you have a chance to jot down Wheeler factors

9 or, no? If you didn't that is all right.

10 ADC: I did not, Ma'am.

11 MJ: All right, I will do it during the case. Listen carefully

12 in case you want anything added, all right?

13 Is there anything else that we can do right now?

14 DC: Your Honor, the defense prepared copies of Defense Exhibits

15 Alpha through Delta, which is everything except the photographs, Your

16 Honor, and we do have a binder prepared for each member of the panel,

17 Your Honor.

18 MJ: Very well.

19 DC: At the court's discretion, I don't know when it is an

20 appropriate time, to give this to the panel just before they go into

21 deliberations, the bailiff can bring them in.

22

1 MJ: That is what I am thinking. I will announce at the
2 beginning when they come that I have accepted them in evidence and
3 tell them that they will each have a copy to review during
4 deliberations, all right?

5 DC: Yes, Your Honor. There is only one copy of the
6 photographs.

7 MJ: Got it. Anything else?

8 ADC: Yes, Ma'am. The defense tentatively intends on arguing for
9 a punitive discharge so at whatever point you would like to do an
10 inquiry with the accused.

11 MJ: Okay, what does "tentatively" mean?

12 ADC: Well that is our intent and I doubt that will change.

13 MJ: Okay, then let's do that now.

14 Private First Class Richmond, the reason that your counsel
15 brought that up is a punitive discharge is not a good thing. You
16 know that right?

17 ACC: Yes, Ma'am.

18 MJ: Okay. In the Army there are five types of discharges, best
19 to worst, honorable, general under honorable conditions, other than
20 honorable, bad-conduct, and dishonorable discharge. Do you have all
21 those?

22

1 ACC: Yes, Ma'am.

2 MJ: The only two that a court-martial can give, the only two
3 that this court-martial can give are the bad-conduct discharge or the
4 dishonorable discharge. So they don't have the opportunity to give
5 you a honorable discharge, a general discharge, or an other than
6 honorable discharge.

7 Do you understand that?

8 ACC: Yes, Ma'am.

9 MJ: If you are adjudged a bad-conduct discharge or a
10 dishonorable discharge, it will forever adversely stigmatize the
11 character of your military service and it will limit your future
12 employment and schooling opportunities.

13 Do you understand that?

14 ACC: Yes, Ma'am.

15 MJ: It could also adversely affect your future with regards to
16 legal rights, economic opportunities, and social acceptability.

17 Do you understand that?

18 ACC: Yes, Ma'am.

19 MJ: In addition, if you receive a punitive discharge, you lose
20 substantially all benefits from the department of Veterans Affairs,
21 and the Army, as well as other benefits which may normally be given
22 by other governmental agencies.

23

1 MJ: Do you understand that?

2 ACC: Yes, Ma'am.

3 MJ: Have you discussed with your defense counsel your desires
4 in this regard?

5 ACC: Yes, Ma'am.

6 MJ: Do you think that you fully understand the ramifications of
7 a punitive discharge?

8 ACC: Yes, Ma'am.

9 MJ: Are you aware that even if this court doesn't give you a
10 discharge, that your chain of command may try to decide to chapter
11 you anyway after this court-martial?

12 ACC: Yes, Ma'am.

13 MJ: And you understand that if you are administratively
14 discharged through a chapter proceeding, that you may still not get
15 an honorable discharge.

16 Do you understand that?

17 ACC: Yes, Ma'am.

18 MJ: But do you understand that an administrative separation is
19 considered far less severe than a punitive discharge?

20 ACC: Yes, Ma'am.

21

1 MJ: Knowing everything that I have told you and that your
2 defense counsel have explained to you, is it your expressed desire to
3 permit your counsel to argue for a discharge in this case?
4 ACC: Yes, Ma'am.
5 MJ: I assume defense, that you are going to be arguing that if
6 they consider confinement appropriate that they should not consider
7 that appropriate and adjudge a discharge instead?
8 ADC: Uh, Ma'am, could you repeat that?
9 MJ: Okay.
10 ADC: Sorry.
11 MJ: Are you asking--is your argument going to be give him a
12 discharge and consider not giving him confinement?
13 ADC: Yes, Ma'am.
14 MJ: Is that the deal?
15 ADC: Yes, Ma'am.
16 MJ: Roger.
17 ADC: Or minimal.
18 MJ: Roger, okay. Is that your understanding of what your
19 defense counsel is going to argue for in this case?
20 ACC: Yes, Ma'am.
21 MJ: Are you okay with that?
22

1 ACC: Yes, Ma'am.

2 MJ: So do you expressly consent then to your defense counsel

3 stating in argument that you desired to be discharged with a punitive

4 discharge?

5 ACC: Yes, Ma'am.

6 MJ: All right. Anything else?

7 TC: Nothing from the government.

8 MJ: Defense?

9 ADC: No, Ma'am.

10 MJ: Call the members.

11 [The session adjourned at 1312, 5 August 2004.]

12 [END OF PAGE]

13

1 [The court-martial was called to order at 1312, 5 August 2004.]

2 MJ: Court is called to order. All parties present when the
3 court recessed are again present. The members are also present.

4 Members of the panel, we are now going to go into the
5 sentencing portion of this trial. At a previous session I admitted
6 Prosecution Exhibit 15, which is the Accused's enlisted record brief.
7 I also admitted Defense Exhibit A which is several awards the Accused
8 has received, Defense Exhibit B, which includes letters of
9 commendation, Defense Exhibit C, which includes other letters for
10 your consideration in determining an appropriate sentence, and
11 Defense Exhibit D, which includes cards which he has received, and
12 finally Defense Exhibit E, which is a compellation of photographs for
13 your consideration.

14 Now it is my understanding that the defense has put
15 together notebooks for each of you to consider with the exception of
16 the photographs, so we will give you all the originals to take back,
17 but you will each have copies in your deliberations to review during
18 your sentencing deliberations as well.

19 Trial counsel, please announce the personal data on the
20 front page of the charge sheet.

21

017726

1 TC: Yes, Your Honor.

2 NAME OF THE ACCUSED: RICHMOND, Edward L., Jr.

3 SOCIAL SECURITY NUMBER: [REDACTED] (S)(u)-2

4 GRADE OR RANK: PFC.

5 PAY GRADE: E3.

6 UNIT OR ORGANIZATION: Headquarters and

7 Headquarters Company, 1st Battalion, 27th Infantry, Kirkuk, Iraq, APO

8 AE 09347-9998.

9 INITIAL DATE OF CURRENT SERVICE: 22 May 2002.

10 TERM OF CURRENT SERVICE: 6 Years.

11 BASIC PAY PER MONTH: [REDACTED] (S)(u)-2 \$1,495.50.

12 SEA OR FOREIGN DUTY PER MONTH: \$250.00.

13 TOTAL PAY PER MONTH: \$1,745.50.

14 NATURE OF RESTRAINT OF ACCUSED: Restriction tantamount

15 to confinement.

16 DATES IMPOSED: 1 through 30 April 2004.

17 MJ: Thank you. Trial counsel, do you have any evidence to

18 present at this time?

