

APPENDIX O

U. S. Department of Justice

Washington, DC 20530

August 6, 1997

MEMORANDUM

TO: FRANK W. HUNGER
Assistant Attorney General
Civil Division

THROUGH: EVA M. PLAZA
Deputy Assistant Attorney General
Torts Branch, Civil Division

FROM:  HELENE M. GOLDBERG
Director
Torts Branch, Civil Division

Attached for your consideration is an action memorandum for the Attorney General recommending that Department attorneys be permitted to assert the defense of Supremacy Clause immunity to any criminal charges brought by the State of Texas against United States Marine Corps personnel arising from the May 20, 1997, shooting death of Esequiel Hernandez, Jr. Please contact me if you have any questions or comments regarding the memorandum.



U.S. Department of Justice
Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

THROUGH: THE ASSOCIATE ATTORNEY GENERAL

FROM: Frank W. Hunger
Assistant Attorney General
Civil Division

SUBJECT: **ASSERTION OF SUPREMACY CLAUSE IMMUNITY TO ANY CRIMINAL CHARGES BY THE STATE OF TEXAS AGAINST UNITED STATES MARINE CORPS PERSONNEL ARISING FROM THE MAY 20, 1997, SHOOTING DEATH OF ESEQUIEL HERNANDEZ, JR.**

PURPOSE: To recommend that Department attorneys be permitted to assert the defense of Supremacy Clause immunity to any criminal charges brought by the State of Texas against United States Marine Corps personnel arising from the May 20, 1997, shooting death of Esequiel Hernandez, Jr.

TIMETABLE: A decision is needed as soon as possible. A Texas state grand jury was convened on July 30, 1997, to consider charges against four Marines involved in the shooting death of Esequiel Hernandez, Jr. The grand jury is currently in recess until August 14, 1997. It is anticipated that the grand jury will conclude its investigation and render a decision on that date.

SYNOPSIS: On May 20, 1997, Marine Corporal Clemente M. Banuelos shot and killed Esequiel Hernandez, Jr., while leading a four-man Marine surveillance team performing a federal counterdrug mission in support of the United States Border Patrol. Corporal Banuelos shot Mr. Hernandez in order to defend a member of his team from the threat of imminent death or serious bodily harm. Our review indicates that Corporal Banuelos acted reasonably and in accordance with the applicable federal Rules of Engagement. The State of Texas has convened a grand jury to consider whether to indict Corporal Banuelos and the other members of his team on state homicide charges. By virtue of the Supremacy Clause, U.S. Const art. VI, cl. 2, federal agents

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are immune from state criminal prosecution for actions taken during the performance of federal duties that are honestly and reasonably believed to be necessary and proper. See, e.g., *In re Neagle*, 135 U.S. 1 (1890); *Kentucky v. Long*, 837 F.2d 727 (6th Cir. 1988). The Civil Division seeks authority to assert the defense of Supremacy Clause immunity to any criminal charges brought by the State of Texas against the Marines involved in this incident.

FACTS:

The following facts are compiled from transcripts of the Marines' radio communications and statements that the Marines gave to the FBI, the Texas Rangers and local law enforcement agents.

In April 1996, the U.S. Border Patrol submitted a support request to the Department of Defense ("DOD") requesting a surveillance and monitoring mission in the Marfa, Texas, Sector in support of the Border Patrol's Southwest Border drug interdiction mission. The Border Patrol's support request was ultimately approved by Joint Task Force Six ("JTF-6"), the responsible DOD command, and assigned to the Headquarters Battery, 5th Battalion, 11th Marine Regiment, 1st Marine Division, stationed at Camp Pendleton, California.

The Marine Corps unit was to man four concealed Listening Post/Observation Posts ("LP/OPs") from May 15-29, 1997, in areas of suspected drug activity designated by the Border Patrol. The purpose of the LP/OPs was to detect, monitor and report drug smuggling. Each LP/OP was to be manned on a continuous basis by a four-member team of Marines rotating in 72 hour shifts. Corporal Banuelos was the Team Leader of a team consisting of himself, Assistant Team Leader Cpl Roy Torrez, Jr., radio operator Lance Corporal ("LCpl") Ronald H. Wieler, Jr., and LCpl James M. Blood.

Corporal Banuelos' team was assigned the mission of observing the Polvo Crossing area of the Rio Grande River, south of Redford, Texas. The Polvo Crossing is a site where narcotics smugglers are known to enter the United States. Corporal Banuelos' team

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was to monitor the crossing at night and rest in a camouflaged "hide site" during the day. Their orders were to remain undetected and report any suspicious activity by radio to the Border Patrol and their Tactical Operations Center ("TOC") which were both monitoring all radio messages. The team was equipped with night vision devices, binoculars, radio communications gear, and standard military field equipment. They were armed with standard M-16A2 service rifles.

Corporal Banuelos' team began its three-day surveillance mission the night of May 17, 1997, and was to be relieved the night of May 20, 1997. At 6:00PM on May 20, 1997, the team was openly moving all of its equipment from the daytime hide site to the LP/OP in anticipation of being relieved that night. It was approximately one hour and 45 minutes before sunset and visibility was excellent although a storm was moving into the area and a strong wind was blowing. The team observed a man on horseback on the Mexican side of the river and reported that sighting to the Border Patrol. The sighting of the rider was significant because the Marines had been briefed that drug smugglers sometimes used horses to smuggle narcotics into the United States. Almost immediately after sighting the rider, the Marines noticed a man armed with a rifle walking with some goats on the American side of the Rio Grande. The Marines had also been briefed that narcotics smugglers worked in teams, frequently employing scouts on foot. At the time the Marines first saw the armed man, three of them were standing in the open carrying among them a black five-gallon water can, a full backpack and communications gear. The Marines were certain that the man had spotted them because of his concentrated stare in their direction.

Corporal Banuelos placed his men in a security halt and radioed a report that a man armed with a rifle was approximately 200 meters from their position. At approximately 6:07PM the man fired a shot at the two Marines carrying the black water can. Corporal Banuelos immediately reported "We are taking fire!" While Cpl Banuelos was transmitting that message,

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the man fired a second shot at the Marines. Both Cpl Torrez and LCpl Wieler reported hearing the bullets pass by them at ear level indicating that they were receiving accurate rifle fire.

After the second shot, Cpl Banuelos ordered his men to chamber a round in their rifles so that they could defend themselves. At 6:11PM he notified the Border Patrol and the TOC that if the man aimed his rifle at them again, they would fire back. The TOC replied "Roger, Fire Back." At approximately this time the armed man began moving east in a tactical manner. He was moving in a crouch from one covered and concealed position to the next. Corporal Banuelos' perception was that the man was moving east in order to outflank the Marines. At 6:14PM Cpl Banuelos notified the Border Patrol and the TOC that the armed man was moving and that "He knows we are out here, he [is] looking for us!"

Corporal Banuelos determined that the best way to protect his team was to maintain visual contact with the armed man and wait for the Border Patrol response element. He feared that if the Marines lost sight of the man he would sneak up on their position and fire at them from a hidden position to their flank or rear. Accordingly, he ordered his team to move east, parallel with the man, in order to keep him in sight. Corporal Banuelos maneuvered his team by having one Marine at a time take a short rush from one position to the next while the other members of the team provided cover. This is a standard military tactical movement technique. At approximately 6:27 PM, Cpl Banuelos directed LCpl Blood through hand and arm signals to move further east onto higher ground. When LCpl Blood rose to rush to the higher ground, the armed man saw him and aimed his rifle in LCpl Blood's direction. Corporal Banuelos believed that LCpl Blood would be killed or seriously injured unless he took immediate action. Accordingly, he fired a single round at the man in order to protect LCpl Blood. The round struck the man and he fell backward out of sight. Corporal Banuelos immediately notified the Border Patrol and the TOC that he had shot the armed man.

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Corporal Banuelos was not sure whether the man still posed a threat to his team. Accordingly, he ordered the team to cautiously approach the site where the man fell, moving tactically. When the Marines reached a position approximately 50 meters from the man they began shouting "United States Marines, come out with your hands up, drop your weapon." Hearing no response, the team slowly moved toward the man's position. At approximately 6:35PM, the team saw the man lying in the foundation of a chimney next to an abandoned house.

They secured the man's rifle and posted security at the site. Corporal Banuelos removed a baseball cap that was covering the man's face and saw that the man's head, neck, and jaw were twisted and contorted in an unusual position. Corporal Banuelos feared that the man's neck was broken, so he decided not to move him. He looked for a gunshot wound, but saw no bleeding or other evidence of a wound. At 6:45PM the Border Patrol arrived and took control of the scene. An Army MEDEVAC helicopter airlifted the man to a hospital for treatment, but he was dead on arrival from a single gunshot wound. The man was later identified as Esequiel Hernandez, Jr.

DISCUSSION:

A Texas State grand jury is considering whether to indict Corporal Banuelos and the other members of his team on state homicide charges. By virtue of the Supremacy Clause, U.S. Const. art. VI, cl. 2, federal agents are immune from state criminal prosecution for actions taken during the performance of federal duties that are honestly and reasonably believed to be necessary and proper. See, e.g., *In re Neagle*, 135 U.S. 1 (1890); *Kentucky v. Long*, 837 F.2d 727 (6th Cir. 1988).

The seminal decision articulating this concept of federal supremacy is *In re Neagle*. In *Neagle* a Deputy U.S. Marshall was charged with murder by the State of California for shooting and killing a man who assaulted Supreme Court Justice Stephen J. Field. The Supreme Court held that the Deputy Marshall "was acting under authority of the law of the United States and . . . is not liable to answer

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in the courts of California on account of his part in the transaction." *Neagle*, 135 U.S. at 76.

Under *Neagle*, a federal agent is immune from state prosecution if (1) the federal agent was performing an act which he was authorized to do by the law of the United States and (2) in performing that authorized act, the federal agent did no more than was necessary and proper for him to do. *Kentucky v. Long*, 837 F.2d at 744. The necessary and proper prong of the *Neagle* test is subjective not objective; the federal agent is immune so long as he had an honest and reasonable belief that what he did was necessary and proper even if he exercised poor judgment. *Long* 837 F.2d at 744.

Corporal Banuelos and the Marines in his team clearly satisfy the first prong of the *Neagle* test because they were performing an authorized federal counterdrug mission pursuant to lawful military orders. Corporal Banuelos also satisfies the second prong of the test because he fired in an honest and reasonable belief that the use of deadly force was required to protect LCpl Blood from death or serious bodily harm. Corporal Banuelos has passed a polygraph examination on this point administered by Ernie Hulsey, the former chairman of the Texas State Board of Polygraph Examiners.¹

The conduct of federal military operations is authorized and governed exclusively by federal law and is not subject to control by the criminal codes of the various States. The Constitution provides that Congress shall have power "To make Rules for the Government and Regulation of the land and naval forces" and that the "President shall be Commander in Chief of the Army and Navy of the United

¹ This information was provided for purposes of this memorandum by Cpl Banuelos' private counsel, Jack B. Zimmermann, Esq., who specifically requested that it remain confidential and not be disseminated outside the Department for any purpose. Mr. Zimmermann's request for confidentiality is based upon ethical considerations that this information not be publicly released while the grand jury is considering the case.

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States." U.S. Const art. I, § 8, cl. 14; art. II § 2, cl. 1. The States cannot control or regulate federal military operations. The use of force by the Armed Force of the United States is governed by the Joint Chiefs of Staff Standing Rules of Engagement. CJCS Instruction 3121.01 (October 1, 1994). The overriding theme of the Standing Rules of Engagement is that military commanders have both the inherent authority and an obligation to use all necessary means available and to take all appropriate action in self-defense of their units. Corporal Banuelos acted in the honest and reasonable belief that his actions were necessary to protect his unit.

