

12.

On 24 November, 2004, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me (See R.C.M. 308 (a)). (See R.C.M. 308 if notification cannot be made.)

LUIS E. GUARDA

Typed Name of Immediate Commander

Headquarters and Headquarters Company, 4ID

Organization of Immediate Commander

CPT

Grade

Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.

The sworn charges were received at 1600 hours, 24 November, 2004 at HQs, 124th Special Troops Battalion,
Designation of Command or

4th Infantry Division.

Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE ¹ _____

JAY K. CHAPMAN

Typed Name of Officer

Commanding

Official Capacity of Officer Sign

MAJ

Grade

Signature

Memo JALS-CCR

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY

b. PLACE

c. DATE

Headquarters, 4th Infantry Division

Fort Hood, Texas

2005
5 March 2004

Referred for trial to the General court-martial convened by Court-Martial Convening Order Number 2

dated

9 July, 20 04, subject to the following instructions:² To be tried

as a non-capital case.

By COMMAND of MAJOR GENERAL THURMAN

Command or Order

CHRISTINE A. COBB

Typed Name of Officer

NCOIC, CRIMINAL LAW

Official Capacity of Officer Signing

SFC

Grade

Signature

15.

On 7 March, ~~2003~~ 2005, I (caused to be) served a copy hereof on (each of) the above named accused.

STEVEN B. FULLER

Typed Name of Trial Counsel

CPT

Grade or Rank of Trial Counsel

Signature

FOOTNOTES: 1— When an appropriate commander signs personally, inapplicable words are stricken.

2— See R.C.M. 601(e) concerning instructions. If none, so state.

1 Major General James D. Thurman, 4th Infantry Division, Fort
2 Hood, Texas, convened the court-martial and referred the charges
3 and specifications to it.
4

5 The civilian defense counsel made a motion of unlawful pretrial
6 restraint, which was marked as **Appellate Exhibit II**, and a
7 513 issue concerning Private Stewart's medical records.
8

9 The military judge stated that prior to this session, the court
10 held an 802 session, present which were the trial counsel,
11 defense counsel and the military judge. Some administrative
12 issues were discussed. The military judge also stated that the
13 medical records belonging to Private Stewart which were
14 requested by the defense were available. The government stated
15 that they would not seek protection under 513 to include the
16 witness, Private Stewart. The military judge stated that a
17 motion would be required as to the government's unlawful
18 pretrial restraint in order for the court to decide if there was
19 a violation to Article 13. The defense agreed to file the
20 motion by 1700, Friday. The military judge stated that an
21 Article 39(a) session would be scheduled for 0830, 16 May 2005,
22 to deal with those motions.
23

24 The defense had no further motions to present.
25

26 The accused pled as follows:
27

28 **To Charge I and its Specification thereunder: Not Guilty.**
29

30 **To Charge II and its Specification thereunder: Not Guilty.**
31

32 The military judge stated during that 802 conference, a pretrial
33 order was issued on 2 March 2005. The military judge also
34 stated that any witnesses dealing with the Article 13 issue
35 needed to be addressed.
36

37 The military judge stated that the motion for the defense's
38 expert assistant was approved. The military judge stated that
39 due to the availability of expert assistant, his testimony would
40 not be presented at a point in the trial that would confuse the
41 panel members.
42

1 The military judge stated that First Lieutenant Saville, a
2 potential government witness, was previously court-martialed and
3 that he was the detailed military judge for that case. The
4 military judge stated that there was a contest to one of the
5 specifications and First Lieutenant Saville was found guilty.
6 The military judge further stated that he did recall the
7 accused's name being mentioned in the case.

8
9 The military judge stated that if the defense had an issue with
10 him presiding over the case, then the defense would bring that
11 to the court's attention by the 16th of May. The civilian
12 defense counsel stated that he would submit a motion concerning
13 that issue. There being no objection by both parties, the
14 military judge stated that the defense withdrew from an
15 agreement with the Convening Authority dated
16 8 March 2005.

17
18 The accused responded that he agreed to withdraw from the
19 agreement with the Convening Authority dated 8 March 2005.

20
21 The military judge informed the accused of the meaning of an
22 arraignment and that, should the accused be voluntarily absent
23 on the next scheduled date of trial, the government might be
24 able to proceed in his absence. The accused responded that he
25 understood.

26
27 The Article 39(a) session recessed at 0929, 26 April 2005.

28
29 **END OF PAGE**

1 The Article 39(a) session was called to order at 0835,
2 16 May 2005.

3
4 PERSONS PRESENT

5
6 COLONEL THEODORE DIXION, MILITARY JUDGE
7 CAPTAIN STEVEN FULLER, TRIAL COUNSEL
8 CAPTAIN MATTHEW HOVER, ASSISTANT TRIAL COUNSEL
9 CAPTAIN EVAN SEAMONE, ASSISTANT TRIAL COUNSEL
10 DAVID SHELTON, CIVILIAN DEFENSE COUNSEL
11 CAPTAIN MARK SANTOS, MILITARY DEFENSE COUNSEL
12

