

IN A GENERAL COURT-MARTIAL OF THE UNITED STATES  
US ARMY TRIAL JUDICIARY, SECOND JUDICIAL CIRCUIT

	)	
	)	
UNITED STATES	)	DEFENSE MOTION TO DISMISS THE
	)	CHARGES FOR A VIOLATION OF THE
v.	)	RIGHT TO COUNSEL AT THE ARTICLE
	)	32 HEARING
Hurst, Jeffery T.	)	
SGT, U.S. Army	)	17 JUNE 2012
Charlie Company, 3 <sup>rd</sup> Battalion	)	
21 <sup>st</sup> Infantry Regiment, 1 <sup>st</sup> Stryker Brigade	)	
Combat Team, 25 <sup>th</sup> Infantry Division,	)	
Fort Bragg, North Carolina	)	
	)	

**RELIEF SOUGHT**

COMES NOW SGT Jeffery T. Hurst, by and through undersigned counsel, pursuant to R.C.M. 906(b)(3) moves this court to dismiss the charges referred on April 4, 2012 for failure to properly investigate the charges as required by Article 32, UCMJ, in that the accused was denied a right to counsel resulting in a defective referral of charges.

**BURDEN OF PERSUASION AND BURDEN OF PROOF**

Pursuant to R.C.M. 905(c), the burden is on the Defense as the moving party by a preponderance of the evidence.

**FACTS**

1. SGT Jeffrey T. Hurst, a member of Charlie Company, 3rd Battalion, 21st Infantry Regiment, 1st Stryker Brigade Combat Team, 25th Infantry Division, deployed from Fort Wainwright Alaska on 14 May 2011.
2. SGT Hurst and his unit deployed to Kandahar Afghanistan on 14 May 2011.
3. SGT Hurst was assigned to 3-21 Infantry Battalion (Task Force Gimelt).
4. The Horn of Panjwa'i is within Task Force Gimlet's battle space.
5. The Horn of Panjwa'i is known as the birthplace of the Taliban and is considered a command and resupply area for Taliban operating in Kandahar province.
6. Panjwai was continually the site of fighting, and emplacements of improvised explosive devices (IED's).

7. Upon deployment to Afghanistan, SGT Hurst and Charlie Company, 3rd Battalion were assigned to COP Palace, located in the Horn of Panjwa'i.
8. COP Palace is a small outpost approximately 300 meters wide by 400 meters long, paved with limestone gravel and surrounded by 9 feet tall hescoe barriers filled with sand and gravel to protect against enemy fire.
9. COP Palace contained a small motor pool, 10 camouflaged container handing units (CHUs) that serve as Solider living quarters, a morale and welfare (MWR) tent, laundry facilities, a mess trailer, a shower facility, and a command and control shed.
10. COP Palace was bordered on the west side by a line of trees and barriers that separated COP Palace from an Afghanistan National Army (ANA) compound of similar size and population to Palace.
11. Constructed on top of the barriers are four twenty-foot lookout towers manned 24 hours a day that overlook the battle space around COP Palace.
12. The soldiers of Charlie Company, 3rd Battalion, constantly went out on patrols and faced daily attacks by insurgents.
13. The sound of small arms fire in the COP Palace area was common. Skirmishes between insurgent and coalition forces occurred repeatedly
14. Small arms fire was often followed by close air support (CAS), consisting of pairs of attack helicopter or fixed-winged aircraft, laying fires down on attacking insurgent forces.
15. From July to September 2011, Task Force Gimlet participated in 12 deliberate operations (CONOPs), cleared approximately 85 IEDs, and had 37 actual IED strikes.
16. Battalion Headquarters is operated at FOB Zangabad.
17. COP Palace is approximately 2 miles north of FOB Zangabad and approximately 10 miles west of Sperwan Ghar.
18. To get to COP Palace from the Battalion Headquarters at FOB Zangabad, travel is north along route Quebec on a road laden with IEDs in Stryker vehicles.
19. The threat of roadside attacks was constant, when traveling, armed Soldiers had to man lookout positions in the front and rear of the vehicles, while those inside monitor closed circuit screens connected to vehicle borne cameras that scan the area for threats.
20. SGT Hurst and members of Charlie Company, 3rd Battalion, faced numerous attacks by insurgents and suffered injuries to members of the unit on a daily basis.