Several critical federal interests will be advanced by permitting Department attorneys to assert that Cpl Banuelos and the Marines on his team are immune from prosecution by the State of Texas. First, the right of Congress and the President to control the operations of the Armed Forces of the United States will be protected from encroachment by the States. Second, the ability of the Government to utilize the Armed Forces to provide support to civilian law enforcement agencies in the interdiction of illegal narcotics will be protected. Third, soldiers, sailors, airman and Marines will be shown that they can follow lawful orders and their military training without fear of state criminal prosecution. Fourth, the United States' interest in vigorously defending its employees from adverse legal consequences arising from the performance of their federal duties will be advanced. Although Supremacy Clause immunity can be raised by private counsel, the argument loses much of its force if it is not raised by Department attorneys.

Corporal Banuelos, Cpl Torrez, LCpl Wieler, and LCpl Blood each requested Department of Justice representation pursuant to the provisions of 28 CFR 50.15. After reviewing all available facts, the Torts Branch determined that the Marines were acting within the scope of their federal employment and that representation was in the interest of the United States. Accordingly, the Deputy Assistant Attorney General for the Torts Branch approved

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Department representation and the retention of private counsel at government expense pursuant to 28 CFR 50.16. Separate private counsel have been retained for each of the four Marines.

The Criminal Section of the Civil Rights Division is currently investigating this incident. The current focus of their inquiry is that LCpl Wieler gave inconsistent statements to local police, his military chain-of-command, and the Texas Rangers shortly after the shooting. In his statement to the local police given on May 20, 1997, LCpl Wieler states that "at the time the fire was shot [sic] I did not have eyes on the suspect because of brush was blocking my view." In his statement to his commander given later that date he states that "[a]t the time CPL Banuelos had fired a shot I did not have the suspect in my sights because of the brush in front of me." In his statement given to the Texas Rangers and FBI the next day he states that "Corporal Banuelos motioned for me to move forward and hold, which was to Corporal Banuelos' left, then motioned Lance Corporal Blood to his right leaving Corporal Banuelos in the middle. At this time I saw the individual raise the rifle and point toward Lance Corporal Blood and I saw the muzzle flash of Corporal Banuelos' weapon and heard a shot." The Torts Branch has no explanation for LCpl Wieler's seemingly inconsistent statements. However, Supremacy Clause immunity turns on Cpl Banuelos' subjective belief that it was necessary to fire in order to protect LCpl Blood from the imminent threat of death or serious bodily harm. Whether LCpl Wieler saw Mr. Hernandez point his rifle at LCpl Blood is immaterial. Cpl Banuelos states that he clearly saw Mr. Hernandez point his rifle at LCpl Blood and has passed a polygraph on that point.

The District Attorney investigating this case for the State of Texas and the Texas Rangers have raised questions concerning the angle of entry of the bullet that struck Mr. Hernandez. The bullet struck him in the right front rib cage below his right armpit and passed through his lungs laterally. The District Attorney and Rangers

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speculate that this indicates that Mr. Hernandez was not pointing his rifle in the direction of LCpl Blood at the time Cpl Banuelos fired. Ballistics experts in consultation with Cpl Banuelos' private counsel, Jack B. Zimmermann, Esq., have opined that it is impossible to determine where Mr. Hernandez's rifle was pointing from the angle of entry of the bullet. Additionally, questions have been raised concerning why the Marines moved from their position instead of staying in place or retreating. As is discussed above, Cpl Banuelos explains that he moved his team in order to keep Mr. Hernandez in sight. He feared that if the Marines lost sight of Mr. Hernandez, he would sneak up on them and fire at them from a hidden position to their flank or rear. Given the circumstances, this course of action appears to have been reasonable.

RECOMMENDATION: For the foregoing reasons, the Civil Division recommends that Department attorneys be permitted to assert the defense of Supremacy Clause immunity to any criminal charges brought by the State of Texas against United States Marine Corps personnel arising from the May 20, 1997, shooting death of Esequiel Hernandez, Jr.

APPROVE _____

Concurring Components: ,

DISAPPROVE _____

None

OTHER _____

MEMORANDUM FOR FILE

RE: Southwest Border Shooting Incident

Department attorneys are hereby authorized to assert Supremacy Clause immunity to any criminal charges brought by the State of Texas against United States Marine Corps personnel arising from the May 20, 1997, shooting death of Esequiel Hernandez, Jr.

JANET RENO
Attorney General

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

EXECUTIVE SUMMARY

TO: THE ATTORNEY GENERAL

THROUGH: ERIC H. HOLDER, JR.
Deputy Attorney General

JOHN C. DWYER
Acting Associate Attorney General

RICHARD W. ROBERTS
Chief, Criminal Section
Civil Rights Division

FROM: FRANK W. HUNGER
Assistant Attorney General
Civil Division

SUBJECT: Southwest Border Shooting Incident

PURPOSE: To obtain authority for Department attorneys to assert Supremacy Clause immunity to any criminal charges brought by the State of Texas against United States Marine Corps personnel arising from the May 20, 1997, shooting death of Esequiel Hernandez, Jr.

TIMETABLE: As soon as possible.

DISCUSSION: The Civil Division seeks authority to assert the defense of Supremacy Clause immunity to any criminal charges brought by the State of Texas against United States Marine Corps personnel arising from the May 20, 1997, shooting death of Esequiel Hernandez, Jr.

RECOMMENDATION: The Civil Division recommends that Department attorneys be permitted to assert the defense of Supremacy Clause immunity.

APPROVAL _____

DISAPPROVE _____

OTHER _____

APPENDIX P

(2/27/1997)

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE

Date: 07/17/1997

To: El Paso

From: El Paso
Midland RA
Contact: SA Kyle K. Bonath

Approved By: Kincaid Terry R

Drafted By: Bonath Kyle K: kkb

Case ID #: 282A-EP-32400 (Pending)

Title: ROY TORRES, JR.,
RONALD HARRY WICKLER, JR.,
CLEMENTE MANUEL BANUELOS,
JAMES MATTHEW BLOOD,
U.S. MARINES;
EZIOQUIAL HERNANDEZ, JR. (DECEASED) - VICTIM;
CIVIL RIGHTS

Synopsis: Investigation conducted on July 9, 1997.

Details: On July 9, 1997, representatives from the FBI and the District Attorneys office were present at an investigation conducted by the Texas Rangers into the Marine shooting on May 20, 1997. The entire investigation was videotaped by the DPS. The purpose of the investigation was to videotape the terrain and to record Hernandez's and the Marines' perspectives. Four different sites were identified and marked for videotape and photo purposes:

- Point 1: the position where Hernandez was standing when he shot toward the Marines observation post.
- Point 2: the Marines observation post, when they were when fired upon.
- Point 3: the position from where Clemente Banuelos shot Hernandez.
- Point 4: the position where Hernandez was shot.

To approximate the Marines' position when Hernandez shot in their direction, mannequins were dressed in camouflage and placed at the Marines' observation post (point 2). The mannequins were very difficult to see from Hernandez's position (point 1). Hernandez's .22 rifle was fired several times from Hernandez's position (point 1) toward the Marines' observation post (point 2). The position of the Marines (point 2) was within

7/17/97
 BY: [Signature]
 [Signature]
 [Signature]

DUPLICATE SERIAL FORWARDED
TO: M. NA GR 7-7E-97

282A-EP-32400-4
JUL 17 1997

To: El Paso From: El Paso
Re: 282A-EP-32400, 07/17/1997

the range of Hernandez's .22 rifle. One .22 round pierced the plywood marker identifying point 2.

An individual portrayed Hernandez and approximated his route and pace (according to radio log) from where Hernandez's fired (point 1) to where Hernandez was shot (point 4). The individual portraying Hernandez was videotaped along his route from the Marines' vantage point (point 2). The approximate route the Marines would have taken from their observation area (point 2) to where Clemente Banuelos shot Hernandez (point 3) was videotaped. Aerial shots from a helicopter were taken of the surrounding area and all four points.

APPENDIX Q

Memorandum



BFK:bbm
DJ 144-76-4283

Subject Shooting of Esequiel Hernandez in Redford, Texas, by Marines on May 20, 1997	Date OCT 14 1997
To Isabelle Katz Pinzler Acting Assistant Attorney General Civil Rights Division	From <i>BFK</i> Barry P. Kowalski Special Litigation Counsel Criminal Section Civil Rights Division

Attached are Talking Points and Q and As for the Attorney General regarding the investigation into the death of Esequiel Hernandez. Mr. Hernandez, an 18-year-old American living on the Mexican border, was shot and killed by a United States Marine participating in a federal drug interdiction law enforcement operation near the small town of Redford, Texas, on May 20, 1997. A federal investigation is being conducted by the Civil Rights Division, with the assistance of the United States Attorney's Office for the Western District of Texas, to determine whether the criminal civil rights statutes were violated.¹ Our investigation did not become an active one until the investigation by local Texas authorities ended in a no-bill on August 14, 1997.

At the same time, the Marine Corps is conducting an investigation into the incident, as well as its implications on the Marine Corps' involvement in border drug interdiction operations. That investigation is being directed by Major General John Coyne, a lawyer brought out of retirement by the Commandant of the Marine Corps. We are coordinating investigations in an attempt to avoid duplication of effort and inconsistent findings.

Mr. Hernandez was shot and killed by the leader of a four-man Marine observation team, Corporal Banuelos. The only witnesses to the shooting are the three other members of the team. While the Marines' explanation of the circumstances of the

¹ Media reports allege that failures by the United States Border Patrol may have contributed to the death of Mr. Hernandez. Our investigation has no credible evidence that conduct by any member of the Border Patrol suggests criminal complicity. It is not within our expertise to determine the quality of USBP/USMC coordination and support of each others missions.

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shooting justifies the use of deadly force, one Marine has given inconsistent statements that cannot be innocently reconciled and another has provided information that is in contradiction with known facts. In other words, two of the three eye-witnesses appear to have lied. In addition to this disturbing fact, forensic evidence raises questions about the shooter's version of events. Banuelos claims he fired when the victim shouldered his rifle and aimed at one of the members of his team. If the victim shouldered the rifle right-handed, as investigation reveals was his habit, the trajectory of the wound is completely inconsistent with such action. Additionally, Banuelos advanced his team toward the victim notwithstanding the fact that his mission required his team to remain in hiding without engaging anyone. His explanation for departing from his rules of engagement has been that he believed the victim was attempting to flank his team. That explanation is questionable since the victim moved 130 yards away from the original position of the Marines during a thirteen minute time period (a rate of ten meters per minute, a speed more consistent with simply herding goats, than attempting to flank a Marine unit).

However, evidence shows that the victim was armed with a .22 rifle and at the beginning of the incident had fired a shot that the Marines believed was aimed at them. Accordingly, while there is no clear indication that a federal or Uniform Code of Military Justice violation occurred, the evidence suggests that two Marine eye-witnesses have not been completely truthful, warranting careful additional investigation. General Coyne shares our skepticism about the candor of the Marines involved.

While we are conducting several necessary investigative steps, the key to the investigation is aggressive interview of the three Marine witnesses. Unfortunately, efforts initiated to interview the three witness Marines have not as yet been successful. A joint interview by General Coyne and the writer originally scheduled for September 11, 1997, was thwarted by civilian defense attorneys, who were originally retained by the Department for the local investigation, but have continued to represent the Marines pro bono. Following the lead of the attorney representing the shooter, Banuelos, the attorneys for the witness Marines have refused to obey an order to be interviewed by General Coyne and me, contending that the order which conveys use immunity as to any UCMJ, federal or local Texas prosecution, is nonetheless illegal. The unified defense has its supporters within the Marine Corps and the order has not been enforced. Instead, Marine legal authorities and the convening authority in this investigation, Lieutenant General Carlton Fulford, at the behest of the defense team, are attempting to arrange a Court of Inquiry, as a substitute to an interview. General Coyne agrees with us that a Court of Inquiry is simply an effort to empower the defense attorneys at the expense of effective interviews of the witness Marines in order to protect 267

the shooter and the witnesses who may have lied. General Coyne is assisting our effort to oppose the Court of Inquiry and to seek enforcement of the original order to compel interviews with use immunity.