19 TC: Yes, Your Honor.

20

017727

(S)(G)-2
Z

1 CHIEF WARRANT OFFICER TWO [REDACTED] U.S. Army, was called
2 as a witness for the prosecution, was sworn, and testified as
3 follows:

4 DIRECT EXAMINATION

5 Questions by the trial counsel:

6 Q. Could you state your full name, your rank, and your unit
7 please?

8 A. Chief Warrant Officer Two [REDACTED] I am with
9 the 43rd Military Police Detachment, CID, at Fort Hood, Texas.

10 Q. And where do you work right now?

11 A. Currently I am assigned to the Fort Hood Resident Agency at
12 Fort Hood, Texas.

13 Q. Where did you work in February and March of this year?

14 A. I was deployed with--we were attached with 4th Infantry
15 Division here in Tikrit.

16 Q. How long have you been a CID agent?

17 A. Approximately 8 years.

18 Q. And in the process of these 8 years, have you conducted
19 CID-type subject interviews?

20 A. Yes, I have.

21

017728

1 Q. Approximately how many interviews?
2 A. Subject interviews?
3 Q. Subject interviews.
4 A. Um, 200 or so.
5 Q. On 1 March of this year, did you have an occasion to
6 conduct a subject interview with Private First Class Richmond?
7 A. Yes, I did.
8 Q. Do you see him in the courtroom today?
9 A. Yes, I do.
10 Q. Would you please point to him?
11 [The witness pointed to the accused.]
12 TC: The witness had identified PFC Richmond.
13 Q. On 1 March 2004, about how much time did you spend with PFC
14 Richmond?
15 A. Approximately 45 minutes to an hour. I was conducting
16 another interview and after I was completed then I came into that
17 interview that Agent (b)(6)-(b)(7)(C) was doing.
18 Q. Where you familiar with the allegations that he was talking
19 to him about?
20 A. Yes, I was.

21

1 Q. What were Private Richmond's understandings about the facts
2 regarding Mr. [REDACTED] and the flex-cuffs and whether or not Mr. [REDACTED]
3 had weapons on 1 March? (S)(b)-7 (S)(b)-7

4 A. I am sorry, can you repeat the question?

5 Q. On that day, 1 March, what were PFC Richmond's
6 understandings as to whether or no Mr. [REDACTED] had weapons or whether
7 or not he was flex-cuffed at the time of the shooting? (S)(b)-7

8 A. At the time of the shooting he stated that he did not know
9 that the Iraqi man was flexi-cuffed, nor if he had any weapons on him
10 then.

11 Q. And did he know, exactly, what happened--I mean did he know
12 if he was flex-cuffed on 1 March?

13 A. Oh, I am sorry. Yes, he did. He knew he was flexi-cuffed
14 then.

15 Q. During the course of your interview with PFC Richmond, was
16 there anything about him, or his demeanor that struck you as
17 extraordinary?

18 A. Um, in my experience in dealing with subject in the cases
19 where death has occurred, I kind of--it helps me to determine how I
20 am going to interview and in this case he referred to the victim as
21 "ole boy" or just certain types of names that I felt was a little
22 unusual.

23

1 A. So I asked him, I said, "Now that after you shot him and
2 you discovered that he was indeed flexi-cuffed and that he did not
3 have--he was not posing a threat, how does that make you feel now?"
4 And he replied that he really didn't feel anything toward the Iraqi
5 man and that he was just doing his job.

6 Q. What if anything did PFC Richmond say about the word,
7 "remorse?"

8 A. Well he didn't indicate to me that there was any remorse
9 toward the Iraqi man. Like I said, he basically stated, "Look, I did
10 my job."

11 Q. Did he render a sworn statement in the case at that time on
12 that day?

13 A. Yes, he did.

14 Q. What if anything in that sworn statement when asked a
15 question of whether or not he had remorse, what did Richmond say?

16 A. I believe he stated something to the effect that the
17 incident occurred and I would do it again if I had to.

18 TC: No further questions.

19 MJ: Defense, any cross-examination?

20 ADC: Yes, Ma'am.

21

CROSS-EXAMINATION

Questions by the assistant defense counsel:

Q. Now when he said that he would do it again, he was referring to the same circumstances based on what he knew at the time of the shooting, wasn't he?

A. From what I perceived, it was the situation, not his--I guess what it was more of a if the situation occurred again, I would do it again.

Q. Okay, he never said that he was glad that Mr. [REDACTED] was dead? (b)(6)-(7)

A. He did not say that.

Q. He never said that he was happy about it?

A. No.

Q. Okay, and this--have you--this statement was on or about 1 March?

A. Correct.

Q. So maybe a day or two after the incident?

A. Yes.

Q. And you hadn't had a chance to talk to PFC Richmond about the incident since then, have you?

A. No, actually I redeployed right after that.

1 ADC: Thank you.
2 MJ: Any redirect?
3 TC: No, Ma'am.
4 MJ: Members of the panel, any questions?
5 [Negative response from all members.]
6 MJ: Apparently not. Permanent?
7 TC: Yes, Your Honor.
8 MJ: Any objection?
9 ADC: No objection, Ma'am.
10 [The witness was duly warned, permanently excused, and withdrew from
11 the courtroom.]

12 CAPTAIN [REDACTED] S, U.S. Army, was recalled as a witness for the
13 prosecution, was reminded of his oath, and testified as follows:

14 DIRECT EXAMINATION

15 Questions by the trial counsel:

16 Q. Captain [REDACTED] would you please remind us again, what is
17 your position?

18 A. I am the Mortar Platoon Leader for HHC, 1-27 Infantry, Sir.

19 Q. And how long have you been the platoon leader?

20 A. Since February 2003, Sir.

21

017733

1 Q. Would the events of 28 February involving PFC Richmond's
2 manslaughter of Mr. (b)(6)-y did that event affect your unit?

3 A. I am sorry, Sir, I didn't hear what you asked.

4 (b)(6)-y Q. The events of 28 February, where PFC Richmond killed Mr.
5 did that affect your unit?

6 A. Yes, Sir, it did.

7 Q. How did it affect your platoon?

8 A. Following the incident with PFC Richmond, the battalion
9 commander and the battalion sergeant major, we were no longer
10 authorized to do missions. We were pretty much ostracized within the
11 battalion, labeled as undisciplined, murders, some other words that
12 probably would like to be said in the courtroom, Sir. It was
13 extremely rough for at least 2 to 3 months, Sir.

14 Q. Was the platoon required to undergo any additional
15 training?

16 A. Yes, Sir. The battalion commander spoke with me shortly
17 after the incident. He wanted us to take a step back, slow down, and
18 conduct some retraining basically on what we had been doing while we
19 had been in Iraq. Convoy operations, TCPs, cordon searches and
20 things of that nature, Sir.

21

1 Q. Now how did you feel about that considering the types of
2 soldiers you have at the point you were doing this remedial training
3 with them?

4 A. I thought it was unnecessary. Like I said before, I have
5 been in the mortar platoon since February 2003. I know my soldiers.
6 I trained them. I trained them before we deployed. They are a great
7 group of soldiers. There was no reason for it. The reason for--I
8 felt very upset, embarrassed and shame because the actions of one
9 individual totally tarnished the hard work and dedication by the good
10 soldiers in the platoon.

11 Q. Now the reason for this, for this remedial training, did it
12 have anything to do also with the incident that occurred 2 days [sic]
13 before 28 February?

14 A. I couldn't tell you, Sir, but probably yes.

15 Q. How has your platoon been treated outside of the FOB since
16 the 28th of February?

17 A. Within the brigade, Sir, I have had some people come up to
18 me and make some references about my platoon, about my soldiers,
19 about my leadership abilities. I have gotten some pretty harsh
20 remarks from some random people. We have been labeled as murders,
21 undisciplined, and just other things like that, Sir.

22

1 Q. Did anything happen to you while you were here in Tikrit
2 for this trial?

3 A. Yes, Sir. I was in the MWR palace yesterday, early
4 yesterday morning, and a soldier I knew from the brigade, actually a
5 senior NCO, approached me. I have just known him from being in the
6 Brigade the last couple of years. He asked me what I was doing down
7 here and I said I was down here for a court-martial. He said, "Oh,
8 you are with the Richmond case?" I said, "Roger." He said, "So that
9 was your platoon?" He really didn't say that. He made a comment.
10 Would you like me to say it?

11 Q. Yes, please.

12 A. He said, "Oh, so you are the one that had that fucked up
13 platoon?" And I got extremely angry because that is the stereotyping
14 I am given.

15 There was only four people from our platoon out there that
16 day and we have been labeled and ostracized ever since. And it has
17 angered me, not just because a leader, but it has angered me because
18 there are soldiers in my platoon that were not even there, had
19 nothing to do with it.

20 Outstanding soldiers that have done outstanding things out
21 here and all of a sudden, their credibility, their friends from
22 around the FOB, it all disappeared and that is what angers me more.