13 PERSONS ABSENT

14
15 CAPTAIN THOMAS SCHIFFER, ASSISTANT TRIAL COUNSEL
16 KENN COSTLEY, COURT REPORTER
17 MEMBERS.
18

19 The detailed reporter, Sergeant First Class Dorothea Hall had
20 been previously sworn.
21

22 The trial counsel announced the legal qualifications and status
23 as to oaths of all members of the prosecution and that they had
24 been detailed by Captain Thomas Schiffer, Chief of Military
25 Justice, 4th Infantry Division.
26

27 The trial counsel further stated that no member of the
28 prosecution had acted in a manner which might tend to disqualify
29 them.
30

31 The military judge stated that, in an earlier session of the
32 trial held on 26 April 2005, the accused was informed of his
33 rights concerning counsel as set forth in Article 38(b) and
34 R.C.M. 901(d).
35

36 The accused responded that he understood his rights with respect
37 to counsel and that he still desired to be defended by Captain
38 Santos and David Shelton.
39

40 The military judge stated that the purpose of the session was to
41 resolve two defense motions.
42

1 The military judge questioned the civilian defense counsel
2 concerning a motion for the military judge to recuse himself.
3 The defense withdrew the motion.
4
5 The defense made a motion for unlawful pretrial restraint
6 credit, which was marked as **Appellate Exhibit II**. The
7 government's response to the motion was marked as **Appellate**
8 **Exhibit III**.
9
10 The defense made a motion to abate the proceedings, which was
11 marked as **Appellate Exhibit IV**. The government response to the
12 motion was marked as **Appellate Exhibit VI**.
13
14 The defense made a supplement motion to abate the proceedings,
15 which was marked as **Appellate Exhibit V**.
16
17 The defense called **Command Sergeant Major Terry Bivens** as a
18 witness with respect to the motion for unlawful pretrial
19 restraint credit, as reflected in **Appellate Exhibit II**.
20
21 The civilian defense counsel presented argument on the motion.
22 The trial counsel presented argument on the motion.
23 The civilian defense counsel presented rebuttal argument on the
24 motion.
25
26 The Article 39(a) session closed at 0945, 16 May 2005.
27
28 The Article 39(a) session opened at 1026, 16 May 2005. All
29 parties present prior to the recess were again present. All
30 panel members were absent.
31
32 The military judge stated that the defense's sentencing credit
33 for unlawful pretrial restraint was denied.
34
35 The government stated that the court shouldn't consider the
36 facts relating to R.C.M. 305 or Article 13. The military judge
37 stated that the court would award 14 days sentencing credit for
38 the violations of R.C.M. 305 and Article 13.
39
40 The military judge also stated that the court found no intent to
41 punish; however, the conditions did not appear to serve as a
42 legitimate government purpose as it related to any additional

1 requirement imposed upon Staff Sergeant Werst after permission
2 was granted to leave Fort Hood, Texas.

3
4 The military judge stated that the defense's motion to order the
5 Convening Authority to grant testimonial immunity to Captain
6 Cunningham was denied.

7
8 The military judge stated that the defense failed to meet its
9 burden under all three prongs of R.C.M. 704. However, the
10 military judge stated that the court did not rely upon that
11 deficiency as it was related to the prong as much as the
12 government had conceded that Captain Cunningham would invoke his
13 right against self-incrimination.

14
15 The military judge stated that the government had not engaged in
16 any discriminatory use of immunity and had granted all requests
17 for immunity that the defense had submitted except Captain
18 Cunningham and those individuals that immunity had not been
19 provided after the request by the defense.

20
21 The military judge stated that there wasn't a showing of
22 discriminatory use of immunity by the government to obtain the
23 tactical advantage and no evidence that the government through
24 its overreaching had force the witness to invoke any privilege
25 against self-incrimination. The military judge stated that the
26 court wasn't convinced that Captain Cunningham's testimony was
27 material. However, for the purposes of the motion, the court
28 considered Captain Cunningham's testimony as being material. It
29 wasn't exculpatory, but the court didn't rely upon either one of
30 those aspect of the third prong in R.C.M. 704. The court relied
31 specifically on the aspects of the third prong which discussed
32 cumulative nature of the testimony.

33
34 The military judge stated that the court's review of the
35 documents submitted by the defense, as attachments to the
36 motion, indicated that the witnesses have been requested; and
37 there were no indications that the government had denied the
38 production of those witnesses, Staff Sergeant Matthew Salinas
39 and Sergeant First Class John Staples and that the synopsis of
40 their testimony indicated that they intended to testify as to
41 the order provided by Captain Cunningham. So, Captain

6 P

1 Cunningham's testimony could be obtainable through other
2 sources.

3

4 The military judge stated that the defense's motion to abate the
5 proceedings was denied.

6

7 The military judge stated that the court did not rely upon the
8 third prong of R.C.M. 704 relating to the materiality of Captain
9 Cunningham's testimony. The court suspected that the order, if
10 any, given by Captain Cunningham could be material, relevant, or
11 admissible.

12

13 The military judge stated that both parties would brief that
14 issue by way of a motion in limine that would be submitted
15 within 7 days. Neither side would have to wait on the other
16 side submission to present their brief to the court.

17

18 The defense's motion in limine was marked as **Appellate Exhibit**
19 **VIII** and the government's response to the motion in limine was
20 marked as **Appellate Exhibit IX**.

21

22 The military judge stated that the trial would begin on 23 June
23 and the briefs would be due by COB, Friday.

24

25 The military judge stated that the court would be interested in
26 the parties' positions as to why it was relevant and as to why
27 it was admissible in light of M.R.E. 403.