21. On one such patrol, SGT Hurst and members of Charlie Company, 3rd Battalion, were victims of an Improvised Explosive Device (IED).
22. SGT Hurst suffered a concussion and was evacuated shortly thereafter to Kandahar Air Field (KAF) for testing.
23. While at KAF, SGT Hurst was diagnosed with a Traumatic Brain Injury (TBI). SGT Hurst stayed at KAF for 30 days until he was sent back to COP Palace.
24. While back at COP Palace, SGT Hurst continued to patrol and pull guard duty due to the shortage of manpower.
25. PV2 Danny Chen entered the U.S. Army on 5 January 2011 at Fort Benning, Georgia.
26. PV2 Chen went through basic training at Fort Benning Georgia from on or about 5 January 2011 to on or about 15 April 2011.
27. While at Ft. Benning, PV2 Chen struggled with basic infantry soldier tasks.
28. On 2 May 2011, PV2 Chen reported to Fort Wainwright, Alaska.
29. On 11 May 2011, PV2 Chen was assigned to 1st Stryker Brigade Combat Team, 25th Infantry Division.
30. While at Fort Wainwright, PV2 Chen was set to deploy around July 2011.
31. However, due to unknown reasons, PV2 Chen did not deploy.
32. On or about 17 August 2011, PV2 Chen missed a morning formation at Fort Wainwright.
33. Concerned for his safety, SPC Johnson, a friend and squad mate of PV2 Chen went to PV2 Chen's room to look for him.
34. After numerous knocks and attempts, PV2 Chen finally answered the door to his barracks room.
35. Immediately after answering the door to his barracks room, PV2 Chen went back to his bed and curled into the fetal position.
36. PV2 Chen informed SPC Johnson that his parents were preparing to disown him due to joining the Army and his upcoming deployment.
37. SPC Johnson reported PV2 Chen's behavior to SGT Johnson (NCOIC for BTB), SGT Lopez and CPT Mitchell, the rear detachment Company Commander, because at that time, he feared for PV2 Chen's well being.

38. In spite of SPC Johnson's reports, PV2 Chen deployed to Afghanistan on 19 August 2011.
39. Upon arriving at KAF, PV2 Chen was then notified that he would be assigned to Charlie Company, 3rd Battalion, 21st Infantry Regiment, 1st Stryker Brigade Combat Team, 25th Infantry Division, at COP Palace.
40. Upon arriving to COP Palace, on or about 19 August 2011, PV2 Chen was placed in second (2<sup>nd</sup>) squad. At that time, PV2 Chen's team leader was SGT Zade.
41. Upon arrival at COP Palace, PV2 Chen was assessed to determine his skills and knowledge before going out on patrols.
42. After being assessed by SGT Hurst and SSG Van Bockel, it was determined that PV2 Chen lacked some of the basic infantry soldier skills necessary to competently participate in the various tasks the platoon performed, including patrols.
43. PV2 Chen was deemed a danger to himself and others and required additional training before being allowed to go on patrols.
44. PV2 Chen was given remedial training on basic infantry soldier skills because he wasn't operating to standard as an infantryman with the platoon at COP Palace.
45. PV2 Chen continued to fail at basic infantry skills and was not permitted to go on patrols due to the danger he posed to himself and others.
46. While at COP Palace, PV2 Chen was assigned to guard duty, trash pickup, dish washing, vehicle maintenance and other common duties around the COP.
47. Due to the shortage of manpower and PV2 Chen's either inability to learn basic infantry skills or deliberate failures in demonstrating basic infantry competence, PV2 Chen was assigned to more details at the COP than other soldiers in the platoon who actually went out on patrols and often engaged the enemy in combat.
48. PV2 Chen's deliberate or negligent failures included showing up for guard duty to relieve another soldier unprepared. PV2 Chen often showed up for guard duty in a combat zone without:
  - a. required gear items necessary to stand post
  - b. the required amount of water.
  - c. his ACH on.
  - d. the correct duty uniform.
49. PV2 Chen fell asleep while on guard duty at COP Palace.

