



DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
TIKRIT NORTHERN FIELD OFFICE
COB SPEICHER, IRAQ



REPLY TO
ATTENTION OF:

FICI-JA-TNO

07 September 2006

MEMORANDUM FOR Commander, 3d Battalion, 187th Infantry Regiment, 3d Brigade Combat Team, 101st Airborne Division (Air Assault), FOB Brassfield-Mora, Iraq, APO AE 09349

SUBJECT: Objection to the Denial of Defense Request for Production of Witness

1. In accordance with Rules for Court-Martial (R.C.M.)405(j)(4) the Defense hereby objects to the Investigating Officer's refusal to produce the following witnesses: LTC Nathaniel Johnson Jr., MAJ Stephen Harms; CDR Charles Cavaiani; LCDR Patricia Melsen; LCDR Karen Karadimov; DC1(SW) Marco King; MA2 Michelle Behl; CMA Joseph A. Nace; and MACM(AW) Donaldson.
2. Defense submitted an additional witness request via email on 23 July 2006 requesting LTC Johnson and MAJ Harms' production. (Enclosure 1). Although the IO listed a 20 July 2006 deadline for witness lists, the Government requested an additional witness that same day. It is important to note the IO granted the Government's witness and denied the Defense's.
3. Per R.C.M. 405(g)(1)(A), "any witness whose testimony would be relevant to the investigation and not cumulative, shall be produced if reasonably available." Military Rules of Evidence 401 defines "relevant evidence," as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."
4. With respect to the denial of LTC Johnson as a witness, this testimony was wholly relevant. In addition, within the meaning of R.C.M. 405(g)(1)(A), LTC Johnson should have been deemed "reasonably available" because he was located at the same place as the majority of witnesses who convoyed up to the Article 32(b) investigation.
 - a. First, as proffered by Defense LTC Johnson was the Convening Authority and appointed LTC Daniel as the IO. It causes some concern that a Battalion Commander appointed a Division Staff Officer as the IO. For this reason, the Defense requested LTC Johnson be listed as a witness in order for the Defense to ferret out under what authority LTC Daniel was appointed. This request was denied. To that end, LTC Johnson was briefly questioned by the Defense on 27 July 2004 at FOB Brassfield-Mora. LTC Johnson indicated that he did not know who LTC Daniel was, and had no idea how his name came across his desk. Further, LTC Johnson indicated that he believed MAJ Don Lobeda from Division JAG informed him of LTC Daniel, and further drafted the appointment memorandum for LTC Johnson's signature. It is of paramount concern to the Defense under what auspices LTC Daniel was appointed. It appears that an Unlawful Command Influence issue exists. However, without the opportunity to question LTC Johnson at the Article 32(b) investigation regarding the mechanics behind his appointing an officer of the same rank independent of his own chain of command and supervisory authority, Defense has been unable to meaningfully explore this issue. This testimony cannot be considered cumulative because LTC Johnson is the best person to

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SUBJECT: Objection to the Denial of Defense Request for Production of Witnesses.

discuss his appointment of the IO. Therefore, the denial to produce him as a witness hindered the ability of the defense to gain meaningful discovery, one of the chief aims of an Article 32(b) investigation.

b. Second, because his testimony would have been relevant, as discussed above, LTC Johnson should have been produced because he was, at the time of the Article 32(b) investigation, "reasonably available" within the context of R.C.M. 405(g)(1)(A). LTC Johnson is the Commander of 3d Battalion, 187th Infantry Regiment, 3d Brigade Combat Team, 101st Airborne Division (Air Assault), and is located at FOB Brassfield-Mora, Iraq. The majority of the witnesses presented came from that FOB, and convoyed up to COB Speicher. Additionally, aircrafts fly between the two locations daily. There would have been no additional expense or delay in producing him. Though Defense understands the necessity of mission accomplishment, particularly in a deployed environment; concessions could have been made to limit his removal from his duties.