23

1 A. Because I just have some outstanding soldiers in my platoon
2 and their names have just been tarnished since we have been here over
3 one action, one action.

4 Q. Has your platoon bounced back?

5 A. Yes, Sir, they have. They have. We haven't had any
6 problems since.

7 TC: No further questions.

8 MJ: Defense?

9 ADC: Yes, Ma'am.

10 **CROSS-EXAMINATION**

11 **Questions by the assistant defense counsel:**

12 Q. Captain (b)(6)-2 [REDACTED] didn't you say on direct that the incident
13 on 18 February also played a role on the reputation of your unit?

14 A. Initially, yes, it had some affect. (b)(6)-5

15 Q. Three Iraqi females that were noncombatants were shot in
16 that incident, correct?

17 A. Yes, they were.

18 Q. As a matter of fact Sergeant (b)(6)-2 [REDACTED] was involved in that
19 incident, wasn't he?

20 A. Yes, he was.

21

017737

(b)(6)-2

1 Q. And yet Sergeant [REDACTED] still went out on the mission 10
2 days later?

3 A. Yes, he did.

4 Q. And yesterday you came in and you testified that PFC
5 Richmond was a good soldier?

6 A. Yes, he was.

7 Q. So you think he was a good soldier?

8 A. Do I still think he is a good soldier now?

9 Q. Well, was there anything that you knew yesterday that you
10 don't know now? (b)(6)-2

11 MJ: Captain [REDACTED] I can barely hear you, which tells me that
12 members of the panel are probably having trouble as well.

13 ADC: I am sorry, Ma'am.

14 Q. Yesterday you testified that he was a good soldier?

15 A. He was a good soldier at his technical proficiency, yes, he
16 was.

17 ADC: Thank you.

18 MJ: Any redirect.

19 TC: Yes, Your Honor.

20

1 **REDIRECT EXAMINATION**

2 **Questions by the trial counsel:**

3 Q. Knowing that he has been convicted of voluntary
4 manslaughter, is he a good soldier now?

5 A. No, he is not.

6 TC: No further questions.

7 MJ: Any recross on that?

8 ADC: No, Your Honor.

9 MJ: Members of the panel, any questions for Captain [REDACTED]

10 [Negative response from all members.] (b)(6)-2

11 MJ: Apparently not. Permanent?

12 TC: Yes, Ma'am.

13 [The witness was duly warned, permanently excused, and withdrew from
14 the courtroom.] (b)(6)-2

15 **CAPTAIN [REDACTED] U.S. Army, was called as a witness for the**
16 **prosecution, was sworn, and testified as follows:**

17 **DIRECT EXAMINATION**

18 **Questions by the trial counsel:**

19 Q. Please state your name, your rank, and your unit. (b)(6)-2

20 A. Captain [REDACTED] Captain, HHC,
21 Headquarters and Headquarters Company Commander.
22

1 Q. Your position is the HHC Commander?

2 A. Yes.

3 Q. Where are you located?

4 A. I am located at Kirkuk Regional Air Base in Kirkuk, Iraq.

5 Q. And where are your soldiers from your company located?

6 A. My soldiers are located in three different locations,

7 Kirkuk Regional Air Base, FOB McHenry, and FOB Gains Mills.

8 Q. How many soldiers do you have?

9 A. Approximately 207.

10 Q. Now you are aware of the facts and circumstances

11 surrounding the 28 February voluntary manslaughter that has been

12 adjudicated today, right?

13 A. Yes, I am.

14 Q. Has that incident affected your unit?

15 A. Yes, it has.

16 Q. How so?

17 A. Upon receiving word of the incident, I was then summoned to

18 come down to McHenry to conduct an inquiry. I was informed by the

19 battalion commander that the mortars would stand down. They would

20 not leave the FOB for operations.

21

1 A. They were restricted to gate guard and other trivial
2 duties, not only that, but they had been receiving ridicule and
3 criticism from other units within the battalion as well as within the
4 brigade.

5 Q. Did this crime have any impact directly on you as an
6 officer?

7 A. Yes, it did.

8 Q. How so?

9 A. Well few--about 2 months ago, PFC Richmond gave an
10 interview to the local newspaper. Friends of mine from Fort Benning
11 who normally surf the net saw the article, and the way the article
12 read, it looked as if his chain of command gave him some misguidance
13 on the ROE.

14 Those soldiers knowing me being the Commander of HHC,
15 1-27 immediately perceived that I gave that ROE. All of a sudden I
16 began to receive emails asking me what was going on and subsequently
17 families talked, my daughter was at summer school and the next thing
18 I know some kid walked up to her and said, "Your Dad is a murder."

19 TC: No further questions.

20 MJ: Defense?

21

1 ADC: Yes, Ma'am.

2 CROSS-EXAMINATION

3 Questions by the assistant defense counsel:

4 Q. Captain [REDACTED], with regard to that incident that you
5 just mentioned. (b)(6)-2

6 A. My daughter?

7 Q. Yes.

8 A. Okay.

9 Q. Isn't it true that that newspaper article was really
10 talking about Captain [REDACTED] not you? (b)(6)-2

11 A. Yes, as I stated.

12 Q. But essentially it failed to specify that PFC Richmond was
13 attached to a different company for that mission, right?

14 A. Yes, it did.

15 Q. So you gave him--the article gave him a misleading
16 impression, correct?

17 A. Yes.

18 Q. So really, that negative impact came from a careless
19 reporter, didn't it?

20 A. Yes, it did.

1 ADC: Thank you.

2 MJ: Redirect?

3 TC: No, Your Honor.

4 MJ: Members of the panel, any questions for Captain [REDACTED]
5 [Negative response from all members.] (b)(6)-2

6 MJ: Apparently not. Permanent?

7 TC: Yes, Your Honor.

8 [The witness was duly warned, permanently excused, and withdrew from
9 the courtroom.]

10 MJ: Government?

11 TC: Nothing further, Your Honor.

12 MJ: The government rests?

13 TC: The government rests.

14 MJ: Defense?

15 ADC: Yes, Ma'am.

16 [END OF PAGE]

17

(S)(G)-2

1 STAFF SERGEANT [REDACTED], U.S. Army, was called as a witness
2 for the defense, was sworn, and testified as follows:

3 DIRECT EXAMINATION

4 Questions by the trial counsel:

5 Q. Could you state your full name, your rank, and your
6 position, or your unit?

7 A. Staff Sergeant [REDACTED], NCOIC of 1-27 DFAC.

8 Q. DFAC?

9 A. Yes, Sir.

10 TC: Your witness.

11 Questions by the assistant defense counsel:

12 Q. Staff Sergeant [REDACTED] do you know the accused PFC Richmond?

13 A. What is that, Sir?

14 Q. Do you know PFC Richmond?

15 A. Yes, Sir.

16 Q. How do you know him?

17 A. He came to work for me a couple of times doing rations.

18 Q. Okay, during what time frame are you talking about?

19 A. It was after the incident.

20 Q. Okay, for how long--well how long have you known PFC
21 Richmond?

22 A. Approximately 3 months, Sir.

23

1 Q. Okay, and during that 3 months how much have you interacted
2 with him?

3 A. Not too much. He came down a few times and helped me with
4 rations. I see him around the connexes every once in a while and
5 inside the chow hall, Sir.

6 Q. Okay, but did you have a chance to directly supervise him?

7 A. Just those few times when he came to work for me down at
8 the ration point, Sir.

9 Q. And on the times that you supervised him, you said it was
10 after the incident, right?


11 A. Right.

12 Q. And on the times you supervised him, how did he perform his
13 duties?

14 A. Excellent. I never had any issues with him, Sir. He does
15 what he is told to do and never questions what I said to him or what
16 not.

17 Q. Was he ever disrespectful to you?

18 A. No, Sir.

19 ADC: Thank you, Sergeant  (b)(6)(b)(7)(C)

20 MJ: Government?

21

1 TC: No questions, Your Honor.

2 MJ: Members of the panel, any questions for Staff Sergeant

3 [REDACTED] (S)(G)-2

4 [Negative response from all members.]