Per Department instruction, I have advised the Marine Corps, through Lieutenant General Fulford, of the Department's concerns regarding a Court of Inquiry. At this time, it is not clear that Marine authorities will follow the suggestion of General Coyne and the Department and enforce the order to submit to interviews. If this occurs, we are prepared to withdraw from the "joint" investigation and proceed to grand jury. While there have been investigative advantages in cooperating with the Marines to date, a Court of Inquiry is a poor substitute for an interview and vastly inferior as an investigative tool as compared to judicially compelled grand jury testimony.² While we remain eager to cooperate with the Marine investigation directed by General Coyne, with whom we have an excellent working relationship and whom we trust, we cannot do so at the expense of the effectiveness of our own criminal investigation, which languishes while Marine authorities attempt to accommodate demands by defense attorneys. General Coyne understands why the Department feels compelled to adopt this position.

In consultation with General Coyne, we have advocated October 16, 1997, as a deadline for compliance with the order to testify.³ If interviews have not occurred by then, we are prepared to commence grand jury investigation on November 13, 1997, in Pecos, Texas. In such case, we would recommend the Department not extend use immunity to any statements made by the

² The proposed Court of Inquiry offers no advantage to our investigation. It changes simple interviews into a mini-trial. The proposal would allow the subject of the investigation and his attorney to be present to hear the witnesses. It allows the witnesses to call witnesses of their own, to cross-examine each other and each others witnesses. It allows the witnesses to subpoena their testimony before the local grand jury, something to which they are otherwise not entitled. We cannot be a party to the proposed Court of Inquiry and conduct a legitimate investigation.

³ The order is now only applicable to the two Marines who we suspect have not been candid. The third Marine witness was prematurely discharged from the Marine Corps without notice to the Marine investigative team before he was served with the order to be interviewed. That discharge action is being separately investigated by the Marine Corps. In any event, because the defense has adopted a unified response posture, we reasonably anticipate that if the first two Marines agreed to be interviewed, the third will voluntarily follow.

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Marine witnesses until they have testified in the grand jury.⁴ If this course of action is necessary, it will not likely be harmoniously received by Marine authorities. On the other hand, some influential Marine authorities, even according to their own specially appointed investigator General Coyne, appear more interested in being conciliatory toward defense counsel than placing witnesses, who have questionable credibility, in a position best designed to obtain truthful information. Continued cooperation at the expense of an effective investigation is simply not an acceptable option.

⁴ The Marine witnesses have made four prior statements, including one under oath to the local grand jury. Yet another statement made without Department participation in the interview before testimony to a federal grand jury is disadvantageous to our investigation.

TALKING POINTS: MARINE SHOOTING

o On May 20, 1997, Esequiel Hernandez, an eighteen year old American citizen was shot and killed on the American side of the border near the small town of Redford, Texas.

o The shooter has been determined to be the leader of a four-man Marine observation post, Corporal Clemente Banuelos.

o The only eye-witnesses are ther other three members of Banuelos' team.

o The Marine team was a part of a law enforcement drug interdiction operation.

o Local investigators, assisted by the FBI, promptly investigated the shooting.

o The local investigation terminated with a no-bill on August 14, 1997, in Marfa, Texas,

o On August 15, 1997 the Civil Rights Division, assisted by the FBI and the United States Attorney's office from the Western District of Texas commenced an active investigation.

o At the same time, a Marine Corps investigation, commencing in July, 1997, was being conducted by a specially appointed investigating office, Major General Coyne, brought from retirement by the Commandant for the assignment.

o The Department of Justice investigation, while remaining independent of the Marine Corps investigation, is closely coordinating investigative activity, sharing information and conducting joint interviews.

o Corporal Banuelos is the only subject of the federal criminal civil rights investigation. While there may have been deficiencies in the implementation of the operation, there is no evidence to suggest that any Marine supervisor or United State Border Patrol agent is culpable of any wrongdoing.

o An attorney from the Civil Rights Division has visited the scene of the shooting, interviewed law enforcement officers who investigated the incident, interviewed Marines who were not eye-witnesses, and initiated forensic examinations. All this investigation is being coordinated with General Coyne's investigation. 10210

o The most critical investigative action, interview by the Department of the eye-witness Marines, has not yet occurred because of protracted negotiations between the Marine Corps and attorneys for the subject and the witness Marines.

o The attorneys for the subject and the witness Marines are attempting to persuade the Marine Corps to enact a Court of Inquiry as a substitute for interviews.

Q AND As

Q - IS THE UNITED STATES DEPARTMENT OF JUSTICE INVESTIGATING THE FATAL SHOOTING OF ESEQUIEL HERNADEZ, A YOUNG GOAT-HERDER, WHO WAS SHOT AND KILLED BY A MARINE OBSERVATION TEAM ON MAY 20, 1997, AT THE BORDER NEAR REDFORD, TEXAS?

A - YES. THE CIVIL RIGHTS DIVISION IS INVESTIGATING THAT INCIDENT AND THE UNITED STATES ATTORNEY FROM THE WESTERN DISTRICT OF TEXAS IS ASSISTING THAT INVESTIGATION ALONG WITH THE FEDERAL BUREAU OF INVESTIGATION.

Q - A TEXAS GRAND JURY NO-BILLED THIS CASE. WHY IS THE DEPARTMENT OF JUSTICE INVESTIGATING?

A - A LOCAL GRAND JURY IN MARFA, TEXAS, WAS INVESTIGATING WHETHER LOCAL LAWS HAD BEEN VIOLATED AND DECIDED ON AUGUST 14, 1997, NOT TO BRING CHARGES. WE ARE NOW INVESTIGATING TO DETERMINE WHETHER FEDERAL LAW WAS VIOLATED.

Q - WHY IS THE DEPARTMENT OF JUSTICE INVESTIGATING A MILITARY OPERATION?

A - IN THIS INSTANCE THE MARINES WERE ASSISTING FEDERAL LAW ENFORCEMENT. IF THERE WAS CONDUCT THAT VIOLATED THE RIGHTS PROTECTED BY THE UNITED STATES CONSTITUTION, THEN THE INVESTIGATION OF THAT CONDUCT IS WITHIN THE JURISDICTION OF THE CIVIL RIGHTS DIVISION.

Q - DID THE MARINES VIOLATE THE CONSTITUTION?

A - THAT IS WHAT IS THE SUBJECT OF THE INVESTIGATION. NO CONCLUSION WILL BE REACHED UNTIL ALL THE FACTS ARE AVAILABLE.

Q - IS THE UNITED STATES MARINE CORPS ALSO INVESTIGATING THIS INCIDENT?

A - YES. THE COMMANDANT OF THE MARINE CORPS HAS CALLED MAJOR GENERAL JOHN COYNE BACK TO ACTIVE DUTY TO CONDUCT AN INVESTIGATION OF THE INCIDENT AND THE MARINE CORPS RESPONSIBILITIES IN SUCH MISSIONS.

Q - WHAT IS THE RELATIONSHIP BETWEEN THE INVESTIGATION OF THE DEPARTMENT OF JUSTICE AND THE MARINE CORPS?

A - THE INVESTIGATIONS ARE INDEPENDENT OF EACH OTHER. HOWEVER, TO ELIMINATE DUPLICATION AND TO PROVIDE BETTER INVESTIGATIONS, THE TWO INVESTIGATIONS ARE COORDINATING WITH EACH OTHER. WE HAVE AN EXCELLENT RELATIONSHIP WITH GENERAL COYNE AND HIS INVESTIGATORS.

Q - INITIAL REPORTS FROM THE MARINE CORPS EXONERATED THE MARINES INVOLVED, HAS NEW INFORMATION SURFACED TO CAST DOUBT ON THAT PROCLAMATION?

A - I CANNOT COMMENT ON THE SPECIFICS OF A PENDING INVESTIGATION.

Q - WILL THE DEPARTMENT OF JUSTICE CONVENE A FEDERAL GRAND JURY?

A - I CANNOT COMMENT ON THE SPECIFICS OF AN OPEN INVESTIGATION.

Q - ALLEGATIONS HAVE BEEN MADE ABOUT THE CONDUCT OF THE UNITED STATES BORDER PATROL AGENTS, ARE ANY OF THEM BEING INVESTIGATED AS WELL AS THE MARINES?

A - NO BORDER PATROL AGENT IS A SUBJECT OF INVESTIGATION AT THIS TIME INVOLVING THIS INCIDENT. I CANNOT BE ANY MORE SPECIFIC THAN THAT.

Q - CAN YOU SHARE INFORMATION WITH THIS COMMITTEE ABOUT WHAT YOUR INVESTIGATION HAS REVEALED?

A - NOT AT THIS TIME. OUR INVESTIGATION IS STILL AN ACTIVE ONE.

Q - WHEN WILL YOUR INVESTIGATION BE CONCLUDED?

A - I DO NOT KNOW AT THIS TIME. WE MUST CONDUCT APPROPRIATE INVESTIGATION TO RESOLVE ALL ISSUES IN THE INVESTIGATION. WE WILL DO THAT AS QUICKLY AS IT CAN BE EFFECTIVELY AND THOROUGHLY COMPLETED.



UNITED STATES MARINE CORPS

1 MARINE EXPEDITIONARY FORCE, P.M.F.

BOX 968900

CAMP PENDLETON, CALIFORNIA 92088-9300

STANDARD FORM NO.

5800

SLB

27 Oct 97

From: LtCol S. L. Bumgardner, USMC, Cognizant Judge Advocate, JAGMAN Investigation, I Marine Expeditionary Force

To: Mr. Barry Kowalski, Special Litigation Counsel, Criminal Section, Civil Rights Division, U.S. Department of Justice, P. O. Box 66018, Washington, D. C. 20085-6018

Subj: RULES OF ENGAGEMENT FOR JTF-6 MISSION JT414-97A

Ref: (a) Phoncon btw LtCol Bumgardner/Mr. Kowalski of 27 Oct 97

Encl: (1) Investigative Documents pertaining to Shooting on 20 May 97

1. As discussed in the reference, the enclosures are provided to assist you in forming an opinion as to whether Corporal Clemente M. Bannuelos, USMC, was acting within the Joint Task Force Six (JTF-6) Rules of Engagement when he shot and killed Mr. Esequiel Hernandez on 20 May 97.