50. Due to the constant injuries that members of Charlie Company, 3rd Battalion faced, squads had regular and frequent turnovers to meet mission requirements.
51. On or about 29 September 2011, PV2 Chen's team leader SGT Zade left COP Palace.
52. On or about 30 September 2011, SGT Hurst became PV2 Chen's team leader.
53. Approximately one week later, on 3 October 2011, PV2 Danny Chen committed suicide by a self-inflicted gunshot wound to the head.
54. PV2 Chen's suicide took place in a guard tower at COP Palace, Kandahar Province, Afghanistan.

#### Investigation

55. Immediately after PV2 Chen's suicide, the U.S. Army Criminal Investigation Division (CID) conducted an investigation.
56. CID conducted over 50 interviews and obtained statements from all the Soldier's at COP Palace.

#### Charges

57. On 21 December 2011, seventy-nine days after the investigation began, the government preferred charges against SGT Hurst.
58. Upon information and belief, the Trial Counsel had access to the statement obtained in the course of the investigations as early as mid October 2011.

#### Article 32 Delay

59. The defense counsel, CPT Gurtov, was detailed to this case on 28 December 2011.
60. On 29 and 30 December 2011, the Defense began receiving electronically the documentary evidence in this case. Initial discovery consisted of approximately 750 pages of documentary evidence.
61. The Government set the Article 32 hearing for 6 January 2012, despite the fact that SGT Hurst's defense counsel was located in El Paso Texas.
62. On 2 January 2012, CPT Gurtov submitted a delay request until 27 February 2012 in order to prepare for the Article 32.
63. This request was granted in part and denied in part and the Article 32 hearing was set for 20 February 2012.

64. On or about 3 January 2011, SGT Hurst retained Mr. Haytham Faraj, a civilian defense attorney to represent him on his case.
65. On December 23, 2012, Mr. Faraj had signed up and paid to take the California Bar exam which was supposed to be administered Feb 28 – Mar 1, 2012.
66. On January 4, 2012, Mr. Faraj commenced trial in the case of United States v. Wuterich, a case that was scheduled to last 4-6 weeks and involved over 60 witnesses and tens of thousands of documents.
67. On 1 February 2012, Mr. Faraj submitted another delay request to the Article 32 hearing until March 6, 2012. The delay would have postponed the Article 32 hearing by another 14 days. This delay request stated that if witnesses become unavailable for live testimony and the Government's best efforts cannot secure their live presence, the Defense would not object to alternative forms of testimony.
68. This delay request, submitted at the conclusion of *U.S. v. Wuterich*, in which Mr. Faraj was defense counsel, clearly articulated the reasons necessary for the delay.
69. On February 6, 2012, the IO denied the delay request of the Article 32 hearing submitted by Mr. Faraj.
70. On 14 February 2012 the Defense requested reconsideration of the Defense request for an Article 32 delay of 6 March 2012.
71. In the Government's response to the Defense delay request, the Government conceded that SGT Hurst was entitled to civilian counsel only if they are reasonably available and will not unduly delay the investigation.
72. A delay from 20 February until 6 March would not have unduly delayed the investigation as evidenced by the Governments later submitted delay request to exclude the time from 9 April 2012 until 9 May 2012.
73. On or about 16 February 2011, the Defense' request for reconsideration was denied by the Convening Authority.

#### Article 32 Hearing

74. On February 20, 2012, the IO convened a hearing in the case of U.S. v. SGT Jeffery Hurst but without SGT Hurst's counsel. SGT Hurst objected to the Article 32 proceedings without counsel, Mr. Faraj present. SGT Hurst declined to participate and maintained his objection throughout."
75. SGT Hurst's detailed counsel was ordered to be present at the Article 32 and attended. She did not participate except to object to the hearing.

76. The IO violated his mandate as set forth in his appointing order and DA PAM 27-17 by commenting that the defense desired to have this Art 32 proceeding nullified by a military judge and thereby get the delay to which they were denied. *See* continuation sheet – page 1 of 3 of the Investigator’s Report.
77. SGT Hurst did not participate in the proceeding despite his presence at the hearing because he was not represented by counsel.