5 MJ: Apparently not. Permanent, Captain [REDACTED]

6 ADC: Yes, Ma'am. (S)(G)-2

7 [The witness was duly warned, permanently excused, and withdrew from
8 the courtroom.]

9 **STAFF SERGEANT [REDACTED], U.S. Army, was called as a witness**
10 **for the defense, was sworn, and testified as follows:**

11 **DIRECT EXAMINATION**

12 **Questions by the trial counsel:**

13 Q. Staff Sergeant [REDACTED] please state your full name, your
14 rank, and your unit?

15 A. [REDACTED], Staff Sergeant, HHC, 1-27
16 Infantry.

17 TC: Your witness.

18 **Questions by the assistant defense counsel:**

19 Q. Good afternoon Sergeant [REDACTED]

20 A. Good afternoon, Sir. (S)(G)-2

21 Q. Do you know PFC Richmond?

22 A. Yes, Sir.

23

1 Q. How do you know him?

2 A. Sir, I know him from February 03, once I start to get to
3 the unit I met the guys from his platoon also him.

4 Q. So you have known him since February 2003?

5 A. Yes, Sir. ! !

6 Q. And during that time, how much have you interacted with
7 him?

8 A. We have quite a few interactions. Not much. Quite a few
9 with him and platoon.

10 Q. Since you have been in Iraq, well actually since 18
11 February, have you interacted with him much since then?

12 A. Yes, Sir.

13 Q. In what capacity?

14 A. Since February, Richmond attached to my sections and
15 basically he assist me whenever I need it, Sir, so that is the type
16 of interaction we have.

17 Q. Okay so have you seen him on a daily basis?

18 A. Yes, Sir.

19 Q. During that timeframe, do you have an opinion on his duty
20 performance?

21 A. Yes, Sir.

22

1 Q. And what is that opinion?

2 A. Good.

3 Q. Okay, has he ever been disrespectful to you?

4 A. Negative, Sir.

5 Q. Has he ever disobeyed you?

6 A. Negative, Sir.

7 ADC: Thank you, Sergeant.

8 MJ: Government, any cross?

9 TC: No, Your Honor.

10 MJ: Members of the panel, do you have any questions for Staff

11 Sergeant [REDACTED] (b)(6)-2

12 [Negative response from all members.]

13 MJ: Apparently not. Permanent?

14 ADC: Yes, Ma'am.

15 [The witness was duly warned, permanently excused, and withdrew from

16 the courtroom.]

17 MJ: Defense.

18 ADC: Yes, Ma'am.

19

(b)(6)-2

1 PRIVATE FIRST CLASS [REDACTED], U.S. Army, was called as a
2 witness for the defense, was sworn, and testified as follows:

3 DIRECT EXAMINATION

4 Questions by the trial counsel:

5 Q. Please state your name, your rank, and your unit?

6 A. [REDACTED], PFC, HHC, 1-27, Mortars.

7 TC: Your witness. (b)(6)-2

8 Questions by the assistant defense counsel:

9 Q. Good afternoon PFC [REDACTED]

10 A. Good afternoon, Sir.

11 Q. Do you know the accused, PFC Richmond?

12 A. Roger, Sir.

13 Q. How do you know him?

14 A. He's the Godfather to my daughter.

15 Q. What is your daughter's name?

16 A. [REDACTED] (b)(6)-2

17 Q. And how long have you known PFC Richmond?

18 A. Since I got to Headquarters.

19 Q. And how long has that been?

20 A. About 2 years, Sir.

21

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1 Q. And you said that he is the Godfather of your daughter?

2 A. Roger, Sir.?

3 Q. Why did you ask him to do that?

4 A. Because when he come over to my house, my daughter always

5 play with him and usually she don't hang around other guys or be

6 around other guys. But she got attached to him and he always make

7 sure she had what she needed.

8 Q. Well you must be pretty good friends with him?

9 A. Roger, Sir.

10 Q. Well what is--what is Richmond like, how would you describe

11 him?

12 A. Well since I been to HHC he always looked after me. He

13 always pushed me to be a better mortar, to help me with my job. He

14 is basically like the best friend I had here.

15 Q. Okay, do you have an opinion on his potential to be

16 rehabilitated as a productive member of society?

17 A. Well what do you mean, Sir?

18 Q. Just to be a law abiding productive member of society. Do

19 you have an opinion on that?

20 A. I don't understand that question, sorry.

21

1 Q. Well, do you think that he is likely to commit criminal
2 wrongdoing in the future?

3 A. No, Sir.

4 Q. And why not?

5 A. Because that is not the kind of person that he is.

6 Q. Next I would like to ask you if you have ever had the
7 occasion to talk with him about the Iraqi people?

8 A. Yes, Sir.

9 Q. About how he feels about them?

10 A. Roger, Sir.

11 Q. Well what did he tell you?

12 A. One day we just came back from a mission and I was mad
13 about something the Iraqi people did and I was talking to him about
14 it and he was like, "You can't be mad at all the Iraqi people,
15 because not all of them is doing wrong. We just have to come here
16 and give them help and everything should be fine."

17 ADC: Thank you PFC [REDACTED] (b)(6)-2

18 WIT: Yes, Sir.

19 TC: No questions, Your Honor.

20 MJ: Members of the panel, do you have any questions for PFC

21 [REDACTED]
22 (b)(6)-2

1 [Negative response from all members.]

2 MJ: Apparently not. Defense, permanent?

3 ADC: Yes, Ma'am.

4 [The witness was duly warned, permanently excused, and withdrew from

5 the courtroom.]

6 MJ: Defense?

7 ADC: Yes, Ma'am, if I may have 1 moment?

8 MJ: You may.

9 [Long pause.]

10 ADC: Ma'am, at this time I would request to read a letter from

11 the Accused's father to the panel.

12 MJ: You certainly may. Is it part of the exhibits?

13 ADC: No, Ma'am, it is not.

14 MJ: Have you seen it?

15 TC: No objections, Your Honor.

16 MJ: Okay, go ahead.

17 ADC: Colonel (b)(6)(b)(7)(C) members of the panel, PFC Richmond's father

18 is sitting right behind me. He is this gentleman [pointing to a man

19 in the gallery] right here in the blue shirt and he has asked me to

20 read this to you gentlemen today.

21

(S)(G)-2

1 ADC: "Dear jurors, my name is [REDACTED]. I
2 have traveled here at my own expense to be by my son's side at this
3 difficult time. My emotions will not allow me to get on the stand
4 and speak so please forgive me.

5 Our son is loved by family and friends. I own a small
6 heating and air conditioning business back in Louisiana. It looks
7 like sometimes a person tries to do what he concedes as right but it
8 turned out bad. Me, my wife, and my daughter love our son very much.
9 I would stay here and wait on him to take him back home if you found
10 that that was appropriate. Thank you for your time. [REDACTED]

11 [REDACTED] and family"

(S)(G)-2

12 One moment, Your Honor, please.

13 [Long pause.]

14 ADC: Ma'am, at this time PFC Richmond would like to make an
15 unsworn statement.

16 MJ: Would you like to do that from counsel table or from up
17 here on the stand.

18 DC: He would prefer to stand in the center of the room and
19 address the panel from there.

20 MJ: That is fine, you may PFC Richmond.

21

UNSWORN STATEMENT

PRIVATE FIRST CLASS [REDACTED] (S) (b)(1) (b)(2) the accused, stood and made the following unsworn statement:

ACC: Colonel [REDACTED] (S) (b)(1) (b)(2) and members of the panel, I accept the decision today that you have decided that I am guilty of voluntary manslaughter and I am sorry for everything that happened.

If I had known everything then that I knew now it wouldn't have happened and I am sorry that it had to come to this.

[The accused returned to counsel table.]

ADC: Nothing further.

MJ: Defense, anything further?