2. The tabs of enclosure (1) may be divided into nine general groups:

- maps and photographs of the incident site (Tabs 1-2);
- rules of engagement (ROE) information (Tabs 3-12);
- opinions earlier expressed by others, concerning the application of the Rules of Engagement to the facts of this shooting incident (Tabs 13-16);
- statements of the four Marines of Team 7 of JTF-6 Mission JT414-97A: Cpl Bannuelos, Cpl Torrez, LCpl Wieler, and LCpl Blood (Tabs 17-20);
- I MEF Investigating Officer's interview with LTC Cory, USA (Tab 21);
- JTF-6 matrix comparing facts found in statement and opinions, and our matrix comparing the statements of the Team 7 Marines (Tabs 22-23);

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- Operations Order for Mission JT414-97A (Tab 24) and;

3. The sketch maps found at Tab (2) were created at the direction of LTC Cory with the assistance of the Team 7 Marines. The handwritten comments on the sheet titled "Phase Alpha" came from comments by the Team 7 Marines on the evening of 21 May 97 while they were awaiting, or had concluded, their interview with the Texas Rangers. You will recall that Cpl Torrez also drew a sketch map during his interview with the Texas Rangers. This map follows that statement at Tab (18).
4. Contained within the ROE documents at Tab (9) is a sheet titled "JTF-6 RULES OF ENGAGEMENT" and three slides taken from a press conference in May or June, 1997 to provide information concerning the JTF-6. Although the information contained at Tab (9) is consistent with the JTF-6 ROE card found at Tab (4), the lecture materials located at Tabs (5-7), and the "Rules of Engagement Fact Sheet" found at Tab (8), the specific documents provided at Tab (9) were not given to the Marines who participated in Mission JT414-97A. I include the materials at Tab (9) to ensure your complete knowledge of all the documents that may be referred to in discussions of the JTF-6 rules of engagement.
5. The numerous statements of the Marines, culminating with their request to the Department of Justice for civilian counsel prepared with the assistance of military defense counsel, provide an increasingly detailed account of the events. The I MEF JAGMAN investigation team has retyped two of the handwritten statements by Cpl Torrez at Tab (18) for legibility. Two matrixes are provided to you as a tool to identify significant facts of the incident in the various statements are provided at Tabs (22) and (23). These matrixes were prepared as part of the investigative effort of JTF-6 and the I MEF JAGMAN team.
6. As you form an opinion about whether the JTF-6 ROE was complied with on 20 May 97, please consider the following references to the SROE and JTF-6 ROE materials, the proposed standard of review, and a draft presentation of the facts now known followed by opinions. Should you disagree with any fact or any opinion I have provided, please bring that to my attention. All quotations from the SROE are taken from enclosure (1), Tab (3): Enclosure A, Chairman, Joint Chiefs of Staff Instruction 3121.01, Standing Rules of Engagement for US Forces, 1 October 1994. Citations to the paragraphs of the SROE follow the quotation in brackets []. The references to JTF-6 ROE are taken from the JTF-6 ROE Card found at Tab (4) and the JTF-6 IPC Legal Brief of 2 Jan 97 found at (6).

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a. Rules of Engagement

(1) The purpose of the SROE is to "provide implementation guidance on the inherent right and obligation of self-defense and the application of force for mission accomplishment. The SROE establish fundamental policies and procedures governing the actions to be taken by US force commanders during all military operations..." [1.a.] US military commanders have, "...inherent authority and obligation to use all necessary means available and to take all appropriate action in self-defense" [2.a.] "At all times, however, the requirements of necessity and proportionality as amplified in these SROE will be the basis for the judgment of the commander as to what constitutes an appropriate response to a particular hostile act or demonstration of hostile intent." [5.a.]

(2) The SROE describes necessity, hostile act, hostile intent and proportionality as follows: "Necessity. A hostile act occurs or a force or terrorist exhibits hostile intent." [5.d.(1)] "A hostile act is an attack or other use of force ...against... US forces..." [5.e.] "Hostile intent is the threat of imminent use of force ...against... US forces..." [5.f.] "Proportionality. The force used must be reasonable in intensity, duration, and magnitude, based on all facts known to the commander at the time, to decisively counter the hostile act or hostile intent and to ensure the continued safety of US forces." [5.d.(2)]

(3) After providing the above definitions, the SROE explains, "When a hostile act is in progress, the right exists to use proportional force, including armed force, in self-defense by all necessary means available to deter or neutralize the potential attacker or, if necessary, to destroy the threat." [5.e.] When hostile intent is present, the right exists to use proportional force, including armed force, in self defense by all necessary means available to deter or neutralize the potential attacker or, if necessary, to destroy the threat." [5.f.]

(4) The SROE addresses five topics under the heading "Action in Self-Defense." The first two topics are relevant to the authority provided to Cpl Benueles to resort to the use of armed force on 20 May 97. These two topics address means of self-defense and pursuit. Because of their importance, they are quoted below:

a. Means of Self-Defense. All necessary means available and all appropriate actions may be used in self-defense. The following guidelines apply for unit or national self-defense.

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(1) Attempt to Control Without the Use of Force. The use of force is normally a measure of last resort. When time and circumstances permit, the potentially hostile force should be warned and given the opportunity to withdraw or cease threatening actions.

(2) Use Proportional Force To Control the Situation. When the use of force in self-defense is necessary, the nature duration and scope of the engagement should not exceed that which is required to decisively counter the hostile act or hostile intent and to ensure the continued safety of US forces...

(3) Attack to Disable or Destroy. An attack to disable or destroy a hostile force is authorized when such action is the only prudent means by which a hostile act or hostile intent can be prevented or terminated. When such conditions exist, engagement is authorized only until the hostile force no longer poses an imminent threat.

b. Immediate Pursuit of Hostile Foreign Forces. In self-defense, US forces may pursue and engage a hostile force that has committed a hostile act or demonstrated hostile intent and that remains an imminent threat. [8.a. and 8.b.]

(5) The materials on ROE found at Tabs (5-8) were developed by JTF-6 to train forces that conduct JTF-6 missions. These materials were intended to be consistent with the authority for use of force contained in the SROE (Tab (3)). These materials were provided to the Mission Commander of JT414-97A for use in training his Marines. Captain Gantz, a Marine Judge Advocate, used these materials at Camp Pendleton on 16 Apr 97 to teach ROE to the Marines participating in Mission JT414-97A. A final ROE class was conducted in Texas on 13 May 97 by CPT Spencer, USAF, a JTF-6 mission planner. The JTF-6 ROE card, found at Tab (4), was provided to the Marines participating in Mission JT414-97A. This ROE card was intended to be consistent with the SROE. The JTF-6 rules of engagement materials, ROE classes, and ROE card were not intended to place additional restrictions nor grant additional authority on the use of force from what is contained in the SROE.

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(a) The JTF-6 materials found at Tab (6) state in paragraph 3(f)(2) under the heading of "Pursuit:

Can chase person who posed threat, if no present threat-no use of deadly force, if situation changes and during chase faced with threat of death or serious bodily harm then deadly force justified.

(b) The JTF-6 ROE card in paragraph five states, "You may pursue hostile forces only to defend or retrieve military personnel."

b. Proposed Standard of Review. When determining whether the resort to armed force by Cpl Banuelos that killed Mr. Hernandez was consistent with the SROE, the following questions must be asked:

- (1) Did Cpl Banuelos attempt to control without use of force?;
- (2) Did Cpl Banuelos employ force as a measure of last resort?;
- (3) Did time and circumstances not permit Cpl Banuelos to warn Mr. Hernandez to withdraw or cease his threatening actions?;
- (4) Did Cpl Banuelos use proportional force to control the situation?;
- (5) Was Cpl Banuelos's action the only prudent means by which a hostile act or hostile intent could be prevented or terminated?;
- (6) Was Cpl Banuelos authorized to pursue?

c. Draft Facts and Opinions.

(1) On 20 May 97 four Marines from Headquarters Battery, 5/11, Camp Pendleton California, were taking part in a JTF-6 detection/observation mission in support of the US Border Patrol along the border between the US and Mexico. Their mission was to observe the Polvo Crossing of the Rio Grande River and report activity connected with crossings. At about 1800, at the direction of the Team Leader, Cpl Banuelos, Team 7 left their hide site and moved thirty yards up a slope towards their

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LP/OP. To their left, they saw a rider on horseback across the Rio Grande River in Mexico. Cpl Banzuelos stopped his Team. The Marines, who were wearing camouflage "gullie" suits they had made and had camouflage paint on their faces, went to a knee as part of the security pause to observe the rider. The Marines next heard bells and saw a man carrying a rifle accompanying goats directly to their front on the US side of the Rio Grande River about 185 meters away. Team 7 had previously reported seeing goats at its location but had not reported seeing a goat herder. The man then fired a .22 caliber rifle twice in the direction of Team 7. Cpl Banzuelos believed the shots fired were aimed at Team 7. Unknown to Cpl Banzuelos was that the man who fired his rifle was Essequiel Hernandez, an 18 year old high school student who lived less than 500 meters from where the Marines had located their LP/OP.

(2) After the firing of the two shots in the direction of Team 7, the non-force defensive measures immediately available for Cpl Banzuelos's consideration were: a) ~~remain in place~~ and assume a defensive position; b) ~~retreat~~ to the hide site by moving back about thirty meters across the terrain along the Rio Grande where the slope of the ground and the stand of salt cedar trees offered substantial cover and concealment; c) ~~maneuver~~ the team approximately 30 meters to their right on to slightly higher ground; d) ~~shoot~~ an identification and warning to Mr. Hernandez who was across the arroyo nearly 200 meters away; or e) ~~charge~~ by closing the distance between Team 7 and Mr. Hernandez.

(a) Rather than resorting to armed force to destroy the threat, Cpl Banzuelos elected to use a non-force defensive measure to respond to the shots. He ordered Team 7 into a prone position to provide temporary cover and directed they chamber a round into their M-16s. Next, Cpl Banzuelos radioed the Tactical Operation Center (TOC) to report being shot at. After his report, Cpl Banzuelos was aware from the broadcasts on the US Border frequency that the US Border officers had been notified of the shooting and were responding to his location at Polvo Crossing. As displayed by the maps at Tab (2), after firing in the direction of the Marines, Mr. Hernandez began to move. Because this movement was generally away from Team 7 and because Mr. Hernandez was not aiming or firing in the direction of the Marines, the perceived hostile act had ceased.

(b) From the outset, Cpl Banzuelos apparently believed Mr. Hernandez may have been attempting to flank Team 7 and possibly continue his attack. At 1810 Cpl Banzuelos makes an unclear reference during the radio transmission about pulling back, "from our right flank" that may corroborate a statement he made to law enforcement officials on the night of 20 May 97. That evening, in a statement provided

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to Texas peace officer, Captain Gilbert Spencer, Cpl Banelos wrote. "I thought the man was going to continue around our right flank." It is certain that Cpl Banelos was concerned about further firings. During the same series of radio transmissions where he makes reference to "from our ...right flank," at 1811:19, Cpl Banelos stated, "As soon as he raises that rifle down range, we're taking him." The radio operator in the Tactical Operation Center acknowledged this transmission by stating, "Rodger...fire back." A later transmission at 1815:13 from the Tactical Operations Center directing Cpl Banelos "to follow the ROE" is not acknowledged. It is unknown whether Cpl Banelos ever heard this additional guidance.

(c) The manner of Mr. Hernandez's movement after firing the shots has been given several different descriptions. In the radio transmission at 1814, Cpl Banelos describes Mr. Hernandez as "He's hiding, he's ducking down." In the three written statements provided by the Marines prior to consultation with legal counsel, some describe Mr. Hernandez as simply walking or moving. Others characterize his movement as "bobbing and weaving" and "moving in and out of the bush."

(3) As displayed by the sketch map and supported by the statements of the Marines, between 1807 and 1820 Cpl Banelos moved himself and his three Marines about twenty-five meters to high ground overlooking the arroyo that separated Team 7 from Mr. Hernandez. This piece of terrain was the best location in the vicinity for the unit to act in self-defense. From this high ground Team 7 had visual contact with Mr. Hernandez. In this position, Cpl Banelos had the ability to obtain cover, concealment, and mutually supporting firing positions by dispersing the members of his team along the reverse slope of the military crest that was oriented to the northeast, consistent with Mr. Hernandez's direction of movement. Cpl Banelos kept the other three members of Team 7 on this piece of high ground until shortly after 1820.