5. With respect to the denial of MAJ Stephen Harms as a witness, this testimony was wholly relevant. In addition, within the meaning of R.C.M. 405(g)(1)(A), MAJ Harms should have been deemed "reasonably available" because he was at COB Speicher, and in fact, attended the Article 32(b) investigation.

a. First, MAJ Harms is the Brigade Judge Advocate and advises COL Steele on all legal matters. It is logical to conclude that MAJ Harms discussed aspects of Operation Iron Triangle with COL Steele, including the Rules of Engagement (ROE). It is also logical to conclude that MAJ Harms discussed the necessity of an AR 15-6 Investigation and the results there from with COL Steele. As the legal advisor to COL Steele, MAJ Harms is a unique witness because he may have had some involvement in drafting the ROE for the operation. He may also be able to provide evidence that other senior leaders had visibility on the ROE for this mission. This could potentially affect the preferral chain, and ultimately require a different General Court Martial Convening Authority. It is the right of the Defense to present any matters in extenuation or mitigation at the Article 32(b) investigation. Further, it is the right of the Defense to use the Article 32(b) investigation as a tool for discovery. This testimony would not be cumulative because MAJ Harms is the only witness who could testify about his actions regarding the ROE.

b. Second, because his testimony would have been relevant as elucidated above, MAJ Harms should have been produced, because he was "reasonably available." This is most easily evidenced by his physical presence at the Article 32(b) Investigation. There would have been no additional expense or delay in producing him. Likewise, the Defense would have been amenable to making concessions which would limit the time necessary for MAJ Harms to be away from his duties.

6. With respect to the denial of the production of: CDR Charles Cavaiani, LCDR Patricia Melsen; LCDR Karen Karadimov; DC1(SW) Marco King; MA2 Michelle Behl; CMA Joseph A. Nace; and MACM(AW) Donaldson the IO determined that their testimony was relevant. However, the IO declared these witnesses "unavailable," and therefore ordered their testimony be received telephonically. Defense objected and requested the witnesses be ordered to physically appear. The witnesses were all stationed in Arifjan, Kuwait. All witnesses were military personnel. Flights go in and out of that location daily, and there is no reason to believe these witnesses could not have easily been manifested on one of those flights. The IO did not get the benefit of observing these witnesses in person, and is only judging the credibility of these witnesses by their telephonic statements. PFC

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SUBJECT: Objection to the Denial of Defense Request for Production of Witnesses.

Clagett has a sixth amendment constitutional right to confront the witnesses against him.

7. POC is the undersigned at VoIP 242-1933 or sasha.rutizer@us.army.mil

Encl.

1. Email traffic dated 23 July


SASHA N. RUTIZER
CPT, JA
Defense Counsel

Sasha Rutizer

From: kevin.m.hynes@us.army.mil
Sent: Sunday, July 23, 2006 7:22 PM
To: joseph.b.mackey@us.army.mil
Cc: james-daniel@us.army.mil; sasha.rutizer@us.army.mil; jerome.duggan@us.army.mil; chris@bergrin-firm.com; 'Fischbach, William M III CPT USJFCOM FORSCOM'; 'Haarer, Scott R SFC USA FORSCOM'
Subject: Re: witness list

Sir:

With all due respect, the defense has the right to question you about your qualifications to be an IO and any potential biases that you may have, how and by whom you were appointed, and to ask questions of the person who appointed you, especially in this case where it appears that you were appointed by someone of the same rank who is outside your chain of command.

CPT Mackey is correct to the limited extent that he says that LTC Johnson, MAJ Sullivan and MAJ Harms have been available for questioning. However, there is a big difference between defense counsel asking these witnesses questions on their own and having them questioned on the record in an Article 32 hearing, especially one where there is going to be a verbatim transcript of all testimony. To the best of my knowledge, the defense has not objected to any proposed witnesses by the government and the only witness you have objected to are defense witnesses. If convicted at court-martial, SSG Girouard, SPC Hunsaker, SPC Graber and PV2 Clagett could possibly be sentenced to death. It does not seem unreasonable to me that the Investigating Officer should err on the side of inclusion when it comes to requested witnesses, especially witnesses requested by the defense.