### **WITNESSES/EVIDENCE**

Charge Sheet; Dated December 21, 2011  
Request for Continuance of the Article 32 Hearing; Dated January 30, 2012  
Government Rebuttal to Defense Delay Response; Dated February 1, 2012  
IO Response to Defense Request; Dated February 06, 2012  
Defense Request for Reconsideration of Decision Denying Continuance; Dated February 14, 2012  
CO Response to Request for Denying Request; Dated February 16, 2012  
Investigating Officer’s Report; Dated February 26, 2012  
Objection to Article 32 Investigation; Dated March 06, 2012  
Advice on Government Request for Excludable Delay; Dated April 23, 2012  
Approval of Excludable Delay; Dated April 23, 2012  
Statement of Zade, William Daniel; Dated November 04, 2011  
Statement of Van Bockel, Andre J; Dated October 16, 2011  
Statement of Johnson, Bryan N.; Dated October 17, 2011  
MSNBC News Suicide among US troops spike, military officials unsure of reasons; Dated June 19, 2012  
Time Inc. Is the U.S. Army Losing Its War on Suicide? ; Dated April 13, 2010  
*United States v. Fiorito*, ARMY20080535, 2011 WL 779922

### **LEGAL AUTHORITY AND ARGUMENT**

Amendment 6<sup>th</sup> to the United States Constitution  
Article 32, UCMJ, 10 U.S.C. §832  
Article 38, UCMJ, 10 U.S.C. §838  
R.C.M. 405  
R.C.M. 506  
R.C.M. 707  
R.C.M. 906  
*United States v. Wattenbarger*, 21 M.J. 41, 43 (C.M.A. 1985)  
*United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007)  
*ABC, Inc. v. Powell*, 47 M.J. 80 (C.A.A.F. 1997)  
*United States v. Kinard*, 45 C.M.R. 74, 77 (1972)  
*United States v. Donohew*, 18 USMCA 149, 152, 39 CMR 149 (1969)

*Powell v Alabama*, 287 US 45, 77 L Ed 158, 53 S Ct 55 (1932)  
*United States v Potter*, 14 USCMA 118, 33 CMR 330 (1963)  
*United States v Evans*, 1 USCMA 541, 4 CMR 133 (1952)  
*United States v Wiesbeck*, 50 M.J. 461 (C.A.A.F. 1991)  
*U.S. v. Thomas*, 22 M.J. 57, 59 (C.M.A. 1986)  
*Morris v. Slappy*, 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983)  
*United States v. Fiorito*, ARMY20080535, 2011 WL 779922  
*United States v. Smith*, 40 C.M.R. 418 (A.C.M.R. 1968)  
*U.S. v. Payne*, 3 M.J. 354, 355-356 (C.M.A. 1977)  
*Shadwick v. City of Tampa*, 407 U.S. 345 (1972)

Amendment 6<sup>th</sup> to the United States Constitution guarantees a person accused of a crime the right to representation by counsel. The constitutional right to counsel attaches at the time adversarial judicial proceedings have commenced against an accused whether by way of formal charges preliminary hearing, indictment, information or arraignment. *United States v. Wattenbarger*, 21 M.J. 41, 43 (C.M.A. 1985). (Internal quotations and quotations omitted). In the military, this sixth-amendment right to counsel attaches at preferral of charges. *Id.* (Internal citations and quotations omitted). R.C.M. 506 promulgates the 6<sup>th</sup> Amendment right to counsel into the UCMJ and extends the right to military personnel accused at a special or general court martial. Pursuant to Article 32 and R.C.M. 405, no charges may be referred to a general court martial for trial until a thorough and impartial investigation of all the matters set forth therein has been investigated. R.C.M. 405(f) provides the accused the right to be represented by counsel at an Article 32 hearing. R.C.M. 405(d)(2)(C), affords an accused the right to representation by civilian counsel. The impact of error at an Article 32 hearing may only be speculated upon on direct review. *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007). The accused is required to identify and object to any error in the Article 32 proceeding at the outset. *Id.* When an objection is made the judge is required to fashion an appropriate remedy under R.C.M. 906(b)(3). In the event the accused disagrees with the military judge's ruling, the accused may file a petition for extraordinary relief to immediately address the Article 32 error. *Id.* (citing *ABC, Inc. v. Powell*, 47 M.J. 80 (C.A.A.F. 1997)) (granting petition for extraordinary relief and issuing writ of mandamus).