(4) While Cpl Banelos and the three Marines of Team 7 observed for some thirteen and a half minutes, Mr. Hernandez moved about 130 meters away from Team 7 to the northeast. His rate of movement was less than 10 meters a minute. During this time Cpl Banelos continued in his decision that armed force was not necessary for unit self-defense. Objectively, during these thirteen minutes of observation Cpl Banelos had time to reconsider his initial concern that Mr. Hernandez might be moving to flank the team.

(5) At about 1820, Cpl Banelos broadcast the exact location of Mr. Hernandez to a US Border Patrol Agent who was responding to Team 7's report of shots

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being fired at them. Cpl Banielos described Mr. Hernandez as being in front of a house. This house is adjacent to the well where, at about 1827, Mr. Hernandez was shot by Cpl Banielos. Despite the tactical advantage afforded by the high ground and knowledge that law enforcement officials were enroute to his location, Cpl Banielos decided to move down the arroyo. He gave the SABER radio to Cpl Torrez—who was not the radio operator-- and left him on the high ground in an overwatch position sighted in on Mr. Hernandez. Cpl Banielos then took LCpl Blood and LCpl Wieler down the slope of the high ground and across the arroyo that separated Team 7 from Mr. Hernandez. No one radioed the Marine Tactical Operation Center or the inbound Border Patrol Agents that this movement was occurring.

(6) When Cpl Banielos led LCpl Wieler and LCpl Blood off the high ground, little objective basis exists for a belief that Mr. Hernandez was engaged in a flanking movement. After the fact, this was given as an explanation for the movement. However, if Cpl Banielos's last radio transmission before he fired his rifle is to be relied upon, Mr. Hernandez stayed at the house by the well for at least seven minutes. The decision of Cpl Banielos to depart the high ground with two members of his team is more consistent with pursuit of Mr. Hernandez than going forward to maintain visual contact. The intended benefit of this 65 meter maneuver may have been to guarantee the apprehension of Mr. Hernandez when law enforcement officers arrived. Leaving the radio behind with Cpl Torrez, however, argues against the speculation that Cpl Banielos intended to direct the officers towards Mr. Hernandez.

(7) What was foreseeable about moving the three members of Team 7 off the high ground and closer to Mr. Hernandez was an escalation of the situation. Moving three camouflaged Marines towards a person who had previously fired rounds in their direction would foreseeably provoke the behavior Cpl Banielos had the obligation to prevent—exposing a member of his team to another hostile act.

(8) Once in a position approximately 130 meters from Mr. Hernandez, again as shown by the sketch map and supported by the statements of the Marines, Cpl Banielos directed LCpl Blood to move laterally a few meters by using hand and arm signals. In separate remarks provided by LTC Cory to the I MEF JAGMAN investigation team (Tab 21), LTC Cory recalls that Cpl Banielos stated that he shouted or yelled at LCpl Blood to move. Immediately following his guidance to LCpl Blood, Cpl Banielos reports observing Mr. Hernandez raise his weapon and take aim at LCpl Blood. Corporal Banielos fired a single shot from his M-16, killing Mr. Hernandez. In the reports taken on 20 May 97, no other member of Team 7 saw Mr. Hernandez raise his

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.22 rifle, although Cpl Torrez immediately reported to the Tactical Operations Center that, "The man... the man pointed his rifle down range and we took him out." After firing the shot, only then did Cpl Banuelos shout out verbal warnings as he moved forward toward Mr. Hernandez.

(9) In the statements provided after the shooting, the Team 7 Marines assert that verbal warnings could not be used before the shot was fired because of the high winds. At about 1827, a storm was moving towards Polvo Crossing but had not arrived yet. Every law enforcement officer who arrived at the scene, just minutes after the shooting, did not believe that weather conditions would have precluded the effectiveness of a verbal warning. If LTC Cory's memory of what the Marines told him is accurate, Cpl Banuelos was using verbal signals to direct LCpl Blood.

(10) Preliminary forensic opinion provided to the I MEF JAGMAN investigation team is that the wound is consistent with a right profile being displayed to Cpl Banuelos by Mr. Hernandez. Because Mr. Hernandez was right handed and was known by his family to only aim and fire his .22 rifle as a right handed shooter, the wound evidence calls into question Cpl Banuelos's reports of what he saw. A more complete forensic opinion of the facts presented in this case is being prepared by the Armed Forces Institute of Pathology (AFIP). When their effort is complete, that document shall be provided to you.

7. Should you have any questions concerning any of the documents contained in the enclosure or require any other materials to assist you in reaching you opinion, please contact me at (760) 725-9645.

V/R
S. L. B. Q.
S. L. BUMGARDNER

APPENDIX R

**CONCERNS SURROUNDING THE SHOOTING
OF ESBQUIEL HERNANDEZ
ON 20MAY97**

The following document is generated at the request of LCOL Lewis Bumgardner, USMC and is based on limited information. It reflects opinions of the author utilizing only the autopsy report, transcripts of radio transmissions and statements given by the four involved USMC personnel. These opinions in no way imply that the questions raised have not been answered by other documentation not available to the author.

1) The Marines describe Mr. Hernandez, after being shot, as falling into a wall with his feet going up in the air. Photograph 1-11 shows the contents of the wall when examined 2 months after the incident. The wall contains several items that could cause injuries and/or marks on the back of an individual falling into the wall. Autopsy only describes two additional injuries present in addition to the gunshot wound; that being a 1 cm oblique red-brown abrasion over the lateral left scapula region on the back and a 2cm ovoid red-brown abrasion above the right popliteal fossa (back of the knee). There was no report of injury or abrasion to the head as one might have expected to find if hitting the wall or even the bottom of the wall during an uncontrolled fall. Photographs of the body have not been reviewed, but other injuries that would have been expected to have been received as a result of the fall were not recorded in the official autopsy. It is also unknown if the condition of the wall was the same at the time of examination as it was on the day of the incident. The reporting of legs flying up after receiving the gunshot wound laterally as reported is unusual, but not impossible if Hernandez stumbled after sustaining the injury. The lack of wounds or marks to the posterior of the body is troubling.

2) The trajectory of the round suggests that Hernandez had to present his right profile to the shooter to sustain the entry wound reported. While it is unknown by this author if Hernandez was right or left handed, the position would suggest that if Hernandez was preparing to fire left handed, his right elbow was askew or elevated enough to avoid injury. A shooting position is not the only explanation as to why the trajectory of the round was on the right side. Press reports that Hernandez was right handed in writing and in shooting and not accustomed to shooting left handed. It must also be kept in mind that Hernandez would have been presenting a right profile to the Marines while he was walking in the direction from the old fort to the area where his body was eventually found and a natural stride could account for the lack of injury to the right arm and the position of the entry wound. These are but two possibilities to account for the wound. The trajectory also suggests that the shooter was on about the same plane as Hernandez since the round only deviated slightly front to back and right to left.

The above concerns are based on the forensic information at

hand and do not include any subjective concerns. They furthermore may not be relevant after review of complete reporting by local agencies.

APPENDIX S

Date: 10/22/1997 08:14 am (Wednesday)
From: Barry F. Kowalski
To: orange.of21.SMO01:JARRETTM, crt04.po.ipinzler, crt04.po.wyecomans,
rroberts, jspratt
Subject: Marines - Break in case

Mr. Crow representing Blood, the ex-Marine discharged prematurely from the USMC while Coyne & I were negotiating w/ attys in September, and I had a talk yesterday. He has tentatively agreed to bring his client to Wash D.C. on Oct 29 for interview w/ Coyne, me and FBI, with "contractual" immunity grant and polygraph. This is a significant turn of events. If other counsel are not able to talk Crow out of this (they will certainly try), breaking Blood away from the pack has obvious investigative advantages.

It puts our decision in limbo to some extent. I don't see how we can decide our next step - GJ or Ct of I - until we have the results of a Blood interview. If he sticks w/ story and passes poly, the calculus remains the same. If he gives new info, it good change situation possibly dramatically. For example, we might want to grant immunity to only one or the other of the Marines., instead of both. I recommend we keep our options open. Have Marines schedule Ct of I for Nov 4, advise other 2 attys to be prepared to be available for GJ on Nov 13, and consider investigative options on Oct 29. We should meet. Personal request, today is my wedding anniversary. My wife, who is more patient w/ me than I deserve, would like me to leave office by 5pm. Can we complete meeting before than? Barry P.S. - new forensic development of interest. The world's foremost expert on the M-16 says bullet does not usually fragment after 50 to 75 yards. Banuelos, who found his own shell casing for the investigators, found it at 125 yards away from victim's body & the bullet fragment inside victim. Yet another problem with the story of the shot and what led up to it. B.

APPENDIX T

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 8/27/1997

GILBERT SPENCER, PERMIAN BASIN DRUG TASK FORCE (PBDTF), voluntarily appeared at the RAMADA INN in Alpine, Texas. Present during the interview were FEDERAL BUREAU OF INVESTIGATION (FBI) Special Agent KYLE K. BONATH, UNITED STATES DEPARTMENT OF JUSTICE Special Counsel BARRY KOWALSKI, UNITED STATES MARINE CORPS (USMC) Major General (retired) MIKE COYNE, and USMC Major ROBERT MILLER. After being advised of the identities of those present, GILBERT SPENCER provided the following information:

SPENCER was on duty when he heard a call over the BORDER PATROL radio for all available law enforcement to respond to Polvo Crossing at Redford, Texas. SPENCER is stationed in Presidio. While en route, about five to ten minutes later, SPENCER heard the call over the radio: Shots Fired! Man Down!

SPENCER was the first to arrive in the Polvo Crossing area, and he was not going to proceed into the area until he heard it was safe. Deputy OSCAR GALLEGOS, PRESIDIO COUNTY SHERIFF'S OFFICE, was the next person to arrive. SPENCER assumed the shooting might have something to do with the Marines, because he was aware the Marines were in the area. SPENCER and GALLEGOS waited for the UNITED STATES BORDER PATROL (USBP) to arrive so communication could be established with the Marines to ensure it was safe to proceed into the area. SPENCER was in full uniform, including badges and patches.

While Deputy GALLEGOS escorted a lady out of her house near the church to safety, SPENCER and STAN MEYERS, USBP, awaited the okay to go up the hill. MEYERS was having communication problems.

When they received the okay to proceed, SPENCER and MEYERS went running up the hill. At that point a U.S. Marine, who SPENCER would later learn was TORREZ, stood up and brought his weapon up but did not point it directly at them, and said U.S. Marines. MEYERS then identified himself as U.S. Border

Investigation on 8/27/1997 at Alpine, Texas
 File # 282A-EP-32400 Date dictated 8/27/1997
 by SA KYLE K. BONATH

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Continuation of FD-302 of GILBERT SPENCER , On 8/27/1997 , Page 2

Patrol. TORREZ put his weapon to his shoulder and pointed them toward the victim's location. TORREZ appeared real hyped up.

When SPENCER and MEYERS arrived at the victim's location, BANUELOS was standing over HERNANDEZ looking over the body. BANUELOS appeared calm, like nothing had fazed him. SPENCER checked the victim for a pulse and didn't find one, and HERNANDEZ' pupils were fixed, leading SPENCER to conclude HERNANDEZ was dead.

SPENCER said HERNANDEZ's legs were hanging out over the well, facing east, and his head was bent to one side. SPENCER believes he heard from either TORREZ or BANUELOS that BANUELOS had shot HERNANDEZ.

SPENCER asked BANUELOS where he was located when he fired, and BANUELOS pointed and stated about 125 meters in that direction (indicating an easterly direction). BANUELOS indicated his position when he fired without any hesitation.

SPENCER asked BANUELOS to move away from the body, and BANUELOS said, "Yes, I've seen it enough." BANUELOS then showed SPENCER where HERNANDEZ' gun was found. BANUELOS indicated the barrel was pointed toward the east. When SPENCER arrived on scene, the rifle had already been moved and was located on the ground in front of the house.