28

29 There being nothing further, the Article 39(a) session recessed
30 at 1030, 16 May 2005.

31

32

END OF PAGE

1 The military judge called the Article 39(a) session to order at
2 1000, 23 May 2005, at Fort Hood, Texas, pursuant to Court-
3 Martial Convening Orders previously inserted into the record and
4 the following Court-Martial Convening Orders:
5
6

7 Court-Martial Convening Order Number 6, Headquarters,
8 4th Infantry Division (Mechanized), Fort Hood, Texas, dated
9 16 May 2005, as corrected copy, Court-Martial Convening Order
10 Number 6, Headquarters, 4th Infantry Division (Mechanized),
11 Fort Hood, Texas, dated 20 May 2005.
12

13

END OF PAGE

CORRECTED COPY

DEPARTMENT OF THE ARMY
HEADQUARTERS, 4TH INFANTRY DIVISION (MECHANIZED)
FORT HOOD, TEXAS 76544

COURT MARTIAL CONVENING ORDER
NUMBER 6

20 May 2005

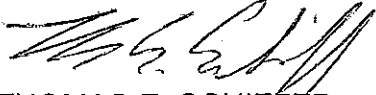
Pursuant to the authority contained in Article 29, UCMJ, the following persona are excused as members of the general court-martial convened by Court-Martial Convening Order Number 2, this headquarters, dated 9 July 2004, for the trial of United States v. Werst only:

COL ALLEN W. BATSCHELET, FA, HHB, DIVARTY
LTC DARYL GORE, OD, HDC, 4TH FSB
CSM ERNEST BARNETT JR., HHC, 1-67TH AR
SGM TERRY ALEXANDER, HHC, 1-66 AR
1SG RONALD W. DVORSKY JR., A TRP, 1-10 CAV

Pursuant to the authority contained in Article 22, UCMJ, the following members are detailed to the general court-martial convened by Court-Martial Convening Order Number 2, this headquarters, dated 9 July 2004, for the trial of United States v. Werst only:

COL DONALD M. MCWILLIE, AV, HHC, 4TH BDE
LTC MARK HURON, EN, HHC, 299 EN
LTC STEVEN D. RUSSELL, IN, HHC, 1-22 IN
MAJ THOMAS E. DETRICK, OD, HHD, 704TH DSB
MAJ WILLIAM A. GEIGER, FA, HSB, 3-16 FA
CSM GABRIEL CERVANTES, HHC, 2-8 IN
CSM MILTON A. JONES, HDC, 4TH FSB
CSM MICHAEL E. WILLIAMS, HHB, 4-42 FA
1SG JAMES F. HAYES, HHC, 4TH BDE
1SG RENE F. RARANGOL, A CO, 404TH ASB

BY COMMAND OF MAJOR GENERAL THURMAN:


THOMAS E. SCHIFFER
CPT, JA
Chief, Criminal Law Division

DISTRIBUTION:
Each Individual Indicated (1)
Commander, 4th Infantry Division (1)
Staff Judge Advocate (1)
Record of Trial (1)
Record Set (1)

10312

1 The military judge stated that the court would permit the
2 government to present evidence relating to the reported list of
3 individuals provided as a result of the operation brief by
4 Captain Cunningham and any information relating to that list
5 other than Captain Cunningham's reported statement.

6
7 The military judge questioned the civilian defense counsel about
8 the defense of obedience to orders. The civilian defense
9 counsel stated that they would not be raising that issue.

10
11 The military judge stated through Mr. Sheldon's brief on the
12 request for immunity or abate of proceedings that, the court
13 found Captain Cunningham's testimony not clearly exculpatory and
14 that the court did find that Captain Cunningham was pending
15 prosecution.

16
17 The military judge stated that prior to this session an 802
18 conference was held, present which were the trial counsel, the
19 defense counsel, and the military judge. Several administrative
20 issues were discussed and the government's witness, Lieutenant
21 Colonel Michael Luszczak, was objected by the defense. It was
22 determined that the government would not be calling that witness
23 on its case in merits, but would call that witness in rebuttal,
24 if necessary.

25
26 The defense stated that they did not have an opportunity to
27 interview Special Agent Matthews Elliot, but would try prior to
28 the next session. The defense also objected to some statements
29 by Jason Pizer and then they withdrew the objection. The
30 military judge stated that the objection was pursuant to an
31 email that the court received about 1815, Friday.

32
33 **Appellate Exhibit VII**, the flyer, was examined by counsel from
34 both sides and the military judge. There being no objection to
35 the flyer, the military judge stated that a copy of the flyer
36 was inserted in the panel members packets.

37
38 The trial counsel stated that Court-Martial Convening Order
39 Number 2, Headquarters, 4th Infantry Division, dated 9 July
40 2004, was amended by Court-Martial Convening Order Number 6,
41 same headquarters, dated 20 May 2005, as corrected by, Court-

1 Martial Convening Order Number 6, same headquarters, dated 20
2 May 2005. The defense did not object to the amendments.

3
4 The military judge stated that there were four missing panel
5 members. The military judge questioned the trial counsel about
6 whether they would proceed forward with six members in which two
7 of the members were enlisted members. The trial counsel stated
8 that he needed to receive guidance on that issue.