SGT Hurst retained civilian counsel in this case on January 3, 2012. On February 1, 2012, civilian counsel requested a two week continuance of the Article 32 hearing which was then scheduled for February 20, 2012. The initial date set for the hearing was January 6, 2012. That date appears to have been nothing more than a successful attempt by the Government to commit the defense to requesting a delay of the hearing to exclude time from the R.C.M. 707 clock. Had the hearing been held on January 6, 2012, Sgt Hurst's detailed counsel would not have been present because she was not located in Afghanistan at the time she was notified a mere nine days before, a period immediately after the Christmas holiday and before New Year. And even if she could have made the travel plans and arrived in Afghanistan on time she would have been ineffective due to inadequate preparations. Accordingly, detailed counsel requested a continuance which was granted in part delaying the hearing until February 20, 2012.



When civilian counsel was retained in this case, he was about to start one of the most notorious war crimes cases to arise from the Iraq war. The case of *U.S. v. Wuterich* commenced on January 4, 2012. The *Wuterich* case was scheduled to last between four and six week. At the conclusion of the third week of the case, the Government in that case offered to withdraw and dismiss all the charges in return for a plea of negligent dereliction of duty. Immediately upon the completion of that case, civilian counsel requested a delay of 14 days to allow counsel to review the evidence in this case and to sit for the California Bar exam which counsel had already signed up and paid for before ever being retained for this case or even hearing of the allegations.

The request for a continuance and a follow-up request for reconsideration were both also denied. On February 20, an Article 32 hearing was held. The accused objected to the hearing and refused to participate without having civilian counsel present. The Accused's detailed counsel was presented pursuant to her military orders to be present at the hearing but she was not authorized to speak for the accused or represent him in any capacity except to place objections to the Article 32 without civilian counsel on the record.

WHETHER A DELAY OF FOURTEEN DAYS OF AN ARTICLE 32 HEARING IS AN UNREASONABLE DELAY OF A PROCEEDING JUSTIFYING THE DENIAL OF AN ACCUSED'S RIGHT TO HAVE CIVILAIN COUNSEL REPRESENT HIM?

The right and opportunity of one accused of crime to select individual counsel of his choice, military or civilian, is "a most valuable right accorded him by the law." *United States v. Kinard*, 45 C.M.R. 74, 77 (1972). Citing *United States v. Donohew*, 18 USMCA 149, 152, 39 CMR 149 (1969). See also Article 38(b), 10 U.S.C. §838. Implicit in the right to counsel is a meaningful opportunity to exercise that right. *Kinard*, at 78. (Citing *Powell v Alabama*, 287 US 45, 77 L Ed 158, 53 S Ct 55 (1932)); *United States v Potter*, 14 USCMA 118, 33 CMR 330 (1963); *United States v Evans*, 1 USCMA 541, 4 CMR 133 (1952). SGT Hurst was denied his right to a meaningful opportunity to exercise his right to counsel when his request for a mere fourteen days continuance was given no consideration and denied despite ample evidence in support of the reasonable request for delay. The request was reasonable because it was for fourteen days, it was based on valid reasons, made in good faith, and was the first continuance civilian counsel had made. See *United States v. Wiesbeck*, 50 M.J. 461 (C.A.A.F. 1991). While the right to counsel is not absolute and must be balanced against society's interest in the efficient and expeditious administration of justice, *U.S. v. Thomas*, 22 M.J. 57, 59 (C.M.A. 1986); citing *Morris v. Slappy*, 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983), under the circumstances in this case the scales firmly tipped in favor of granting the continuance to afford SGT Hurst an opportunity to exercise his right to counsel. See *Kinard, Supra*.