SPENCER and BANUELOS went to look for BANUELOS' shell casing. They zigzagged and circled until BANUELOS indicated the specific area from where he had shot. SPENCER returned to his car to get crime scene tape. En route to his car, SPENCER walked by the site where the body was and noticed the body had been moved. When SPENCER asked GALLEGOS why the body had been moved, GALLEGOS said he and MEYERS had felt a pulse so they moved the body to administer first aid. Upon further examination after the body was moved, no pulse could be located. SPENCER did not check the body a second time for life signs.

SPENCER saw GALLEGOS escort HERNANDEZ' father to the body. The father became upset and started to cry. GALLEGOS then escorted the father away from the crime scene.

SPENCER did not see a visible wound on the victim. SPENCER took some pictures of the body after it was moved from

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the wall. SPENCER also took pictures of the crime scene. SPENCER did not recall seeing a lot of blood on HERNANDEZ' shirt other than a small spot of blood on the shirt near the entry wound.

After retrieving the crime scene tape from his car, SPENCER marked off the area where the body was found. At this time the body was covered with a blanket. While the body was being covered, USBP Agents RUDY RODRIGUEZ and DAVID CASTENADA arrived on the scene. SPENCER, BANUELOS and SPENCER believes, one other USBP agent went out to look for BANUELOS' casing.

SPENCER told GALLEGOS he would have to secure BANUELOS' weapon. BANUELOS said he could not give up his weapon without orders. SPENCER told GALLEGOS retrieving the weapon was GALLEGOS' problem but that it would not be retained as evidence.

SPENCER taped off the area where BANUELOS indicated he was when he shot Hernandez, while looking for BANUELOS' casing. BANUELOS saw his casing and told SPENCER, here's my casing. SPENCER told BANUELOS not to touch it. SPENCER does not believe BANUELOS placed the casing where it was recovered, but he cannot say that BANUELOS did not place it, as he was not watching BANUELOS at all times.

SPENCER asked the Marines to show him where they were when they first saw the victim and the route they took from where they were fired upon to where BANUELOS fired. BANUELOS said they moved from their observation point toward HERNANDEZ because they believed they were getting flanked. BANUELOS said WIELER and BLOOD were to his north. SPENCER cannot make a distinction between the comments BANUELOS said prior to his interview and the comments made when SPENCER took a statement from BANUELOS. SPENCER is not sure if TORREZ ever told him anything. On the walk through of the scene, he believes all four Marines were there along with USBP CASTENADA and possibly Presidio County Deputy RUSTY TAYLOR who arrived sometime during the walk through.

While the Marines were walking SPENCER through the scene, it was getting windy and dark. Sometime during the time SPENCER was walking with the Marines, a Lieutenant had arrived, but SPENCER didn't notice the Lieutenant until he returned from the walk through of the scene with the Marines.

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Prior to getting statements from the Marines, DUNCAN, SPENCER, DOMINGUEZ, and the Lieutenant searched the area HERNANDEZ reportedly shot from for shells. DUNCAN found two .22 shell casings and marked the spot where the casings were located.

SPENCER believes after searching for Hernandez' shells he was talking to Presidio County Sheriff DANNY DOMINGUEZ, and, possibly Texas Ranger DAVE DUNCAN, when the rain hit, and everyone scattered to their cars.

Prior to giving statements, all four Marines were sitting together, but SPENCER does not recall if the four Marines were talking to a Lieutenant.

TAYLOR told SPENCER that DUNCAN wanted statements taken from the four Marines, and TAYLOR asked SPENCER to take a statement from BANUELOS. SPENCER was asked to advise BANUELOS of his rights prior to taking a statement. SPENCER did not ask BANUELOS any questions, he just gave BANUELOS his form and asked him to write what happened on the form. SPENCER told BANUELOS he was not in custody and marked that out on the form. According to the form used to take BANUELOS' statement, the statement was taken at 9:20 p.m. SPENCER took the statement on a Presidio County form.

BANUELOS informed SPENCER his Lieutenant (possibly a Captain) had told BANUELOS he could give a statement if he wanted to. SPENCER is sure BANUELOS said I can make a statement "if I want to". SPENCER provided BANUELOS a Voluntary Statement form and BANUELOS told SPENCER he had read the Voluntary Statement form. SPENCER did not read the Voluntary Statement form to BANUELOS. SPENCER did read the advise of rights form to BANUELOS. The advise of rights form or Miranda Warning form was a form SPENCER provided. The Voluntary Statement form was provided by RUSTY TAYLOR. BANUELOS wrote his statement in SPENCER's patrol car.

After giving his statement, SPENCER told BANUELOS they were done and for BANUELOS to go back with his team.

Shortly after the statements were taken, the scene was then shut down due to weather.

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On May 21, 1997, SPENCER returned to the scene to assist Trooper CAMPBELL and another Trooper use Transit to get readings. SPENCER also assisted the Rangers and the FBI with their walk through of the scene.

Later in the afternoon of May 21st, SPENCER was in the area when the Marines did a walk through with a video camera. The Marines did videotape during their walk through. No law enforcement accompanied the Marines during their walk through.

In SPENCER's opinion, the angle of the entry wound could only make sense if HERNANDEZ was a left handed shooter.

BANUELOS never told SPENCER whether HERNANDEZ was left or right handed.

SPENCER believes there is no way HERNANDEZ could have seen the Marines or the Marines could have seen HERNANDEZ from the position BANUELOS told him WIELER and BLOOD were located. SPENCER bases this belief on where BANUELOS told him WIELER and BLOOD were located, and BANUELOS was not real specific. BANUELOS told Spencer both WIELER and BLOOD were to his north, or his right, and that he was kneeling when he fired his shot. SPENCER does not recall whether BANUELOS' said BLOOD and WIELER were 15 or 30 meters from him.

SPENCER can't remember if BANUELOS said HERNANDEZ pointed his rifle at my men or in our direction or if BANUELOS said at BLOOD or in BLOOD's direction.

When at the Port of Entry in Presidio, SPENCER overheard TORRES telling his superiors that TORRES had a bead on the BORDER PATROL Agents the whole time they were approaching the shooting site. SPENCER thought sighting in on the Agents was inappropriate as he and the BORDER PATROL Agents were in full uniform.

At the time of the incident, the weather was cloudy and there was a light breeze. The weather would not have caused problems with verbal communications.

SPENCER said BANUELOS was cooperative and didn't ask him any questions.

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FEDERAL BUREAU OF INVESTIGATION

Date of transcription 8/28/1997

OSCAR GALLEGOS, PRESIDIO COUNTY SHERIFF'S OFFICE (PCSO), voluntarily appeared at the RAMADA INN in Alpine, Texas. Present during the interview were FEDERAL BUREAU OF INVESTIGATION (FBI) Special Agent KYLE K. BONATH, Senior Supervisory Resident Agent TERRY R. KINCAID, UNITED STATES DEPARTMENT OF JUSTICE Special Counsel BARRY KOWALSKI, UNITED STATES MARINE CORPS (USMC) Major General (retired) MIKE COYNE, and USMC Major ROBERT MILLER. After being advised of the identities of those present, GALLEGOS provided the following information:

GALLEGOS received a call at 6:15 p.m. about a shooting in Redford, Texas, and he immediately proceeded to Redford. GILBERT SPENCER, PERMIAN BASIN DRUG TASK FORCE, was ahead of GALLEGOS and radioed him with directions to the specific location.

When GALLEGOS arrived at the site, he parked just off the highway near the VALENZUELA's trailer residence. GALLEGOS was not certain what was taking place up on the hill.

GALLEGOS escorted an elderly lady who lives in the abandoned church to the VALENZUELA residence for safety. GALLEGOS told the VALENZUELA's there was a man with a gun in the area.

The Border Patrol Agent had already proceeded up the hill. GALLEGOS saw Corporal ROY TORREZ, JR. watching the law enforcement officers come up the hill. TORREZ lifted his weapon but did not aim it at the law enforcement officers.

GALLEGOS and Agent MEYERS, UNITED STATES BORDER PATROL, went to where the body was located. Upon his first look at the body, GALLEGOS originally thought HERNANDEZ' neck might be broken because of the position of his head. GALLEGOS and MEYERS felt for a pulse and GALLEGOS initially thought he felt a weak pulse so he and MEYERS pulled HERNANDEZ' body from the well to render aid. Once the body had been pulled from the well, GALLEGOS and

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by SA KYLE K. BONATH

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MEYERS checked for a pulse but were unable to find one. GALLEGOS believes what he originally thought was HERNANDEZ' pulse was his own pulse which was accelerated from running up the hill. At this point GALLEGOS still thought HERNANDEZ' neck was broken because he didn't see a visible wound.

TORREZ stated he had moved the gun away from the body because he was not sure HERNANDEZ was dead. According to TORREZ, SPENCER had placed a piece of tubing to simulate the gun's position before TORREZ moved it. Agent MEYERS and Agent RUDY MARTINEZ, USBP, both touched the moved gun.

TORREZ pointed out a white pickup with a camper shell that had been driving back and forth in the area. GALLEGOS went to investigate who was driving the pickup. When GALLEGOS stopped the pickup, he determined the driver to be ESEQUIEL HERNANDEZ, SR., who was trying to locate his son. GALLEGOS escorted HERNANDEZ, SR. to the scene. When HERNANDEZ, SR. got within 20 to 25 feet of the body, he saw his son's body and became emotional. HERNANDEZ tried to get closer, but GALLEGOS would not let him. An Agent from USBP escorted HERNANDEZ back to the pickup truck.

GALLEGOS and SPENCER began to try to secure the scene. As they were doing this JESUS VALENZUELA, a first cousin of the victim, came up and wanted inside the crime scene. GALLEGOS told him he could not enter the crime scene, and VALENZUELA got mad.

Close to this time, RUDY RODRIGUEZ, USBP, and DAVID COSTENADA, USBP, arrived and looked over the crime scene. RODRIGUEZ lifted the sheet covering the body and noticed a right side entry wound and a bulge in the left side. GALLEGOS attended the autopsy in San Antonio and said what RODRIGUEZ saw would have been consistent with the autopsy findings. The findings said a steel bullet went straight through HERNANDEZ from his right side towards his left, but did not exit the left side, with fragments going through the liver and spleen.

At this time, Sheriff DANNY DOMINGUEZ and Deputy RUSTY TAYLOR, PCSO, arrived on scene. Sheriff DOMINGUEZ went to talk with the HERNANDEZ family while GALLEGOS and TAYLOR talked to two of the Marines, Lance Corporal JAMES MATTHEW BLOOD and Corporal ROY TORREZ, JR.

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TORREZ told GALLEGOS that HERNANDEZ had shot at them. TORREZ said BANUELOS shot HERNANDEZ because HERNANDEZ raised and pointed his gun at BLOOD. TORREZ told GALLEGOS that he did not see HERNANDEZ raise is rifle.

SPENCER walked through the scene with the other Marines while GALLEGOS and TAYLOR talked to TORREZ. TORREZ was nice to them, but he acted real cocky and macho.

Later, BLOOD told GALLEGOS the Marines were at the observation point when HERNANDEZ shot at them. GALLEGOS believes BLOOD told him HERNANDEZ fired one shot. BLOOD said after HERNANDEZ shot, he started walking away in the direction where HERNANDEZ was ultimately shot. As HERNANDEZ walked away, the Marines followed him. BLOOD said he was about 10 meters north of BANUELOS and WIELER was south of BANUELOS, when BANUELOS shot HERNANDEZ.