V/R,

CPT Kevin Hynes

Defense Counsel
FOB Warrior, Iraq
DSN 318-444-2273

----- Original Message -----

From: joseph.b.mackey@us.army.mil
Date: Sunday, July 23, 2006 6:38 pm
Subject: Re: witness list

> Sir,
> The government renews its objection to produce the below three
> witnesses.
> LTC Johnson - Matters concerning LTC Johnson's authority and decision
> to appoint you as the IO are not those that fall within the scope of
> the Article 32 investigation. As stated in RCM 405(e), "the scope of
> the investigation is to inquire into the truth and form of the
> charges, and such other matters as may be necessary to make a
> recommendation as to the disposition of the charges." All defense
> counsel have LTC Johnson's contact information and can inquire into
> the appointment and address this issue to an appropriate forum. And
> again, LTC Johnson can provide neither relevant nor noncumulative
> testimony concerning the truth of the charges.
>
> MAJ Sullivan - It appears MAJ Sullivan is being asked to
> inappropriately testify concerning his opinion about the truth of the
> charges. All defense counsel have had the opportunity to question MAJ
> Sullivan prior to this Article 32 and present evidence based off of
> his investigation. The unclassified findings and recommendations
> portion will also be provided to the defense (if not already
> provided).
>

> MAJ Harms - Government agrees that his role as a JA would not exempt
> him from testifying, in the event he actually had first- hand
> information surrounding the events being investigated. He was not on
> the objective, never saw the dead bodies, and any testimony he may
> provide about the dead bodies would be second hand knowledge that was
> gained from other witnesses. Therefore, his testimony concerning this
> would be cumulative and marginally relevant. Furthermore, any
> testimony concerning why the original
> 15-6 was initiated and advice to COL Steele does not go toward the
> truth of the charges and would again be cumulative and marginally
> relevant. Like MAJ Sullivan, MAJ Harms has been available for contact
> by defense to gather any information he may have that is relevant to
> this case that may be presented at the Article 32 hearing.

> The government requests continued denial of the above requested
> witnesses unless the defense is able to make a more specific showing
> that their testimony is both relevant and noncumulative.

> v/r,
> CPT Mackey

> Joseph B. Mackey
> CPT, JA
> Trial Counsel
> 3rd BCT, 101 ABN DIV (AASLT)
> VOIP 673-0172
> joseph.mackey@bct3.army.smil.mil

> ----- Original Message -----
> From: sasha.rutizer@us.army.mil
> Date: Sunday, July 23, 2006 5:15 pm
> Subject: witness list

> > Sir,

> > I would request that LTC Johnson, MAJ Sullivan, and MAJ Harms be
> > produced.

> > LTC Johnson- the accused has every right to know how, why, and
> > under what authority the 32 investigating officer was appointed.

> > Since LTC Johnson appointed the 32 IO, he is the most
> > appropriate

> > witness to discuss his actions. His testimony is relevant and
> > necessary, and cannot be considered cumulative.

> > MAJ Sullivan- he conducted the original 15-6 investigation, and
> > ultimately found no fault on the part of those now accused. He was
> > hand selected by COL Steele, and conducted a very thorough
> > investigation. For those reasons, he is the most appropriate
> > witness to discuss his actions. Further, his testimony cannot
> > be

> > considered cumulative, because he is the only person who can discuss
> > what he was thinking at the time he made his findings

> > and
> > recommendations. This testimony is extremely relevant, and it needs
> > to be considered.

> > MAJ Harms- he is the Brigade Judge Advocate, and can give testimony
> > related to what he saw and heard about the bodies.
> > Moreover, he and he alone can discuss why he thought it was
> > necessary for the original 15-6 investigation. Further, his unique
> > perspective as a judge advocate is extremely relevant to these
> > proceedings, because he ultimately advised COL Steele
> > about

> > these matters. Moreover, his role as a judge advocate does not
> > exempt him from these proceedings and his testimony is important to
> > consider.