In *Kinard*, the court analyzes the numerous continuances requested by the accused and the many opportunities afforded to him before finding that the accused had been afforded a meaningful opportunity to exercise his right to counsel but failed to do so. The Court, however, reaffirmed the law that only in the most unusual of cases should an accused be forced to forgo civilian counsel. *Kinard* at 77. *Kinard* remains good law and has been cited in dozens of decisions since, most recently in an unpublished opinion from the U.S. Army Court of Criminal Appeals in *United States v. Fiorito*, ARMY20080535, 2011 WL 779922 (A. Ct. Crim. App. Mar. 3, 2011). The *Fiorito* court reversed a conviction finding the reasons cited by the judge such as

inconvenience and hardship witnesses experienced by delay, loss of military schooling and vacation opportunity, disgruntlement at delayed redeployment to be unpersuasive though not irrelevant for consideration. *Id.* Even a denial of a continuance based on a concern for prosecution witnesses in combat was found to be an abuse of discretion when weighed against a meaningful opportunity to prepare by the defense. *Id.* (Citing *United States v. Smith*, 40 C.M.R. 418 (A.C.M.R. 1968)).

The denial of the requested continuance of the Article 32 strains reason and demands an explanation, especially when juxtaposed against the many months of preparation the Government secured for itself before the hearing and the additional 30 days delay between April 7 and May 7, after the hearing, that the CA summarily declared as excludable.

In contrast, the Defense requested a mere fourteen additional days. Those days would have been excludable anyway. Despite being excludable, neither the IO nor the CA considered the profound implications of a denial on the accused's right to counsel, arguing that it would cause unreasonable delay. The argument about unreasonable delay was oddly absent, however, when it was the Government that needed the delay in April and into May. The prosecution summarily secured for itself 30 days of delay which the CA declared excludable. The purpose of that delay was to coordinate with the family of the alleged victim in this highly publicized and politically influenced case. But the family of the alleged victim have no constitutional or statutory rights in this case. And while their loss is tragic, their rights cannot outweigh the rights of the accused, **especially when there is no evidence that SGT Hurst had any real causal connection to the tragic death.**

The political and media attention this matter has garnered have impacted the manner with which the command and the IO handled this case. Despite SGT Hurst being stationed at Fort Wainright, Alaska, and all witnesses located at Fort Wainright, SGT Hurst was reassigned to Fort Bragg to afford easier access to the alleged victim's parents. The Army's conduct is curious since no causal connection has been established between PV2 Chen's death and anything the accused has done. In fact, evidence suggests a number of other reasonable explanations that avail themselves to a greater level of culpability for Chen's death –if the Army desires to allocate blame for the suicide- than anything SGT Hurst is accused of doing.

a. PV2 Chen's most likely cause of suicide was abandonment by his family.

PV2 Chen was disowned by his family for joining the Army, *See PV2 Johnson's Statement*; he expressed hurt feelings about the decision and exhibited symptoms of depression and emotional distress as a consequence. He also struggled in achieving basic competencies as a soldier which made him ineligible to patrol outside the COP. His lack of competency as a soldier could have certainly been the result of the emotional strain and depression caused by the family abandonment. The mental strain resulting from being disowned cannot be underestimated in someone who is so well connected to a traditional culture that places such a high premium on familial ties. The feeling that his mother had disowned would have had a profound impact on PV2 Chen. That impact is evidenced by the tragic message he left on his arm "tell my family I'm sorry." That message provides a window into the mind of PV2 Chen offering a reasonable and very probable explanation of why he would have committed suicide and the heavy toll being told by his mother that he would be disowned if he leaves for Afghanistan. Finally, PV2 Chen

was in the midst of a high intensity combat environment that has resulted in an inexplicable number of suicides by soldiers and Marines simply for being in that environment. See Suicide among U.S. Troops Spike, military officials unsure of reasons (As it appeared on June 14, 2012, [http://usnews.msnbc.msn.com/\\_news/2012/06/08/12125014-suicides-among-us-troops-spike-military-officials-unsure-of-reasons?lite](http://usnews.msnbc.msn.com/_news/2012/06/08/12125014-suicides-among-us-troops-spike-military-officials-unsure-of-reasons?lite)); Is the U.S. Army Losing its War on Suicide. (As it appeared on June 14, 2012, <http://www.time.com/time/nation/article/0,8599,1981284,00.html>). The reasons soldiers in combat commit suicide are too innumerable to account for but hazing and maltreatment are rarely cited as reasons. A common Google search for causes of suicide in soldiers resulted in no relevant results connected to hazing, assuming *arguendo* that PV2 Chen was in fact hazed. Despite the lack of any real evidence indicating a casual connection between the alleged hazing and the suicide, the IO found a connection, ignored relevant evidence offering more reasonable alternatives and engaged in gratuitous attacks on Defense counsel.

b. The Article 32 Investigating Officer was neither impartial nor judicial in the performance of his duties.