BLOOD told GALLEGOS he wasn't sure about the distance between BANUELOS and TORREZ. BLOOD never mentioned anything about WIELER's position.

GALLEGOS said during BLOOD's story, BANUELOS interjected that he saw HERNANDEZ raise his rifle so he shot him. GALLEGOS did not recall BLOOD saying he saw HERNANDEZ raise the rifle.

GALLEGOS thought BLOOD and BANUELOS were acting normal under the circumstances. GALLEGOS would not describe BANUELOS as cocky.

GALLEGOS, TAYLOR, BLOOD, BANUELOS, and either WIELER or TORREZ had met at the location where BANUELOS had shot HERNANDEZ. It was at this time TAYLOR asked BANUELOS for his gun and BANUELOS said no, not until he could talk with my supervisor. GALLEGOS said a Lieutenant FELCYN showed up and gave permission for the weapon to be turned over to law enforcement, as long as someone signed for it. GALLEGOS then took custody of the M16.

GALLEGOS never told anyone to cover the rifle but when TAYLOR arrived on the scene, he told GALLEGOS to cover HERNANDEZ' rifle. The rifle was covered with a canvass sleeping bag cover.

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The Marines were in a Suburban prior to giving statements.

GALLEGOS took TORREZ' statement. When TORREZ got into GALLEGOS' car, he got into the back seat and GALLEGOS read him his Miranda warning. GALLEGOS read TORREZ his Miranda warning from a card because he didn't have a form with him. GALLEGOS remembers the Lieutenant telling TORREZ, "you don't have to make a statement if you don't want to." TORREZ responded right away that it was okay, he would make a statement.

Initially, GALLEGOS didn't ask TORREZ any questions, he just told TORREZ to write down what happened from start to finish. GALLEGOS finished taking TORREZ' statement, and TORREZ left GALLEGOS' car.

At this time DUNCAN asked GALLEGOS for a plastic bag to cover the body with, as it was raining hard. Soon thereafter, Sheriff DANNY DOMINGUEZ and DUNCAN left the scene to make a telephone call. At that point, all the Marines left and went back to Marfa. The law enforcement officers on the scene concluded their investigation and met at the Annex.

GALLEGOS accompanied the body to the forensics lab in San Antonio. GALLEGOS doesn't know if anyone did a paraffin test on the body. There was also a Texas Ranger present at the autopsy.

In GALLEGOS' opinion, HERNANDEZ didn't see the Marines and, while he may have shot towards them, he wasn't shooting at them. GALLEGOS also believes the Marines should have warned HERNANDEZ.

GALLEGOS could not understand why the Marines did not give a verbal warning to HERNANDEZ prior to shooting him. GALLEGOS said the weather was cloudy but not windy and any warnings should have been heard.

GALLEGOS expressed his opinion that Redford is not Vietnam and the mission should be totally different here.

GALLEGOS wonders why did the Marines followed HERNANDEZ for 20 minutes.

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None of the Marines said anything to GALLEGOS about HERNANDEZ being right or left handed. GALLEGOS was told by Constable RAUL BARRIGA, who is a security officer at the school and who was also on scene, that HERNANDEZ was right handed. GALLEGOS said Sheriff DOMINGUEZ asked HERNANDEZ' father whether his son was right handed and if his son shot right handed. The father replied yes, his son was right handed and shot right handed.

GALLEGOS has heard talk about threats from the HERNANDEZ family in Ojinaga.

GALLEGOS could not recall when he heard it, but he heard that two of the Marines said HERNANDEZ shot right handed and the other two said he shot left handed.

Mr. HERNANDEZ, SR. was only on scene for a couple of minutes. HERNANDEZ, SR. never touched his son's body.

GALLEGOS had never heard anything bad about the victim and had never heard that he was a supposed drug runner.

GALLEGOS remembers TORREZ had on a guille suit and gloves with the fingertips cut off, but he couldn't remember whether or not TORREZ' face was painted with camouflage.

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 8/28/1997

Agent JERRY SUCAR, UNITED STATES BORDER PATROL (USBP), voluntarily appeared at the RAMADA INN in Alpine, Texas. Present during the interview were FEDERAL BUREAU OF INVESTIGATION (FBI) Special Agent KYLE K. BONATH, Senior Supervisory Resident Agent TERRY R. KINCAID, UNITED STATES DEPARTMENT OF JUSTICE Special Counsel BARRY KOWALSKI, UNITED STATES MARINE CORPS (USMC) Major General (retired) MIKE COYNE, and USMC Major ROBERT MILLER. After being advised of the identities of those present, SUCAR provided the following information:

SUCAR was conducting his normal duties on the evening of May 20, 1997, when he received a radio call about the Marines receiving fire. SUCAR contacted fellow USBP agents MEYER, JOHNNY URIAS, and RUDY MARTINEZ, and told them to get their gear and respond to the scene. SUCAR and MEYER responded to the scene in a sedan, and URIAS and MARTINEZ were in a Suburban. SUCAR and MEYER activated their sirens and proceeded to Redford.

When SUCAR arrived at the site, Deputy OSCAR GALLEGOS, PRESIDIO COUNTY SHERIFF'S OFFICE, (radio call sign 503) and GILBERT SPENCER, PERMIAN BASIN DRUG TASK FORCE, (radio call sign 148) had already arrived on scene.

SUCAR received word over the radio the scene was secure and he went up the hill. SUCAR then had contact with one Marine who had a weapon; however, SUCAR never saw the weapon pointed at them. When they arrived atop the hill, a second Marine led them to the body.

SUCAR saw the body inside the well. SUCAR saw no blood and initially thought the victim was unconscious. MYERS and GALLEGOS checked for a pulse and moved the body from the well to the ground.

SUCAR had no conversation with the Marines and did not overhear any conversation. SUCAR helped to secure the area.

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by SA KYLE K. BONATH

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RODRIGUEZ ordered SUCAR and others to help the Marines retrieve their gear. SUCAR still had no conversation with the Marines. SUCAR retrieved the camouflage nets and carried them to the vehicle where the gear was stored. SUCAR could not comment about any other equipment that was retrieved. SUCAR thought all of the Marines' equipment he retrieved was from the hide site and that none was retrieved from the top of the hill. SUCAR did not notice any binoculars.

When SUCAR arrived on scene, the weather was cloudy but not windy, and he didn't think the weather would present any communication problems.

The Marines seemed calm and concerned.

SUCAR did not see when the Marines left the scene.

SUCAR did say that HERNANDEZ' father got close to the body but SUCAR could not say if the father touched the body.

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FEDERAL BUREAU OF INVESTIGATION

Date of transcription 8/27/1997

STANLEY MEYERS, UNITED STATES BORDER PATROL (USBP), voluntarily appeared at the RAMADA INN in Alpine, Texas. Present during the interview were FEDERAL BUREAU OF INVESTIGATION (FBI) Special Agent KYLE K. BONATH, Senior Supervisory Resident Agent TERRY R. KINCAID, UNITED STATES DEPARTMENT OF JUSTICE Special Counsel BARRY KOMALSKI, UNITED STATES MARINE CORPS (USMC) Major General (retired) MIKE COYNE, and USMC Major ROBERT MILLER. After being advised of the identities of those present, MEYERS provided the following information:

MEYERS was on duty the evening of May 20, 1997, pulling a drag (a tractor tire) behind a car, when he heard someone on the radio say our position is going to be compromised. When asked by who, the response over the radio was by a gentleman herding goats. The next transmission MEYERS heard was about shots fired and the Marines requesting backup. MEYERS disengaged his drag and proceeded to Presidio.

In Presidio, MEYERS got his gear, gun and bulletproof vest and proceeded to the Redford scene with fellow Agent JERRY SUCAR. They arrived prior to Agents JOHNNY URIAS and RUDY MARTINEZ and saw Deputy OSCAR GALLEGOS, PRESIDIO COUNTY SHERIFF'S OFFICE, and Agent GILBERT SPENCER, PERMIAN BASIN DRUG TASK FORCE, at the bottom of the hill.

MEYERS established radio contact with 513 who said the area was safe. MEYERS then proceeded up the hill. One of the Marines, who was wearing a guille suit, stood up and said U.S. Marines to which MEYERS responded Border Patrol. MEYERS was about 50 to 60 yards away from the Marine and didn't see him until he stood up. MEYERS didn't know which Marine it was.

MEYERS picked up HERNANDEZ' rifle and moved it closer to the body. MEYERS moved the rifle from the front of the house closer to the body. MEYERS and GALLEGOS checked for a pulse but weren't sure if the victim had a pulse, so they moved the body out of the wall in case first aid was needed. They checked again

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 by SA KYLE K. BONATH

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Continuation of FD-302 of STANLEY MEYERS , On 8/27/1997 , Page 2

after they moved the body out of the well, but they could not find a pulse.

MEYERS then helped secure the area. ESEQUIEL HERNANDEZ, JR.'s father was driving his truck in the area and was brought to the scene. After ESEQUIEL's father had seen the body, MEYERS walked ESEQUIEL's father back to his house.

MEYERS then helped pack up the Marines' gear. MEYERS only saw an antennae and possibly a radio on top of the hill.

MEYERS carried two water jugs from the hide site. MEYERS does not recall seeing night vision or binoculars at the hide site.

MEYERS did not overhear any comments made by the Marines. The only conversation MEYERS recalls having with the Marines was when he asked if the Marines had any problems with snakes. MEYERS does not know the name of the Marine he talked to.

MEYERS said when he arrived at the scene, it was a clear day with no noticeable wind and the weather did not inhibit conversation. Later in the evening a storm blew through with strong winds and rain.

MEYERS has no knowledge of a Border Patrol Response Team.

MEYERS thought the Marines were very professional, disciplined and military in their demeanor.

MEYERS believes the Marines did nothing wrong, that the shooting was just an unfortunate accident.

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FEDERAL BUREAU OF INVESTIGATION

Date of transcription 8/28/1997

Agent RUDY MARTINEZ, JR., UNITED STATES BORDER PATROL (USBP), voluntarily appeared at the RAMADA INN in Alpine, Texas. Present during the interview were FEDERAL BUREAU OF INVESTIGATION (FBI) Special Agent KYLE K. BONATH, Senior Supervisory Resident Agent TERRY R. KINCAID, UNITED STATES DEPARTMENT OF JUSTICE Special Counsel BARRY KOWALSKI, UNITED STATES MARINE CORPS (USMC) Major General (retired) MIKE COYNE, and USMC Major ROBERT MILLER. After being advised of the identities of those present, MARTINEZ provided the following information:

MARTINEZ was at the Presidio Point of Entry processing aliens when he heard on the radio that the Marines were taking fire. MARTINEZ gathered his gear and drove out to the site with Agent JOHNNY URIAS, USBP. While en route to the scene, MARTINEZ heard over the radio that the Marines had permission to return fire.

When MARTINEZ arrived at the scene, GILBERT SPENCER, PERMIAN DRUG TASK FORCE; Deputy OSCAR GALLEGOS, PRESIDIO COUNTY SHERIFF'S OFFICE; Agent MEYER, USBP; Agent SUCAR, USBP, were already on scene.

MARTINEZ observed the body in the well and the .22 rifle beside the well. MARTINEZ assisted GALLEGOS in securing the area.

MARTINEZ was present when the HERNANDEZ family members arrived at the scene. MARTINEZ believes two of ESEQUIEL's brothers were present. One of the brothers was a jailor in Presidio County, and the other brother had a radio. The brother with the radio was communicating with someone in Spanish over the radio. When the brother told the individual on the radio that ESEQUIEL was dead, MARTINEZ heard over the radio, "they are going to pay." MARTINEZ had no indication the individual on the other end of the radio was in Mexico.