ADC: No, Ma'am, the defense rests.

MJ: Government, in rebuttal?

TC: No, Your Honor.

MJ: Okay, members of the panel, I need to have a court session with counsel to discuss my sentencing instructions with you. It is probably a good time for you all to hit the latrine and such.

What will happen, is we will come back and you will hear arguments by counsel, followed by my sentencing instructions. I am about the 90 percent solution, so I will try to give you the written instructions to take back with you, all right?

1 PRES: Yes, Your Honor.

2 MJ: All right.

3 PRES: Yes, Your Honor.

4 MJ: Court is in recess.

5 [The court-martial recessed at 1350, 5 August 2004.]

6 **[END OF PAGE]**

7

1 [The Article 39(a) session was called to order at 1350, 5 August
2 2004.]

3 MJ: Please be seated. The members of the panel have exited the
4 courtroom.

5 All right counsel, I intend to give the standard sentencing
6 instructions. I will instruct the maximum punishment as authorized
7 is reduction to the grade of E1, forfeiture of all pay and
8 allowances, confinement for 15 years, and a dishonorable discharge.

9 I will instruct on the types of punishment that they can
10 adjudge. I will not instruct on a fine.

11 As to Wheeler factors, I intend to state his age, 21, his
12 good military character as testified to by several witnesses, his
13 good duty performance since the events of 28 February 2004, that they
14 should take into consideration the duration of his pretrial
15 restriction, his GT score of 126, his education which includes a
16 general education diploma from high school.

17 I was confused defense, does he have a GED and a high
18 school diploma?

19 DC: Yes, Your Honor. He has a GED and he received a home
20 school diploma in order to join the military.

21

1 MJ: Roger. The fact that he is a graduate of both basic and
2 AIT, he is entitled to wear the medals and awards listed on
3 Prosecution Exhibit 15, his enlisted record brief, the lack of
4 previous convictions or Article 15 punishment. I will give the
5 unsworn testimony instruction.

6 Does either counsel intend to argue for a specific
7 sentence?

8 TC: Yes, the government is going to argue for a dishonorable
9 discharge and 8 years confinement.

10 MJ: All right, I will give that section, then. I will give the
11 concluding instructions. I will of course hand them Appellate
12 Exhibit XXIX.

13 Any requests for additional instructions or objections to
14 those that I have listed? Government?

15 TC: No, Your Honor. I do have a question though, in the bench
16 book you ask counsel what the maximum punishment is based on the
17 findings of the court. Will you be asking that on the record in
18 front of the panel?

19 MJ: No.

20 TC: Okay.

21

1 MJ: Defense?
2 ADC: No, Ma'am.
3 MJ: I mean, there is no issue is there?
4 TC: No, Ma'am.
5 MJ: Okay. All right. Court is in recess.
6 [The session adjourned at 1352, 5 August 2004.]
7 [END OF PAGE]
8

1 [The court-martial was called to order at 1403, 5 August 2004.]

2 MJ: Court is called to order. All parties present when the
3 court recessed are again present.

4 Trial counsel, you may present argument.

5 TC: An unarmed, flex-cuffed, noncombatant civilian, was
6 slaughtered on 28 February by PFC Edward Richmond.

7 Today he comes to you and says, "I'm sorry that it had to
8 come to this." Self-centered comment.

(b)(6)-4

9 What about [REDACTED], the man who can not be
10 here? He is dead because of the unlawful actions of Richmond.

11 How much is the life of a poor cow herder worth? What is
12 the value of his life? Maybe it doesn't mean much to Iraqis. Maybe
13 it doesn't mean much to Americans. Maybe it doesn't mean much to the
14 world, but I bet his life meant a lot to him.

(b)(6)-7

15 Mr. [REDACTED] was deprived of the opportunity to enjoy a free
16 Iraq. The fact that he was an Iraqi is not important in this case.
17 The fact that he was a human being is extremely important in this
18 case.

19 PFC Richmond, just like on 1 March, just a few minutes ago
20 in front of the panel, it was all about him. No remorse for killing
21 that other human being.

22

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1 TC: There is a sentencing guideline or sentencing issue called
2 "specific deterrence." It is where the sentencing authority can
3 sentence the person convicted of a crime to deter them from
4 committing future crimes. A way back to rehabilitation and not to
5 commit future crimes is through remorse, realizing what you have done
6 is wrong. Richmond has shown no remorse in front of you today.

7 In addition to no remorse, another specific deterrent issue
8 is along the lines of my argument, the government's argument to
9 confine him for a significant period of time. PFC Richmond should
10 not be allowed to carry a weapon, not only for the United States Army
11 again, but he should never be allowed to carry a weapon again, and he
12 needs some time to think about that.

13 The government is recommending 8 years confinement. The
14 specific deterrent is the main reason for that. He needs a lot of
15 time to think about what he has done. Give him an opportunity to
16 feel remorse, to realize that there is an innocent man that is dead
17 because of him.

18 There are other factors the government asks that you
19 consider during your sentence. One is the impact on the unit at
20 platoon level, starting at platoon level.

21

1 TC: The mortars platoon, you heard from Captain (b)(6)(b)(7)(C) [REDACTED] They
2 were outcasted. They were required to be retrained, and in Captain
3 (b)(6)(b)(7)(C) [REDACTED] opinion, he had good soldiers and his good soldiers were kept
4 out of the fight for a month because of Richmond's actions. They did
5 not need to be retrained. They were good soldiers.

6 Because they were kept out of the fight, and you have heard
7 testimony about the action that this particular battalion undergoes,
8 the battalion suffered, because they did not use this mortars platoon
9 outside of their FOB for that period of time.

10 The outcasted platoon has come back, but they have come
11 back without PFC Richmond. The impact on the unit at the company
12 level, you heard about from Captain (b)(6)(b)(7)(C) [REDACTED] Significant to him,
13 also significant to him, is that personal impact on him when his
14 daughter was asked if her father was a murderer. That means people
15 back in the United States think that HHC, 1-27 Infantry is band of
16 murderers.

17 That is a serious impact with huge implications on that
18 platoon, that battalion, the 2nd BCT of the 25th Infantry Division,
19 and the United States Army.

20

1 TC: General deterrence, unlike specific deterrence is geared
2 towards the outside population of whatever outside of the actual
3 criminal event. It is to deter other people from committing like or
4 similar crimes. PFC Richmond needs to be severely punished for the
5 general deterrence purposes as well.

6 The news of the severe punishment has to get out to the
7 soldiers that--that news being that American soldiers, and the world
8 needs to know this, that American soldiers, if they kill innocent,
9 unarmed, flex-cuffed, noncombatant civilians, then they will be
10 punished by the United States Army.

11 The government requests that you sentence him to a
12 dishonorable discharge, it is the higher level of discharges, and
13 send him to jail for 8 years.

14 MJ: Defense?

15 ADC: Thank you, Ma'am.

16 Colonel [REDACTED] (S)(G-2) members of the panel, the defense does
17 agree with one thing that the government said in its' sentencing
18 argument. The fact that Mr. [REDACTED] (S)(G-2) was an Iraqi was not important.
19 You heard testimony from PFC [REDACTED] (S)(G-2) that he had no ax to grind
20 against the Iraqi people.

21

1 ADC: He had no animosity towards the Iraqi people in general.
2 This incident as tragic and unfortunate as it is, is not dictated by
3 any sort of racism or hostility to the Iraqi people.

4 Up front I will say that the defense is arguing that you do
5 give PFC Richmond a punitive discharge in this case. We agree that
6 his ability to function as a U.S. Army Soldier, especially as an
7 infantryman.

8 He is permanently compromised by this incident. It is
9 highly doubtful that PFC Richmond will ever be able to confidently
10 pull a trigger again and it is, as this case has shown, his judgment
11 probably is not sufficient enough to trust him with that.

12 We agree with that, so if the panel thinks it appropriate
13 to discharge him from the Army, then again, the defense understands
14 the reasons for that and we agree that that may very well be an
15 appropriate course of action to take in this case.