9
10 The Article 39(a) session recessed at 1011, 23 May 2005.

11
12 The Article 39(a) session was called to order at 1100, 23 May
13 2005. All parties present prior to the recess were again
14 present. All panel members were absent.

15
16 The military judge stated that two panel members have been
17 excused and approved properly. There being no objection by the
18 defense, the members entered the courtroom at 1059, 23 May 2005,
19 and were seated.

20
21 COURT MEMBERS PRESENT

22
23 COLONEL DONALD MACWILLIE
24 LIEUTENANT COLONEL MARK HURON
25 LIEUTENANT COLONEL STEVEN RUSSELL
26 MAJOR WILLIAM GEIGER
27 COMMAND SERGEANT MAJOR GABRIEL CERVANTES
28 COMMAND SERGEANT MAJOR MILTON JONES
29 COMMAND SERGEANT MAJOR MICHAEL WILLIAMS
30 FIRST SERGEANT RENE RARANGOL

31
32 Each member was sworn.

33
34 The Article 39(a) session was terminated and the court was
35 assembled at 1100, 23 May 2005.

36
37 The military judge gave the standard preliminary instructions to
38 the panel members.

39
40 The military judge voir dired the panel members.
41

1 The trial counsel and the civilian defense counsel voir dired
2 the panel members.

3
4 Out of the hearing of the panel members, the military judge
5 inquired as to the individual voir dire by the prosecution and
6 the defense.

7
8 The prosecution individually voir dired **Command Sergeant Major**
9 **Milton Jones** on the grounds of his professional reasons and
10 **Command Sergeant Major Gabriel Cervantes** on the grounds of his
11 law enforcement training and his answers to some questions
12 concerning insurgency ties.

13
14 The defense individually voir dired **Colonel Donald Macwillie** on
15 the grounds of his exposure to the media, his knowledge about
16 the case, his social ties with Lieutenant Colonel Huron and
17 Lieutenant Colonel Russell, and his answer to the question on
18 the questionnaire indicating that yes his background experience
19 might affect his ability to serve as a panel member; **Lieutenant**
20 **Colonel Steven Russell** on the grounds of his association with
21 Lieutenant Colonel Nathan Sassman; **Command Sergeant Major Milton**
22 **Jones** on the grounds of his professional reasons; **Command**
23 **Sergeant Major Gabriel Cervantes** on the grounds of his exposure
24 to the media; **Major William Geiger** on the grounds of his
25 exposure to the media; **First Sergeant Rene Rarangol** on the
26 grounds of his exposure to the media; and **Lieutenant Colonel**
27 **Mark Huron** on the grounds of his social ties with Lieutenant
28 Colonel Russell.

29
30 Out of the hearing of the panel members, the military judge
31 inquired as to challenges by the prosecution and the defense.

32
33 The prosecution had no challenged of cause.

34
35 The defense challenged **Colonel Donald Macwillie** on the grounds
36 of his contacts with fellow brigade commanders regarding a staff
37 sergeant back in Iraq who was accused of a crime; **Lieutenant**
38 **Colonel Steven Russell** on the grounds of his association and
39 judgment of Lieutenant Colonel Sassman regarding the Perkins
40 case and his involvement as a panel member in the Perkins case;
41 and **Lieutenant Colonel Mark Huron** on the grounds of being the

1 investigating officer in a case involving **Command Sergeant Major**
2 **Milton Jones** on a criminal offense.

3
4 After the objection by the prosecution on **Colonel Donald**
5 **Macwillie** and **Lieutenant Colonel Mark Huron**, the military judge
6 challenged **Command Sergeant Major Milton Jones** on the grounds
7 that he had personal and professional reasons that would
8 distract him from performing his duties as a panel member.

9
10 The prosecution challenged **Command Sergeant Major Milton Jones**
11 for the court's reasons, but the military judge denied the
12 challenged.

13
14 The court challenged and excused **Command Sergeant Major Milton**
15 **Jones** and **Lieutenant Colonel Steven Russell** for cause.

16
17 The prosecution had no peremptory challenge.

18
19 The defense challenged **Colonel Donald Macwillie** peremptorily.
20 The trial counsel had no opposition to challenge and the
21 military judge granted the challenge.

22
23 **Colonel Donald Macwillie, Lieutenant Colonel Steven Russell,** and
24 **Command Sergeant Major Milton Jones** were excused by the military
25 judge, withdrew from the courtroom, and did not participate
26 further in the proceedings. The remaining members reseated
27 themselves.

28
29 The court-martial recessed at 1232, 23 May 2005.

30
31 The court-martial was called to order at 1335, 23 May 2005. All
32 parties present prior to the recess were again present in court,
33 except **Colonel Donald Macwillie, Lieutenant Colonel Steven**
34 **Russell, and Command Sergeant Major Milton Jones**, the challenged
35 members, were not present.

36
37 The trial counsel made an opening statement.
38 The civilian defense counsel made an opening statement.

39
40 Prior to calling **First Lieutenant Jack Saville** as a government
41 witness, **Command Sergeant Major Gabriel Cervantes** and **Lieutenant**

1 **Colonel Mark Huron** stated that he had heard the witness name in
2 the case of the U.S. v. Perkins.