> >
> > "At the investigation full opportunity shall be given to the accused
> > to ...present anything he may desire in his own behalf, either in
> > defense or mitigation, and the investigation officer shall examine
> > available witnesses requested by the accused."
> > Emphasis added. Article 32 MCM (2005 ed)
> >
> > I ask you to consult with your legal advisor, and approve these
> > witnesses.
> >
> > V/R
> >
> > Sasha N. Rutizer
> > CPT, JA
> > Trial Defense Counsel
> > COB Speicher, Iraq
> >
>



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COB SPEICHER, IRAQ



REPLY TO
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FICI-JA-TNO

07 September 2006

MEMORANDUM FOR Commander, 3d Battalion, 187th Infantry Regiment, 3d Brigade Combat Team, 101st Airborne Division (Air Assault), FOB Brassfield-Mora, Iraq, APO AE 09349


SUBJECT: Objection to the Investigating Officer's Admission of Evidence

1. In accordance with Rules for Court-Martial (R.C.M.) 405(j)(4) the Defense hereby objects to the Investigating Officer's improper admission of an unsworn statement against PFC Clagett. On 9 August 2006, the Article 32(b) Investigation was re-opened to take issue with the additionally preferred charges against PFC Clagett. Over the Defense objection, the Investigating Officer (IO) allowed an unsworn statement of PFC Clagett to be admitted as evidence.

2. PFC Clagett went in front of a Disciplinary Adjustment Board for his alleged disrespectful behavior to DC1(SW) King, and MA2 Behl at the Theater Field Detention Facility. MACM(AW) Donaldson sat as the board, and found that by PFC Clagett's own written statement the disrespect charges to DC1(SW) King were true. In the Article 32(b) Investigation, MACM(AW) Donaldson admitted that he did not read PFC Clagett his rights under Article 31 U.C.M.J. before questioning him. He further acknowledged that he was aware that he was required to read PFC Clagett his rights when asking any questions which might tend to illicit and incriminating response. MACM(AW) Donaldson acknowledged that he has spent the last nineteen years as a law enforcement officer. PFC Clagett wrote an unsworn statement, which was admitted at the Board. It is this unsworn statement that the IO improperly admitted as evidence at the Article 32(b) Investigation.

3. Rules for Court-Martial (RCM) 405(g)(4)(B)(v) states that an unsworn statement may be considered over the objection of Defense only in "time of war." Defense counsel made a timely objection to the admission of this evidence citing the above rule. The IO acknowledges that this statement is unsworn in his Findings and Recommendations. The IO further acknowledges that PFC Clagett was not read his Article 31(b) rights. When Defense counsel objected and cited the rule, the IO asked why Defense counsel did not consider this a time of war. Defense counsel aptly responded that Congress had not declared war, therefore Operation Iraqi Freedom must be considered an operation other than war. To that end, the RCM is clear that an unsworn statement cannot be admitted over defense objection. The IO erred in admitting this document, and wrongfully based his recommendation to forward that charge to a General Court-Martial based on this tainted evidence.

4. POC is the undersigned at VoIP 302-242-1933 or sasha.rutizer@us.army.mil


SASHA N. RUTIZER
CPT, JA
Defense Counsel



DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
TIKRIT NORTHERN FIELD OFFICE
COB SPEICHER, IRAQ



REPLY TO
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07 September 2006

MEMORANDUM FOR Commander, 3d Battalion, 187th Infantry Regiment, 3d Brigade Combat Team, 101st Airborne Division (Air Assault), FOB Brassfield-Mora, Iraq, APO AE 09349

SUBJECT: Objection to the Denial of Defense Request for Delay

1. In accordance with Rules for Court-Martial (RCM) 405(j)(4) the defense hereby objects to the Investigating Officer (IO) denying the Defense Request for Delay dated 24 June 2006. (Enclosure 1) The Defense objects to the said denial for the following reasons: defense counsel was not given adequate time to prepare for a case of this magnitude; defense counsel was not given adequate time to develop evidence of extenuation and mitigation; defense was not given adequate time to interview the Iraqi Army witnesses.