16 We do not agree, however, that 8 years confinement or any
17 significant length of confinement is required in this case. I would
18 like to point to two specific aspects of the sentencing factors that
19 the military judge will instruct you on. The first, is the aspect of
20 deterrence, both specific and general.

21

1 ADC: Now the government has argued that specific deterrence,
2 which means deterrence of PFC Richmond requires that he get a stiff
3 jail sentence. Members of the panel, these circumstances are never
4 going to repeat themselves again in PFC Richmond's life. He is 21
5 years old and if he lives to be a 100 nothing like these
6 circumstances is ever going to occur again.

7 The circumstances of the crime are exactly what caused it
8 to happen. He is not a threat when he is back in American society
9 walking down the street. He is not a threat to commit future crimes.
10 He is not a threat as long as we don't put him again perhaps in this
11 kind of position again, but it will never repeat itself.

12 So for specific deterrence, PFC Richmond is never going to
13 commit this crime again. There is no reason to think that he will.

14 General deterrence, also does not apply for a lengthy jail
15 sentence in this case, if any jail sentence at all. Soldiers
16 understand that ROE is enforced at all levels. They understand that
17 they have to use good judgment when they use force and especially
18 deadly force.

19 I submit to you panel members, that having a court-martial
20 at all is deterrence. Giving a conviction, which we respect, for
21 voluntary manslaughter is deterrence.

22

1 ADC: Is it likely that any infantryman out there performing
2 missions who are aware of this case, are going to feel that they can
3 indiscriminately or with a lack of judgment use deadly force? I am
4 sure that they won't. So general deterrence does not require any
5 jail time and certainly not a lengthy amount of it.

6 Now I would like to shift focus to rehabilitation
7 potential. In this case I am talking about the rehabilitative
8 potential of PFC Richmond. Now members, you have not seen it yet,
9 but admitted into evidence is essentially a packet or a booklet which
10 tells you--it contains letters from friends and family of PFC
11 Richmond which contains information about his previous service, his
12 expert infantry badge, awards he has received, and things of that
13 nature.

14 Also, another packet also contains family photos and things
15 of that nature.

16 We ask that you look very carefully at that information
17 that is presented to you when you go back to deliberate. What that
18 will show you is a different side to PFC Richmond. Because right now
19 we know all the bad things about PFC Richmond and that is what the
20 government has put before you. The crime that he committed.

21

1 ADC: What we have tried to put out in sentencing is some of the
2 good things about PFC Richmond and there is a lot more of that in
3 those packets. What you will see, when you see the letters from his
4 friends and family is that this is a young man who frankly comes from
5 a good stock.

6 It is plain from the information contained in there that
7 the people who know him are people who are educated, people who are
8 thoughtful, and frankly, they were probably just good citizens. They
9 are the kind of people who can give him a support structure to return
10 to.

11 Now that you know that his father is important to him and
12 you heard his statement from his father that I read to you. His
13 father owns a small business in Louisiana.

14 In other words, PFC Richmond, when he--whenever the
15 military is through with him, when ever military custody is
16 relinquished, has a place to go. He has a support structure. He has
17 employment waiting for him. This is not a guy who is going to be on
18 the street and turn to a life of crime or anything to that nature.
19 This is a young man who after he has paid the price for his
20 misconduct, and after he has served whatever punishment you deem
21 appropriate, he will return to society.

22

1 ADC: He will have a productive meaningful life in American
2 society. So we ask that you consider that.

3 Now PFC Richmond and the statements that were attributed to
4 him were already made, which the government is construing as a lack
5 of remorse was simply PFC Richmond saying that under the
6 circumstances, he felt he did what he had to do.

7 The defense respects your verdict on that. We understand
8 your verdict on that. But please do not misunderstand that to mean
9 that he doesn't care that a man is dead or that he is certainly in
10 anyway happy about it.

11 Again, PFC (b)(6)-2 comments tell you that he is not
12 hostile to the Iraqi people. He is an infantryman. He is trained to
13 kill but he is only trained to kill hostiles, insurgents, and people
14 of that nature.

15 But again, I am not trying to gloss over the fact that he
16 committed voluntary manslaughter. We do respect your verdict. I
17 will simply conclude by asking you to consider the fact that
18 confinement is not required to deter PFC Richmond from committing
19 crimes in the future. It is not required to deter other soldiers in
20 similar situations in the future from committing this kind of
21 misconduct.

1 ADC: And, PFC Richmond is a young man who has all the potential
2 in the world to go on and contribute a lot to his family and to the
3 people around and we ask that you discharge him, send him on his way,
4 but allow him to return to his family and to his home as soon as
5 possible.

6 Thank you.

7 MJ: All right, members of the court, you are about to
8 deliberate and vote on the sentence in this case. It is the duty of
9 each member to vote for a proper sentence for the offense of which
10 the accused has been found guilty. Your determination of the kind
11 and amount of punishment, if any, is a grave responsibility requiring
12 the exercise of wise discretion.

13 Although you must give due consideration to all matters in
14 mitigation and extenuation, as well as to those in aggravation, you
15 must bear in mind that the accused is to be sentenced only for the
16 offense of which he has been found guilty.

17 You must not adjudge an excessive sentence in reliance upon
18 possible mitigating action by the convening or higher authority.

19 The maximum punishment that may be adjudged in this case is
20 reduction to the grade of E1, forfeiture of all pay and allowances,
21 confinement for 15 years, and a dishonorable discharge.

22

1 MJ: The maximum punishment is a ceiling on your discretion.

2 You are at liberty to arrive at any lesser legal sentence.

3 In adjudging a sentence, you are restricted to the kinds of
4 punishment which I will now describe or you may adjudge no
5 punishment. There are several matters which you should consider in
6 determining an appropriate sentence.

7 You should bear in mind that our society recognizes five
8 principal reasons for the sentence of those who violate the law.
9 They are rehabilitation of the wrongdoer, punishment of the
10 wrongdoer, protection of society from the wrongdoer, preservation of
11 good order and discipline in the military, and deterrence of the
12 wrongdoer and those who know his crime and his sentence from
13 committing the same or similar offense.

14 The weight to be given any or all of these reasons, along
15 with all other sentencing matters in this case, rests solely within
16 your discretion.

17 This court may adjudge a reprimand, being in the nature of
18 a censure. The court shall not specify the terms or wording of any
19 adjudged reprimand.

20

1 MJ: The court may adjudge reduction to the lowest or any
2 intermediate enlisted grade, either alone or in connection with any
3 other kind of punishment within the maximum limitation. A reduction
4 carries both the loss of military status and the incidents thereof
5 and results in a corresponding reduction of military pay. You should
6 designate only the pay grade to which the accused is to be reduced.
7 For example, E2.

8 I also advise you that any sentence of an enlisted soldier
9 in a pay grade above E1 which includes either of the following two
10 punishments will automatically reduce that Soldier to the lowest
11 enlisted pay grade E1 by operation of law.

12 The two punishments are:

13 One, a punitive discharge meaning in this case, either a
14 bad-conduct discharge or a dishonorable discharge;

15 Or two, confinement in excess of 6 months, if the sentence
16 is adjudged in months, or 180 days if the sentence is adjudged in
17 days.

18 Accordingly, if your sentence includes either a punitive
19 discharge or confinement in excess of 6 months or 180 days, the
20 accused will automatically be reduced to E1.

1 MJ: However, notwithstanding these automatic provisions if you
2 wish to sentence the accused to a reduction, you should explicitly
3 state the reduction as a separate element of the sentence.

4 This court may adjudge restriction to limits for a maximum
5 period not exceeding 2 months. For such a penalty, it is necessary
6 for the court to specify the limits of the restriction and the period
7 it is to run. Restriction to limits will not exempt an accused from
8 any assigned military duty.

9 This court may sentence the accused to hard labor without
10 confinement for a maximum period not exceeding 3 months. Such hard
11 labor would be performed in addition to other military duties, which
12 would normally be assigned. In the usual course of business, the
13 immediate commanding officer assigns the amount and character of the
14 hard labor to be performed.