3
4 The court-martial recessed at 1411, 23 May 2005.

5
6 The Article 39(a) session was called to order at 1412, 23 May
7 2005. All parties prior to the recess were again present in the
8 court, except the panel members. **Command Sergeant Major Gabriel**
9 **Cervantes** was present.

10
11 The military judge questioned **Command Sergeant Major Gabriel**
12 **Cervantes** concerning First Lieutenant Saville. **Command Sergeant**
13 **Major Gabriel Cervantes** stated that he was a panel member in the
14 case of the U.S. v. Perkins and Lieutenant Saville's name was
15 mentioned several times, but he didn't testify.

16
17 Neither side had any further questions for **Command Sergeant**
18 **Major Gabriel Cervantes**. **Command Sergeant Major Gabriel**
19 **Cervantes** withdrew from the courtroom.

20
21 The military judge stated to the defense that if **Command**
22 **Sergeant Major Gabriel Cervantes** sat as a panel member in the
23 Perkins case, there also stood a chance that Lieutenant Colonel
24 Sassman was a witness in that case. Therefore, **Command Sergeant**
25 **Major Gabriel Cervantes** by definition had to evaluate Lieutenant
26 Colonel Sassman's testimony. The defense concurred. The
27 military judge also stated that **Lieutenant Colonel Mark Huron**
28 might have sat on the Perkins case as well. The prosecution
29 stated that they didn't have any concerns at this time.

30
31 **Lieutenant Colonel Mark Huron** entered the courtroom and was
32 seated. The military judge questioned **Lieutenant Colonel Mark**
33 **Huron** concerning First Lieutenant Saville. **Lieutenant Colonel**
34 **Mark Huron** stated that he was the president in the case of the
35 U.S. v. Perkins and that he heard a lot about First Lieutenant
36 Saville although he didn't testify.

37
38 The defense questioned **Lieutenant Colonel Mark Huron** about First
39 Lieutenant Saville's character concerning the Perkins case.
40 The trial counsel questioned **Lieutenant Colonel Mark Huron** about
41 First Lieutenant Saville's creditability as a witness in this
42 case.

1 The military judge questioned **Lieutenant Colonel Mark Huron**
2 about Lieutenant Colonel Sassman's creditability in the Perkins
3 case.

4
5 Neither party on both sides had any additional questions.

6
7 **Lieutenant Colonel Mark Huron** withdrew from the courtroom.

8
9 The defense requested that a new panel be formed and challenged
10 **Lieutenant Colonel Mark Huron** and **Command Sergeant Major Gabriel**
11 **Cervantes**.

12
13 The military judge stated that after a short recess the
14 prosecution would give its recommendations; and the defense
15 would decide rather they were requesting a mistrial or a
16 challenge for cause be granted against **Command Sergeant Major**
17 **Gabriel Cervantes** and **Lieutenant Colonel Mark Huron**.

18
19 The Article 39(a) session recessed at 1432, 23 May 2005.

20
21 The Article 39(a) session was called to order at 1519, 23 May
22 2005. All parties present prior to the recess were again
23 present in court. All panel members were absent.

24
25 The defense challenged **Lieutenant Colonel Mark Huron** and **Command**
26 **Sergeant Major Gabriel Cervantes** and requested a mistrial on the
27 grounds that the remaining members would place them below quorum
28 and the remaining members would have already heard the theories
29 of the case.

30
31 The civilian defense counsel made argument on the motion.

32
33 The military judge stated that both sides could present an
34 opening statement again or a transcript of the opening statement
35 could be presented to the new panel members to read or the
36 opening statements could be read to the panel members. These
37 options could address the concerns of the defense. The military
38 judge also stated that he held both parties responsible for not
39 addressing the issue in a timely fashion.

40
41 The military judge stated that he would allow the defense to
42 chose which option that they would prefer, in other words, he

1 would provide them an opportunity to present an additional
2 opening statement and instructions to the three members not
3 subject to the issue.

4
5 The defense requested that if the court denied the request for a
6 mistrial, then they would request to make a new opening
7 statement.

8
9 The military judge stated that he would permit the defense to
10 exercise one of those three options. However, they must
11 exercise it before close of business, so the reporter would know
12 if she needed to type the proceedings before tomorrow morning.
13 The military judge denied the defense's request for a mistrial.

14
15 The military judge granted the challenge for cause against
16 **Lieutenant Colonel Mark Huron** and **Command Sergeant Major Gabriel**
17 **Cervantes**.

18
19 The military judge stated since the panel members were below
20 quorum, the prosecution was directed to notify the general
21 court-martial convening authority. The military judge stated
22 that if the convening authority detailed additional members,
23 then the court would proceed tomorrow morning. The military
24 judge stated that the prosecution needed to take the appropriate
25 action before close of business and then notify the defense.

26
27 The military judge further stated that the court would reconvene
28 at 0800 tomorrow morning; and the three remaining panel members
29 and any additional panel members would need to be present and
30 ready to proceed at 0900 hours.

31
32 The military judge stated if the members had been previously
33 identified as selected members and had already responded to
34 general court-martial questionnaires, those questionnaires
35 should be available to the defense. If not, the prosecution
36 should inform the court accordingly. If the newly identified
37 members hadn't filled out the questionnaires and if the defense
38 wanted to conduct voir dire in substitute of the questionnaires,
39 they would be able to do so.