2. Defense counsel was not given adequate time to prepare for a case of this magnitude.

a. PFC Clagett was placed in pretrial confinement by his Company Commander on or around 15 June 2006. Military Defense counsel (MDC) was detailed to this case on 16 June 2006 by CPT Megan Shaw, Senior Defense Counsel. Charges were preferred against PFC Clagett on 18 June 2006. During preparation for the Article 32(b) investigation, PFC Clagett remained in confinement at the Theater Field Detention Facility (TFDF) in Arifjan, Kuwait. On 6 July, MDC traveled to Arifjan to meet with PFC Clagett and discuss the upcoming Article 32(b) investigation. On or around 12 July, PFC Clagett retained Mr. Paul Bergrin as his civilian defense counsel (CDC). Due to the geographic differences, the only way for MDC or CDC to discuss issues with PFC Clagett was via telephone. MDC had great difficulty reaching PFC Clagett due to the poor communication set up in the Iraqi Theater of Operations. Phone calls would be interrupted, dropped, or just plain inaudible. Discussing the nuances of this case became increasingly impossible. Further, CDC was only able to contact PFC Clagett if PFC Clagett called him. To that end, PFC Clagett was required to fill out a DA Form 510 and request permission through the TFDF to speak with his attorney. This request generally takes up to 72 hours to be processed. PFC Clagett's ability to help his Defense counsel prepare was extremely impaired by his being confined in another Country and the poor communication set-up. CDC traveled from the United States to Iraq in order to represent PFC Clagett at the Article 32(b) investigation. The Government failed to give CDC the correct paperwork to allow him to travel from Kuwait to Iraq. Due to this error, CDC was delayed in his arrival to Iraq by at least 1 day. Therefore, CDC was only able to meet with PFC Clagett for approximately 1 hour before the Article 32(b) investigation because the IO would not allow for additional time after CDC landed at COB Speicher.

b. On 21 July 2006, MDC traveled with Trial Counsel and CID to the alleged crime scene. Personnel were on the scene for approximately thirty to forty-five minutes before returning to COB Speicher. Defense was not afforded the opportunity to visit the crime scene on its own, and had to share the scene with both trial counsel and CID. This short visit did not provide the Defense adequate time to properly canvass the scene and conduct an investigation. Further, CDC was not

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SUBJECT: Objection to the Denial of Defense Request for Delay

afforded an opportunity to visit the crime scene. It is necessary for the Defense to be able to reconstruct the events of 9 May 2006 in order to properly mount a defense. The ability to properly view and canvass the alleged crime scene would have been possible if the IO granted the Defense's original request for delay.

c. The Government continued to present new information to the Defense up until the eve of the Article 32(b) investigation. The final CD Roms of information were not presented to the Defense until 27 July 2006. (Enclosure 2) These CDs came with hundreds of pages of new information and critical documentary evidence. Had the IO granted the Defense request for delay, Defense would have had ample opportunity to review the evidence and prepare for its introduction to the IO.

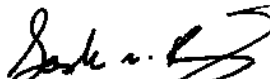
3. Defense counsel was not given adequate time to develop evidence of extenuation and mitigation. Had the Investigating Officer granted the Defense request for a ninety day delay, the Defense would have had the opportunity to develop evidence of extenuation and mitigation. Defense would have been able to consult with experts, gain valuable knowledge, and been able to present that evidence to the IO. An accused is permitted, under R.C.M. 405(f)(11), to present anything in extenuation or mitigation for consideration by the IO. The IO was charged with making recommendations as to whether the death penalty should be sought in the case against PFC Clagett under R.C.M. 1004. This enormous responsibility and the complexity of this case should have convinced the IO that this case demanded the proper time. The IO refused to grant the delay and forced the Defense to present the only evidence it had at the time. Had the IO granted the delay, Defense could have presented evidence to the IO to convince him not to recommend the death penalty.