15 As I have already indicated, this court may sentence the
16 accused to confinement for a maximum of 15 years. A sentence to
17 confinement should be adjudged in either full days or full months or
18 full years; fractions such as one-half or one-third should not be
19 employed. So for example, if you do adjudge confinement, confinement
20 for a month and a half should instead be expressed as confinement for
21 45 days. This example should not be taken as a suggestion, only an
22 illustration of how to properly announce your sentence.

23

1 MJ: In determining an appropriate sentence in this case, you
2 should consider that I have previously ruled that the accused will be
3 credited with 47 days credit against any punishment which includes a
4 term of confinement.

5 If you adjudge confinement as part of your sentence, those
6 days will be credited against any sentence to confinement you may
7 adjudge. This credit will be given by the authorities at the
8 correctional facility where the accused is sent to serve his
9 confinement, and will be given on a day by day--excuse me, day for
10 day basis.

11 This court may sentence the accused to forfeit all pay and
12 allowances. A forfeiture is a financial penalty which deprives an
13 accused of military pay as it accrues. In determining the amount of
14 forfeiture, if any, the court should consider the implications to the
15 accused of such a loss of income.

16 Unless a total forfeiture is adjudged, a sentence to a
17 forfeiture should include an express statement of a whole dollar
18 amount to be forfeited each month and the number of months the
19 forfeiture is to continue. The accused is in pay grade E3 with over
20 2 years of service, the total basic pay being \$1,495.50 per month.

21

1 MJ: If reduced to the grade of E2, the accused's total basic
2 pay would be \$1,337.70.

3 If reduced to the grade of E1, the accused's total basic
4 pay would be \$1,193.40.

5 This court may adjudge any forfeiture up to and including
6 forfeiture of all pay and allowances.

7 Any sentence which includes either, one, confinement for
8 more than 6 months, or two, confinement for 6 months or less and an
9 punitive discharge will require the accused, by operation of law, to
10 forfeit all pay and allowances during the period of confinement.

11 However, if the court wishes to adjudge any forfeitures of
12 pay and or pay and allowances, the court should explicitly state the
13 forfeiture as a separate element of the sentence.

14 The stigma of a punitive discharge is commonly recognized
15 by our society. A punitive discharge will place limitations on
16 employment opportunities and will deny the accused other advantages
17 which are enjoyed by one whose discharge characterization indicates
18 that he has served honorably.

19 A punitive discharge will affect an accused's future with
20 regard to his legal rights, economic opportunities, and social
21 acceptability.

22

1 MJ: This court may adjudge no discharge or this court may
2 adjudge either a dishonorable discharge or a bad-conduct discharge.
3 Such a discharge deprives one of substantially all benefits
4 administered by the Department of Veterans Affairs and the Army
5 establishment.

6 A dishonorable discharge should be reserved for those who,
7 in the opinion of the court, should be separated under conditions of
8 dishonor after conviction of serious offenses of a civil or military
9 nature warranting such severe punishment.

10 A bad-conduct discharge is a severe punishment, although
11 less severe than a dishonorable discharge, and may be adjudged for
12 one, who in the discretion of the court, warrants severe punishment
13 for bad conduct.

14 Finally, if you wish, this court may sentence the accused
15 to no punishment.

16 In selecting a sentence, you should consider all matters in
17 extenuation and mitigation as well as those in aggravation, whether
18 introduced before or after your findings.

19 Thus, all the evidence you have heard in this case from
20 yesterday and today is relevant on the subject of sentencing.

21

1 MJ: You should consider evidence admitted as to the nature of
2 the offense of which the accused stands convicted, plus:
3 His age, he is 21;
4 The accused's good military character as testified to by
5 several witnesses;
6 The accused's good duty performance since the events of 28
7 February 2004;
8 The duration of his pretrial restriction;
9 The accused's GT score of 126;
10 The accused's education, which includes a general education
11 diploma and a home school high school diploma;
12 That the accused is a graduate of Basic Training and AIT;
13 That he is entitled to wear the medals and awards listed on
14 Prosecution Exhibit 15, his enlisted record brief; and
15 The lack of previous convictions or Article 15 punishment.
16 The court will not draw any adverse inference from the fact
17 that the accused has elected to make a statement which was not under
18 oath. An unsworn statement is an authorized means for an accused to
19 bring information to the attention of the court, and must be given
20 appropriate consideration.

21

017775

1 MJ: The accused can not be cross-examined by the prosecution or
2 interrogated by court members or me upon an unsworn statement, but
3 the prosecution may offer evidence to rebut statements of fact
4 contained in it.

5 The weight and significance to be attached to an unsworn
6 statement rests within the sound discretion of each court member.
7 You may consider that the statement is not under oath, its inherent
8 probability or improbability, whether it is supported or contradicted
9 by evidence in the case, as well as any other matter that may have a
10 bearing on its credibility. In weighing an unsworn statement, you
11 are expected to use your common sense and your knowledge of human
12 nature and the ways of the world.

13 During argument, counsel recommended that you consider a
14 specific sentence in this case. You are advised that the arguments
15 of counsel and their recommendations are only their individual
16 suggestions and may not be considered as the recommendation or
17 opinion of anyone other than such counsel.

18 When you close to deliberate and vote, only the members
19 will be present. I remind you that you all must remain together in
20 the deliberation room during deliberations.

21

1 MJ: I also remind you that you may not allow any unauthorized
2 intrusion into your deliberations. You may not make communications
3 to or receive communications from anyone outside the deliberations
4 room, by telephone or otherwise.

5 Should you need to take a recess or have a question, or
6 when you have reached a decision, you may notify the bailiff, who
7 will then notify me of your desire to return to open court to make
8 your desires or decision known.

9 Your deliberations should begin with a full and free
10 discussion on the subject of sentencing. The influence of
11 superiority in rank will not be employed in any manner to control the
12 independence of members in the exercise of their judgment.

13 When you have completed your discussion, then any member
14 who desires to do so may propose a sentence. You do that by writing
15 out on a slip of paper a complete sentence. The junior member
16 collects the proposed sentences and submits them to the president,
17 who will arrange them in order of their severity.

18 You then vote on the proposed sentences by secret written
19 ballot. All must vote; you may not abstain. Vote on each proposed
20 sentence in its entirety, beginning with the lightest, until you
21 arrive at the required concurrence, which again is two-thirds or
22 seven members.

23

017777

1 MJ: A sentence which includes confinement in excess of 10 years
2 requires the concurrence of three-fourths, or in this case, eight
3 members.

4 The junior member will collect and count the votes. The
5 count is then checked by the president who shall announce the result
6 of the ballot to the members. If you vote on all the proposed
7 sentences without arriving at the required concurrence, you may then
8 repeat the process of discussion, proposal of the sentences and
9 voting. But once a proposal has been agreed to by the required
10 concurrence, then that is your sentence.

11 You may reconsider your sentence at any time prior to its
12 being announced in open court. If after you determine your sentence,
13 any member suggests you reconsider the sentence, open the court and
14 the president should announce that reconsideration has been proposed
15 without reference to whether the proposed reballot concerns
16 increasing or decreasing the sentence. I will give you specific
17 instructions on the procedure for reconsideration.

18 As an aid in putting the sentence in proper form, the court
19 may use the sentence worksheet marked Appellate Exhibit XXIX.

20 Trial counsel, would you hand this to Colonel [REDACTED]?

21 [The trial counsel did as directed.]
22

b(6)-2

1 MJ: Sir, that sets forth the various options that you have, and
2 again, if you would cross out any portions that are not applicable so
3 that I may review it and determine that it is in proper format. All
4 right?

5 Extreme care should be exercised in using the worksheet and
6 in selecting the sentence form which properly reflects the sentence
7 of the court. If you have any questions concerning sentencing
8 matters, you should request further instructions in open court in the
9 presence of all parties to the trial.