40
41 After no objection by counsel for both sides, the Article 39(a)
42 session recessed at 1529, 23 May 2005.

1 The court-martial was called to order at 1530, 23 May 2005. All
2 parties present prior to the recess were again present.
3 **Lieutenant Colonel Mark Huron** and **Command Sergeant Mark**
4 **Cervantes** were excused, withdrew from the courtroom, and did not
5 participate further in the proceedings. The remaining members
6 reseated themselves.
7
8 The military judge stated that the court would recess and the
9 proceedings would begin at 0900 hours. The panel members were
10 duly warned against discussing the case and any contact with the
11 media.
12
13 Counsel for both sides had nothing further to discuss.
14
15 The member withdrew from the courtroom. The court-martial
16 recessed at 1533, 23 May 2005.
17
18 The Article 39(a) session was called to order at 1535, 23 May
19 2005. All parties present prior to the recess were again
20 present. All panel members were absent.
21
22 Counsel for both sides have nothing further to discuss.
23
24 The Article 39(a) session was recessed at 1537, 23 May 2005.
25
26 **END OF PAGE**

1 The military judge called the Article 39(a) session to order at
2 0900, 24 May 2005, at Fort Hood, Texas, pursuant to the Court-
3 Martial Convening Orders previously inserted into the record and
4 the following Court-Martial Convening Order:

5

6

7 Court-Martial Convening Order Number 7, Headquarters,
8 4th Infantry Division (Mechanized), Fort Hood, Texas, dated
9 23 May 2005.

10

11

END OF PAGE

DEPARTMENT OF THE ARMY
HEADQUARTERS, 4TH INFANTRY DIVISION (MECHANIZED)
FORT HOOD, TEXAS 76544

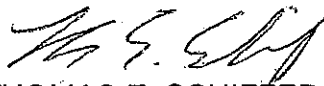
COURT-MARTIAL CONVENING ORDER
NUMBER 7

23 May 2005

Pursuant to the authority contained in Article 22, UCMJ, the following members are detailed to the general court-martial convened by Court-Martial Convening Order Number 2, this headquarters, dated 9 July 2004, for the trial of United States v. Werst only:

MAJ WILLIAM A. GEIGER, FA, HSB, 3-16 FA
MAJ PAUL E. OWEN, EN, HHC, 588 EN
MAJ ERIC E. SCHWEGLER, FA, HHB, 4-42 FA
MAJ HARRIS L. MORRIS, AR, HHC, 1-67 AR
CPT COLIN N. BROOKS, IN, HHC, 2-8 IN
CSM MICHAEL E. WILLIAMS, HHB, 4-42 FA
1SG RENE F. RARANGOL, A CO, 404TH ASB
SFC WARREN P. STEVENS, HHC, DISCOM
SFC TYRONE C. WILLIS, HHC, 299 EN
SFC DWIGHT D. RICHARD, HHB, DIVARTY

BY COMMAND OF MAJOR GENERAL THURMAN:



THOMAS E. SCHIFFER
CPT, JA
Chief, Criminal Law Division

DISTRIBUTION:

Each Individual Indicated (1)
Commander, 4th Infantry Division (1)
Staff Judge Advocate (1)
Record of Trial (1)
Record Set (1)

1 The trial counsel stated that all parties to the trial who were
2 present when the court-martial recessed were again present.

3
4 The trial further stated that, in addition, the following
5 members were present and had been detailed to the court-martial
6 by the Convening Authority, pursuant to Court-Martial Convening
7 Order Number 7, same headquarters, dated 23 May 2005, which
8 would be attached at this point in the record of trial.

9
10 COURT MEMBERS PRESENT

11 MAJOR WILLIAM GEIGER

12 MAJOR PAUL OWEN

13 MAJOR ERIC SCHWEGLER

14 MAJOR HARRIS MORRIS

15 CAPTAIN COLIN BROOKS

16 COMMAND SERGEANT MAJOR MICHAEL WILLIAMS

17 FIRST SERGEANT RENE RARANGOL

18 SERGEANT FIRST CLASS WARREN STEVENS

19 SERGEANT FIRST CLASS TYRONE WILLIS

20 SERGEANT FIRST CLASS DWIGHT RICHARD

21
22
23 Each member was sworn except Major William Geiger, Command
24 Sergeant Major Michael Williams, and First Sergeant Rene
25 Rarangol.

26
27 The court-martial was assembled.

28
29 The trial counsel stated the general nature of the charges.

30
31 The military judge gave the standard preliminary instructions to
32 the panel members.

33
34 The military judge voir dired the court members.

35
36 The trial counsel and the civilian defense counsel voir dired
37 the court members.

1 The prosecution conducted individual voir dire the following
2 panel members:

3
4 **Major Paul Owen**
5 **Captain Colin Brooks**
6

7 The defense conducted individual voir dire the following panel
8 members:

9
10 **Major Harris Morris**
11 **Major Paul Owen**
12 **Major William Geiger**
13 **Major Eric Schwegler**
14 **Captain Colin Brooks**
15 **Command Sergeant Major Michael Williams**
16 **Sergeant First Class Tyrone Willis**
17 **First Sergeant Rene Rarangol**
18

19 Out of the hearing of the court members, the military judge
20 inquired as to the challenges by the prosecution and defense.