An Article 32 Investigating Officer is a lay judge who performs a judicial function. *U.S. v. Payne*, 3 M.J. 354, 355-356 (C.M.A. 1977). Even a lay judge must conduct himself in accordance with proper judicial standards. *Id.* (Citing *Shadwick v. City of Tampa*, 407 U.S. 345 (1972)). The IO in this case failed to adhere to proper judicial standards and abandoned his judicial function and neutrality when he assumed a prosecutorial function. His lack of neutrality was evidence by his inflexible opinion about Chen's cause of death and his professionally offensive comments towards Defense counsel as demonstrated by his gratuitous statements about the intentions behind Defense counsel's inability to appear for the Article 32 hearing.

Moreover, despite the substantial evidence providing other reasonable explanations for a possible suicide, the IO embraced the prosecution's argument that the suicide was caused by maltreatment without any lay or scientific evidence to support such a conclusion except baseless and unscientific arguments. Chen's only suicide note refers to his family, not to any maltreatment he allegedly suffered. His family had disowned him because he deployed to Afghanistan. He wrote a suicide note telling his family he is sorry. In the twisted logic applied by the prosecutors and embraced by the IO, family abandonment and a note of apology back to the family means that Chen killed himself because he was maltreated by soldiers in his unit. There is not a scintilla of evidence indicating that Chen killed himself because he labored under an emotional toll caused solely by the remedial training. Interestingly, the activities Chen engaged in, which the Army suggests led to his suicide, are far less stressful than basic training and Chen's infantry training. Yet despite the lack of a provable causal connection between Chen's suicide and SGT Hurst, the IO found that SGT Hurst is responsible and accused his defense lawyers of engaging in professionally questionable conduct in his report when he asserts that the defense is trying to secure the delay that they could not secure at trial.

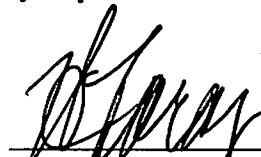
Such statements hardly represent the views of a neutral and impartial fact finder. Defense counsel acted with absolute forthrightness and in the most expeditious manner to support the rocket paced schedule demanded by the IO and the Trial Counsel. Civilian counsel would have had a total of 62 days from the date he was retained until the date requested for an Article 32, and 71 days from the date charges were preferred. In those 62 days, Defense counsel had a nearly a 4 week trial, an attack by online hackers on Defense counsel's computer network

and website that compromised files and totally incapacitated electronic information for a number of days, a Bar exam and, of course, time to review the voluminous evidence in this case. The requested two week delay can hardly be considered unreasonable, unless of course the Army was looking for an excuse, as it appears, to deny the accused the right to a fair trial for political purposes in the hopes of securing a quick plea to appease the family of PV2 Chen and their political supporters who have been led to believe that SGT Hurst and other members of the squad caused his death. The intent of the Army to lay blame where blame will not reside, is demonstrated by the IO's refusal to consider pornographic evidence suggesting an incestuous relationship between a mother and son which demands consideration even if it is later deemed to be irrelevant. Moreover, the IO completely ignored two important items of evidence: 1) PV2 Chen's note on his arm "tell my parents I'm sorry" and 2) his great distress at being informed by his mother that the family is disowning him for deploying to Afghanistan. *PV2 Johnson Statement*, October 3, 2011.

### CONCLUSION

Based on the forgoing, the Defense respectfully requests this Court grant the requested relief by dismissing the referred charges.

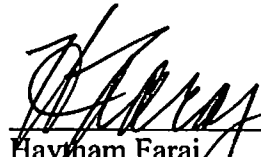
June 19, 2012



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### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was sent via email to the military judge and trial counsel on 19 June 2012.



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