10 In this connection, you are again reminded that you may not
11 consult the Manual for Courts-Martial or any other publication in
12 writing or writing not properly admitted or received during this
13 trial.

14 These instructions must not be interpreted as indicating an
15 opinion as to the sentence which should be adjudged, for you alone
16 are responsible for determining an appropriate sentence in this case.

17 In arriving at your determination, you should select the
18 sentence which will best serve the ends of good order and discipline,
19 the needs of this accused, and the welfare of society. When the
20 court has determined a sentence, the inapplicable portions of the
21 sentence worksheet should be lined through.

22

1 MJ: When the court returns, I will examine the sentence
2 worksheet. The president will then announce the sentence.
3 Do counsel object to the instructions as given or request
4 any other instructions?
5 TC: No, Your Honor.
6 ADC: No, Ma'am.
7 MJ: Does any member of the court have any questions?
8 [Negative response from all members.]
9 MJ: Apparently not.
10 Sir, again, if you desire a recess during your
11 deliberations we must formally come back, convene the court, and then
12 recess. Do you wish a brief recess before we start, or are you ready
13 to go?
14 PRES: No, Ma'am.
15 MJ: Ready to go. All right.
16 (S)(61-2 Trial counsel, come and give all of these to Colonel
17 [REDACTED] please.
18 [The trial counsel did as directed.] (S)(61-2
19 MJ: The other notebooks that you have Captain [REDACTED] can the
20 bailiff bring them in?
21 DC: Yes, Your Honor.
22

1 MJ: All right. Sir, again, please don't mark on the exhibits
2 and bring everything back with you when you return.
3 Court is closed.
4 [The court-martial closed at 1435, 5 August 2004.]
5 [The court-martial opened at 1608, 5 August 2004.]
6 MJ: Court is called to order. All parties present when the
7 court recessed are again present.
8 Sir, have you reached a sentence in this case?
9 PRES: We have, Your Honor.
10 MJ: Is it reflected on the sentence worksheet?
11 PRES: It is, Your Honor.
12 MJ: All right, bailiff, would you please get that from Colonel
13 (b)(6)-2 and hand it to me, please?
14 [The bailiff did as directed and the MJ examined AE XXIX.]
15 MJ: Please hand that back to Colonel (b)(6)-2
16 [The bailiff did as directed.]
17 MJ: I have reviewed the sentence worksheet and it appears to be
18 in proper form. PFC Richmond, counsel, please rise.
19 [The accused and his counsel did as directed.]
20 MJ: Sir, please announce the sentence.
21

1 PRES: Private First Class Edward L. Richmond, Jr., this
2 court-martial sentences you:

3 **To be reduced to the grade of E1;**
4 **To forfeit all pay and allowances;**
5 **To be confined for 3 years; and**
6 **To be dishonorably discharged from the service.**

7 MJ: Please be seated.

8 [The accused and his counsel did as directed.]

9 MJ: Sir, are those all of the exhibits right there in front of
10 you?

11 PRES: They are, Your Honor.

12 MJ: All right. Members of the panel, before I excuse you, let
13 me advise you of one matter. If you are asked about your service on
14 this court-martial, I remind you of the oath that you took yesterday
15 morning. Essentially, that oath prevents you from discussing your
16 deliberations with anyone, to include stating any member's opinion or
17 vote, unless ordered to do so by a court.

18 You may of course discuss your personal observations of the
19 courtroom, what happened in open court, this was a public trial, how
20 the process of a court-martial functions, or anything else that
21 occurred in open court, just not what occurred during your closed-
22 session deliberations. Clear?

23

1 PRES: Clear, Ma'am.

2 MJ: All right. Thank you very much for your attendance and
3 service. You are excused.

4 [The members withdrew from the courtroom.]

5 MJ: Please be seated.

6 [All parties did as directed.]

7 MJ: The members have departed the courtroom. All other parties
8 are present.

9 As a reminder, PFC Richmond, you will be credited with 47
10 days of pretrial confinement against your term of confinement.

11 I have received Appellate Exhibit XXXI. It is entitled
12 Post-Trial and Appellate Rights and dated 5 August 2004. PFC
13 Richmond, do you have a copy of this document?

14 ACC: Yes, Ma'am.

15 MJ: I see your initials on page three, the information on the
16 bottom regarding your father's address. Is that your signature above
17 your signature block?

18 DC: Your Honor, he has unsigned copy in front of him, but if
19 you inquire further, he will indicate that he signed it today.

20 MJ: Right. The copy I have got has a signature. Can you see
21 it [holding up AE XXXI] from there?

22 ACC: I can't see it from here, Ma'am, but I did sign one
23 earlier, Ma'am.


1 MJ: All right, are you satisfied that that is your signature?
2 ACC: Yes, Ma'am.
3 MJ: Now did you go over this and read this before you signed
4 it?
5 ACC: Yes, Ma'am.
6 MJ: And did you go over this carefully with Captain [REDACTED]
7 ACC: Yes, Ma'am. (b)(6)-2
8 MJ: Do you have any questions at all about your rights, post-
9 trial or on appeal?
10 ACC: No, Ma'am. (b)(6)-2
11 MJ: Captain [REDACTED] I assume that because your signature is
12 on here, that you will be responsible for post-trial matters?
13 DC: Yes, Your Honor.
14 MJ: Are there any other matters that we can take up before this
15 court adjourns?
16 TC: No, Your Honor.
17 DC: No, Your Honor.
18 MJ: Court is adjourned.
19 [The court-martial adjourned at 1612, 5 August 2004.]

AUTHENTICATION OF RECORD OF TRIAL

IN THE CASE OF

United States versus PFC Edward L. Richmond, Jr.


I received the completed record of trial for review and authentication on
27 October 2004.

 (S)161-2
LTC, JA
Military Judge


6 December 2004

ACKNOWLEDGEMENT OF RECEIPT AND EXAMINATION

I received the record of trial for review in the foregoing case on
18 September 2004.

 (S)161-2
CPT, JA
Defense Counsel

_____ 20 ____
The record of trial was served on defense counsel on _____ 20 _____. After
verifying receipt with defense counsel on _____ 20 ____ and conferring with the
military judge on review by defense counsel on _____ 20 ____, the record was
forwarded for authentication without completion of the defense counsel's review.

 (S)161-2
CPT, JA
Chief, Military Justice

ACTION

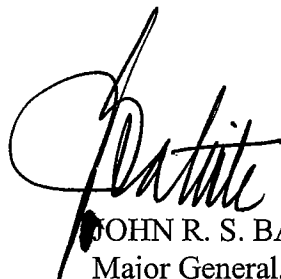
DEPARTMENT OF THE ARMY

Headquarters, 1st Infantry Division

APO AE 09036

In the case of Private First Class Edward L. Richmond, Jr., 434-57-0403, U.S. Army,
Headquarters and Headquarters Company, 1st Battalion, 27th Infantry Regiment, APO AE 09347,
the sentence is approved and, except for that part of the sentence extending to a dishonorable
discharge, will be executed. The accused will be credited with 47 days of confinement against
the sentence to confinement.

APR 15 2005



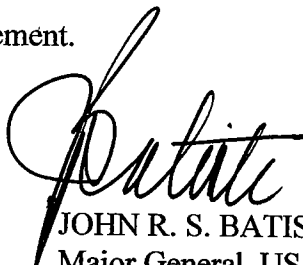
JOHN R. S. BATISTE
Major General, USA
Commanding

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ACTION

DEPARTMENT OF THE ARMY
Headquarters, 1st Infantry Division
APO Army Europe 09392

In the case of Private First Class Edward L. Richmond Jr., 434-57-0403, U.S. Army,
Headquarters and Headquarters Company, 1st Battalion, 27th Infantry Regiment, APO Army
Europe 09347, the sentence is approved and, except for that part of the sentence extending to a
dishonorable discharge, will be executed. The accused will be credited with 47 days of
confinement against the sentence to confinement.


JOHN R. S. BATISTE
Major General, USA
Commanding

FEB 14 2005

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