21
22 The prosecution challenged **Captain Colin Brooks** for cause on the
23 grounds that he knew Captain Eric Paliwanda who was killed by a
24 mortar attack.

25
26 The defense argued against the prosecution's challenge for
27 cause.

28
29 The defense challenged **Major Eric Schwegler** for cause on the
30 grounds that he had a working and social relationship with Major
31 Owen; and his exposure to the media. Also, Command Sergeant
32 Major Williams was his sergeant major; and he served as a panel
33 member with Major Morris.

34
35 The military judge granted the challenge for cause against
36 **Captain Colin Brooks** and **Major Eric Schwegler**.

37
38 The military judge granted an additional peremptory challenge
39 for both parties relating only to the new panel members.

40
41 The prosecution challenged **Sergeant First Class Tyrone Willis**
42 peremptorily.

1 The defense objected to the prosecution's peremptory challenge
2 on the grounds that the accused should only have a peremptory
3 challenge.

4
5 The military judge stated in an earlier 802 session, present
6 which were the trial counsel, the defense counsel, and the
7 military judge, at such time Mr. Sheldon placed the court on
8 notice about the amendment to Article 41 specifically
9 authorizing peremptory challenge for both sides.

10
11 The defense challenged **Major Harris Morris** peremptorily. The
12 military judge granted the challenge.

13
14 **Captain Colin Brooks, Major Harris Morris, Major Eric Schwegler,**
15 **and Sergeant First Class Tyrone Willis** were excused, withdrew
16 from the courtroom, and did not participate further in the
17 proceedings. The remaining members reseated themselves.

18
19 The court-martial recessed at 1117, 24 May 2005.

20
21 The court-martial was called to order at 1225, 24 May 2005. All
22 members present prior to the recess were again present in court.
23 **Major Harris Morris, Major Eric Schwegler, Captain Colin Brooks,**
24 **and Sergeant First Class Tyrone Willis,** the challenged members,
25 were not present.

26
27 The military judge administrated instructions about the opening
28 statement.

29
30 The trial counsel made an opening statement.
31 The defense counsel made an opening statement.

32
33 The following prosecution witnesses were presented on the
34 merits:

35
36 **First Lieutenant Jack Saville**
37 **First Lieutenant Daniel Maurer**
38 **Sergeant First Class Anthony Cabello**
39 **Private First Class Nathan Stewart**
40
41
42

1 The following prosecution evidence was admitted on the merits:
2 **Prosecution Exhibit 2**, sworn statement dated 14 January
3 2004, by Staff Sergeant Werst.
4
5 **Appellate Exhibits X through XXX**, questions by the court
6 members, were marked, shown to counsel for both sides, and
7 handed to the military judge.
8
9 The court-martial recessed at 1925, 24 May 2005.

10
11

END OF PAGE

1 The Article 39(a) session was called to order at 1005,
2 25 May 2005. All parties were present prior to the recess were
3 again present except the panel members.

4
5 The defense objected to a witness, **Colonel James Polo**, on the
6 grounds that the witness was going to testify about Post-
7 Traumatic Stress Disorder. The defense stated that it
8 constitutes bolstering of the witness that is Private First
9 Class Stewart. The defense further stated that his testimony
10 could confuse the panel and some how place a link between
11 Private Stewart's PTSD and this event regardless of the court's
12 instructions or the individual's testimony; and the panel
13 members could consider this type of testimony as a "human lie
14 detector".

15
16 After argument by both sides, the military judge overruled the
17 objection and found under MRE 403 that none of the arguments
18 that the defense presented was persuasive; and it wasn't
19 prejudice to the accused and instructions would be given to the
20 panel members relating to the expert testimony.

21
22 The military judge stated that the government would be allowed
23 to establish a foundation to the credential of the expert
24 witness.

25
26 The Article 39(a) session recessed at 1012, 25 May 2005.

27
28 The court-martial was called to order at 1013, 25 May 2005. All
29 parties present prior to the recess were again present, to
30 include the panel members.

31
32 The following prosecution witnesses were presented on the
33 merits:

34
35 **Colonel James Polo**
36 **Jason Pizer**
37 **Specialist John Plato**
38 **Specialist Charles Pannell**

39
40 **Appellate Exhibits XXXI-XLIX and LI-LIX**, questions by the court
41 members, were marked, shown to counsel for both sides, and
42 handed to the military judge.

1 **Appellate Exhibit L** was marked as a chart drawn by Specialist
2 John Plato.
3
4 The prosecution had nothing further to offer.
5
6 The court-martial recessed at 1529, 25 May 2005.
7
8 The Article 39(a) session was called to order at 1558, 25 May
9 2005. All parties were present prior to the recess were again
10 present, except the panel members.
11
12 The defense made a motion to dismiss Charge I, under RCM 917
13 on the grounds that the government did not put forward any
14 evidence that Mr. Ismail was in fact murdered. The defense
15 further stated that a motion for a finding of "not guilty" and
16 to substitute "an unknown Iraqi male" for "Nasser Ismail" would
17 constitute a major amendment. The defense's motion to dismiss
18 was marked as **Appellate Exhibit LX**.
19
20 The defense counsel presented argument on the motion.
21
22 The assistant trial counsel presented argument on the motion.
23
24 The Article 39(a) session recessed at 1745, 25 May 2005.
25
26 The Article 39(a) session was called to order at 1800, 25 May
27 2005. All parties were present prior to the recess were again
28 present, except the panel members.
29
30 The military judge denied the motion.
31
32 The Article 39(a) session recessed at 1803, 25 May 2005.
33
34 The court-martial was called to order at 1804, 25 May 2005. All
35 parties were present prior to the recess were again present, to
36 include the panel members.
37
38 The defense called **SSG Bryon Hillis** as a witness on the merits.
39
40 The court-martial recessed at 1925, 25 May 2005.
41

1 The court-martial was called to order at 0901, 26 May 2005. All
2 parties present prior to the recess were again present, to
3 include all panel members.