4. There were two Iraqi Army witnesses called to testify. The Defense was only allowed to speak with them a few hours before they testified. Further, the Defense was only able to meet with its interpreter minutes before the interviews. It is apparent through the reading of the Article 32(b) transcripts that there was much difficulty interviewing these witnesses. Had the Defense been given more time to speak with the Iraqi Army witnesses the Defense could have ferreted out the inconsistencies and presented evidence to impeach the witnesses. These witnesses were completely within the control of the Government. The Defense had no access to these witnesses, and had to completely rely on the Government to produce them. The Defense requested to have the witnesses brought up earlier, however, that request was summarily denied. It is plausible that the few hours Defense was able to speak with the Iraqi witnesses will be the only time to do so. It is foreseeable that the Government will seek to declare these witnesses unavailable for purposes of the court-martial. To that end, the Defense should have been given more than a few hours the day of the investigation to interview these potentially important witnesses.

5. POC is the undersigned at VoIP 302-242-1933 or sasha.rutizer@us.army.mil

2 Encls.

1. Request for Delay
2. Email dated 27 July 2006


SASHA N. RUTIZER
CPT, JA
Defense Counsel



DEPARTMENT OF THE ARMY
UNITED STATES ARMY TRIAL DEFENSE SERVICE
COB SPEICHER, REGION IX
IRAQ APO AE 09393

REPLY TO
ATTENTION OF:

FICI-JA-TNO

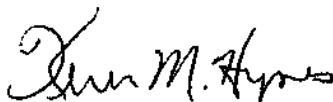
24 June 2006


MEMORANDUM THRU Trial Counsel, 3rd Brigade Combat Team, 101st Airborne Division (Air Assault),
Contingency Operating Base Speicher, Iraq 09393

FOR Article 32 Investigating Officer, U.S. v. Hunsaker and U.S. v. Clagett

SUBJECT: Request for Delay of Article 32 Hearing

1. The Defense requests to delay the Article 32 hearing for 90 days.
2. The delay is requested for the following reasons:
 - a. The Defense has been notified that in excess of one hundred witnesses may be called by both the Government and the Investigating Officer. The Defense will need adequate time to interview these potential witnesses.
 - b. The Defense does not presently have the entire case file. The Government has informed the Defense that it would not make the entire case file available until after 25 June 2006.
 - c. Additional Defense Counsel will be involved in this case, and some may be civilians. A delay is necessary to procure their participation.
 - d. The Defense has been informed that much of the information in the case file remains classified. Consequently, this poses unique challenges that must be resolved prior to the hearing. The Accused, their witnesses, and others working on their behalf may not have the proper security clearance. Therefore, the Accused may be denied the opportunity to meaningfully participate in their defense until the Government declassifies all of the information.
3. The Article 32 investigation, among other things, serves as a means of discovery. *See discussion R.C.M. 405(a)*. The function of the investigation is to ascertain and impartially weigh all available facts in arriving at conclusions and recommendations, not to perfect a case against the Accused. *Id.*
4. POC for this memorandum are the undersigned at: kevin.m.hynes@us.army.mil and sasha.rutizer@us.army.mil.


KEVIN M. HYNES
CPT, JA
Defense Counsel


SASHA N. RUTIZER
CPT, JA
Defense Counsel

From <sasha.rutizer@us.army.mil>
Sent Saturday, July 29, 2006 9:27 am
To "[Deckard, Ryan A SPC USJFCOM FORSCOM](mailto:ryan.deckard@us.army.mil)" <ryan.deckard@us.army.mil>
Cc
Bcc
Subject Re: Service of Evidence

come by anytime today. myself, CPT Hynes, Suddeth, and Miller are here as well.

V/R

Sasha N. Rutizer
CPT, JA
Trial Defense Counsel
COB Speicher, Iraq

----- Original Message -----

From: "Deckard, Ryan A SPC USJFCOM FORSCOM" <ryan.deckard@us.army.mil>
Date: Thursday, July 27, 2006 1:54 pm
Subject: Service of Evidence

> ALCON:

>

> We have compiled all of the evidence for the case on two Compact
> Discs. One is a SECRET disc and another is unclassified. We
> would like to serve these discs on all of you at your convenience.
> Please let me know of a good time to facilitate this. We have
> also prepared two extensive service documents that will need to be
> executed upon receipt of the aforementioned discs.

>

> V/r

>

> SPC Ryan A. Deckard
> HHC, 3rd BCT
> FOB Speicher
> APO AE 09349
> VOIP 673-0242

>