4
5 The following defense's witnesses were present on the merits:

6
7 **Lieutenant Colonel Nathan Sassman**
8 **Lieutenant Colonel Laura Loftus**
9 **Sergeant Major Teddy Blevins**
10 **Staff Sergeant Shane Werst**

11
12 The following defense evidence was admitted on the merits:

13
14 **Defense Exhibit G**, Counseling statement dated 17 May 2005.

15
16 **Appellate Exhibit LXXVI** was marked which was a chart drawn by
17 Staff Sergeant Shane Werst.

18
19 The following prosecution's witnesses were recalled in rebuttal:

20
21 **First Lieutenant Daniel Maurer**
22 **Private First Class Nathan Stewart**
23 **Specialist Charles Pannell**
24 **Staff Sergeant Bryon Pannell**
25 **Jason Pizer**
26 **Sergeant First Class Anthony Cabello**

27
28 **Appellate Exhibits LXI-LXXV, LXXVII, LXXIX-LXXXVII**, questions by
29 the court members, were marked, shown to counsel for both sides,
30 and handed to the military judge.

31
32 The military judge gave preliminary instructions on findings to
33 the members.

34
35 The assistant trial counsel made closing argument on findings.
36 The civilian trial counsel made closing argument on findings.
37 The assistant trial counsel made rebuttal argument on findings.

38
39 The findings worksheet was marked as **Appellate Exhibit LXXVIII**.

40
41 Neither the trial counsel nor the civilian defense counsel
42 objected to the findings worksheet.

1 The military judge gave final instructions on voting to the
2 panel members.
3
4 The findings instructions were marked as **Appellate Exhibit**
5 **LXXXVIII**.
6
7 The panel members withdrew from the courtroom and the court-
8 martial closed at 1538, 26 May 2005.
9
10 The Article 39(a) session was called to order at
11 1539, 26 May 2005. All parties prior to the court being closed
12 were again present, except the panel members.
13
14 The military judge explained the sentencing phase to the
15 accused.
16
17 The accused responded that he understood the sentencing phase.
18
19 The military judge discussed the corrections to the personal
20 data on the charge sheet.
21
22 The military judge stated that the accused would receive 11 days
23 confinement credit and 14 days Article 13 credit.
24
25 The Article 39(a) session was terminated at 1547, 26 May 2005.
26
27 The court-martial opened at 1828, 26 May 2005. All parties
28 present prior to the closing were again present, to include all
29 panel members.
30
31 Out of the hearing of the panel members, the military judge
32 stated that the court reconsidered its ruling regarding The
33 Specification of Charge II and Charge II under the provisions of
34 R.C.M 917. The military judge granted a finding of "not guilty"
35 relating to that specification and that charge.
36
37 The military judge stated to the president that he would use a
38 red pen to mark out the appropriate provisions that the
39 president did not intend to read. The military judge also
40 stated that The Specification of Charge II and Charge II didn't
41 need to be announced.
42

1 The president announced the following findings:

2

3 **Of Charge I and its Specification: Not Guilty.**

4

5 The panel members were excused by the military judge.

6

7 There being nothing further, the court-martial adjourned at

8 1834, 26 May 2005.

9

10

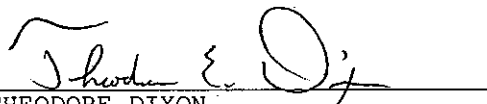
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AUTHENTICATION OF THE RECORD OF TRIAL

IN THE CASE OF

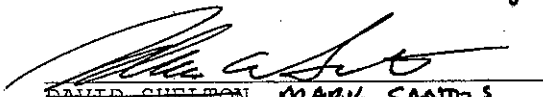
Staff Sergeant Shane Allen Werst,
Headquarters and Headquarters Company,
4th Infantry Division, Fort Hood, Texas 76544

I received the completed record of trial for review and authentication on
26 August 2005.


THEODORE DIXON
COL, JA
Military Judge 26 Aug 05

ACKNOWLEDGEMENT OF RECEIPT AND EXAMINATION

I received the record of trial for review in the foregoing case on
16 Aug 2005 and completed my examination on 16 Aug 2005.


~~DAVID SHELTON~~ MARK SANTOS
CPT, JA Civilian Defense Counsel

DATE: 16 Aug 2005

The record of trial was served on defense counsel on _____
2005. After verifying receipt with defense counsel on _____
2005 and conferring with the military judge on review by defense counsel on
_____ 2005, the record was forwarded for authentication
without completion of defense counsel's review.

RICHARD HENRY
CPT, JA
Chief, Military Justice