MARTINEZ helped transport the Marines' gear from the hide site. All the equipment they moved was from the hide site;

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nothing was moved from the top of the hill. Two of the Marines assisted the Border Patrol agents in moving the gear. Their demeanor was professional and serious.

MARTINEZ said the equipment they transported consisted of water jugs and other containers and one additional guille suit. MARTINEZ never saw any binoculars.

When MARTINEZ arrived on the scene, the weather was partly cloudy to cloudy and it was calm with no wind. MARTINEZ said it would have been possible to hear a shouted warning over 100 meters.

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 8/27/1997

JOHNNY URIAS, UNITED STATES BORDER PATROL (USBP), voluntarily appeared at the RAMADA INN in Alpine, Texas. Present during the interview were FEDERAL BUREAU OF INVESTIGATION (FBI) Special Agent KYLE K. BONATH, Senior Supervisory Resident Agent TERRY R. KINCAID, UNITED STATES DEPARTMENT OF JUSTICE Special Counsel BARRY KOWALSKI, UNITED STATES MARINE CORPS (USMC) Major General (retired) MIKE COYNE, and USMC Major ROBERT MILLER. After being advised of the identities of those present, JOHNNY URIAS provided the following information:

On the night of May 20, 1997, URIAS and his partner, RUDY MARTINEZ, were on duty. They were picking up immigrants along the river when they overheard a radio transmission about one or two shots being fired. URIAS' supervisors radioed for them to return to the station at Presidio. When they arrived at Presidio, URIAS was told to check his prisoners in, get his gear and proceed to Redford. URIAS and MARTINEZ proceeded to Redford in a Suburban, and their fellow Agents, STAN MEYERS and JERRY SUCAR, proceeded to Redford. About 20 minutes later, they arrived in Redford. When URIAS arrived on site, GILBERT SPENCER, PERMIAN BASIN DRUG TASK FORCE, and Deputy OSCAR GALLEGOS, PRESIDIO COUNTY SHERIFF'S OFFICE, were already present.

URIAS tried to establish radio communications with the Marines. URIAS conducted most of the communications, but MEYERS also tried to establish communications. URIAS, MARTINEZ, MEYERS, SUCAR, SPENCER, and GALLEGOS moved toward the church house. URIAS was with SPENCER and MEYERS, and he assumed the others were following behind.

The first Marine URIAS saw was TORREZ, who was holding a weapon in his hand. URIAS did not feel threatened by the way TORREZ was holding his weapon. URIAS would recognize TORREZ and BAWUELOS if he saw them again. URIAS said neither TORREZ or BAWUELOS made any comments to him about what happened. URIAS radioed for additional backup.

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MEYERS and GALLEGOS examined the body, and they thought they felt a weak pulse. MEYERS and GALLEGOS then moved the body from the well because they believed the victim had a pulse. MEYERS and GALLEGOS later told URIAS they may have felt their own pulses because of their run up and the hill and the excitement of the moment.

URIAS provided security in the area, watching in the direction of the abandoned church, until other law enforcement arrived. URIAS was securing the crime scene for approximately 30 minutes. URIAS was asked to help the Marines extract their gear from a site located in dense vegetation. URIAS recovered a large water container from the site. Also at the site were food, water, and some electrical equipment. The only equipment retrieved from a high spot on the ridge was an antennae. URIAS does not recall specifically if any other equipment was located or retrieved from the ridge.

URIAS thinks MEYERS and SUCAR and maybe one other USBP officer may have gone with him and the Marines to retrieve the gear. URIAS does not know which or how many Marines assisted in retrieving their gear. URIAS does not remember overhearing any comments from the Marines about the shooting while retrieving the gear. The only thing URIAS remembers hearing is general conversation. After URIAS helped retrieve the equipment, he went back to his vehicle and waited about one hour.

URIAS and MEYERS were recently hired and are still in training.

When URIAS first arrived on the scene, the weather was cloudy and there were no problems having a conversation.

At some point, family members of the victim began showing up at the crime scene perimeters. URIAS believes the family members were ESEQUIEL HERNANDEZ' brothers. One of the brothers had a hand-held radio and URIAS believes he was communicating with someone in Mexico. URIAS got the impression the radio transmission was from Mexico from another officer. URIAS heard a transmission over the radio stating "they will pay, wait until they get near the border."

URIAS described BANUELOS' and TORREZ' demeanor as serious.

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USBP Agent DIMATTEO saw HERNANDEZ' picture in the paper and recalled HERNANDEZ was the individual URIAS and DIMATTEO had previously talked to about shooting in an area close to their patrol. URIAS did not recognize DIMATTEO had talked to in February. In February URIAS was in the vehicle with DIMATTEO when URIAS heard a popping noise, but URIAS never identified the noise as gunfire. URIAS wouldn't have known shots had been fired in the area if HERNANDEZ hadn't stopped and told them he was firing in the area. URIAS did not hear the conversation between HERNANDEZ and DIMATTEO.

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FEDERAL BUREAU OF INVESTIGATION

Date of transcription 8/27/1997

Assistant Chief RUDY RODRIGUEZ, UNITED STATES BORDER PATROL (USBP), voluntarily appeared at the RAMADA INN in Alpine, Texas. Present during the interview were FEDERAL BUREAU OF INVESTIGATION (FBI) Special Agent KYLE K. BONATH, Senior Supervisory Resident Agent TERRY R. KINCAID, UNITED STATES DEPARTMENT OF JUSTICE Special Counsel BARRY KOWALSKI, UNITED STATES MARINE CORPS (USMC) Major General (retired) MIKE COYNE, and USMC Major ROBERT MILLER. After being advised of the identities of those present, RODRIGUEZ provided the following information:

RODRIGUEZ had just gotten back from El Paso about 6:00 p.m. on May 20, 1997. About 6:30 p.m. RODRIGUEZ received a telephone call informing him a man had fired a shot at the Marines. RODRIGUEZ went to Assistant Chief CASTENADA's office and told CASTENADA to go to the command center and to keep RODRIGUEZ informed of any developments while RODRIGUEZ filled up his gas tank. RODRIGUEZ also told CASTENADA to get a camera.

En route to the scene, RODRIGUEZ could not always hear the radio transmissions.

RODRIGUEZ arrived at the scene the same time as CASTENADA. RODRIGUEZ met CASTENADA on the highway prior to entering the scene, and CASTENADA told RODRIGUEZ he had wrecked his vehicle.

When RODRIGUEZ and CASTENADA arrived, a Medivac helicopter was on site, and the body was near the well.

Deputy GALLEGOS told them HERNANDEZ had died of a broken neck.

The Marines told RODRIGUEZ, "he expired."

Upon entering the crime scene, RODRIGUEZ examined the body. HERNANDEZ was wearing a dark shirt and RODRIGUEZ lifted

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 by SA KYLE K. BONATH

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the shirt and found the entry wound and felt a lump on the opposite side of the entry wound.

Agent MEYER and Deputy GALLEGOS, and possibly Agent URIAS, had moved the body from the wall. HERNANDEZ' rifle was found on the west side of the wall.

The four Marines were on the southeast corner of the crime scene.

When RODRIGUEZ arrived the weather was cloudy and the wind was picking up to more than a light breeze and later in the evening a storm hit the area.

RODRIGUEZ and CASTENADA asked the Marines if they were okay and they responded they were. RODRIGUEZ asked them if they identified themselves to HERNANDEZ. BANUELOS said, "yes." When they were asked if the identification was made in English or Spanish, they responded that it was made in English. RODRIGUEZ did not get the impression they spoke only English. He assumed someone spoke Spanish since two of the Marines were hispanic.

RODRIGUEZ told SPENCER they would need to conduct a walk through and to retrieve any evidence.

SPENCER showed them the area where BANUELOS said he fired from. BANUELOS was with them showing them the area. BANUELOS said I was here and HERNANDEZ pointed his gun toward BLOOD, and I shot him. BANUELOS exhibited his shooting position to RODRIGUEZ as being a kneeling position.

RODRIGUEZ is not sure who found the cartridge. RODRIGUEZ believes either he or CASTENADA found the cartridge.

Deputy RUSTY TAYLOR, PRESIDIO COUNTY SHERIFF'S OFFICE, arrived and asked RODRIGUEZ to get out of the crime scene so as not to destroy any of the evidence.

CASTENADA, SPENCER and TAYLOR prepared to do a walk through.

Prior to CASTENADA, SPENCER, TAYLOR and all four Marines doing a walk through, RODRIGUEZ asked BANUELOS for his weapon, and BANUELOS said no problem, I just need a receipt.

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RODRIGUEZ stayed by the roadside and told Presidio County Sheriff DANNY DOMINGUEZ that he would help in any way he could.

At this time it was beginning to get dark.

Texas Ranger DAVE DUNCAN arrived, and RODRIGUEZ offered the Border Patrol's assistance.

DUNCAN organized the interviews of the Marines.

At this time DUNCAN cleared the Border Patrol to go, and RODRIGUEZ returned to Marfa.

RODRIGUEZ did not question the Marines because of the likelihood that the Rangers, or possibly the FBI, would be conducting the investigation.

RODRIGUEZ or CASTENADA found the cartridge first.

RODRIGUEZ conducted no additional investigation other than talking to JTF6 people on the phone.

RODRIGUEZ gave the Marine Lieutenant a ride back to Presidio.

There was another Marine on site who RODRIGUEZ believed was a Gunny Sergeant.

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FEDERAL BUREAU OF INVESTIGATION

Date of transcription 8/28/1997

CASTENADA, UNITED STATES BORDER PATROL (USBP), voluntarily appeared at the RAMADA INN in Alpine, Texas. Present during the interview were FEDERAL BUREAU OF INVESTIGATION (FBI) Special Agent KYLE K. BONATH, Senior Supervisory Resident Agent TERRY R. KINCAID, UNITED STATES DEPARTMENT OF JUSTICE Special Counsel BARRY KOWALSKI, UNITED STATES MARINE CORPS (USMC) Major General (retired) MIKE COYNE, and USMC Major ROBERT MILLER. After being advised of the identities of those present, CASTENADA provided the following information:

CASTENADA is an ex-Marine and currently Assistant Chief with the USBP, and is loyal to the United States. CASTENADA stated he had prior conversations with JACK ZIMMERMAN, BANUELOS' defense Attorney.

RUDY RODRIGUEZ, Assistant Chief, USBP, told CASTENADA there was a problem at Listening Post, Observation Post Number 3. CASTENADA went to the communications room and heard the Marines over the radio state a male subject had fired twice at them. He also heard authorization for the Marines to return fire if they were fired upon again.

CASTENADA then proceeded to the scene at Redford. While en route, CASTENADA heard the report of a man down. CASTENADA did not know who was down as there was no identification given over the radio. The next radio transmission CASTENADA heard was a request for Medivac.

When CASTENADA arrived, the weather was overcast and breezy.

When he arrived at the perimeter of the scene, CASTENADA met with RODRIGUEZ. CASTENADA then went to the location of the body where he met with Agents MEYER and URIAS. CASTENADA then walked over to GILBERT SPENCER, PERMIAN BASIN DRUG TASK FORCE, and Deputy OSCAR GALEGOS, PRESIDIO COUNTY SHERIFF'S OFFICE. He noted that all four Marines were together nearby.

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CASTENADA looked at the body for an entry wound and noticed a bruise directly opposite the entry wound.

CASTENADA then went over to the Marines to check on them. CASTENADA found out the team leader was Corporal CLEMENTE MANUEL BANUELOS, and CASTENADA and RODRIGUEZ then asked what happened.

BANUELOS told CASTENADA he was in the hide site when he saw a man riding a horse on the Mexican side of the river. The Marines moved from their hide site to their observation area to keep a view of the rider. When the Marines got to their observation point they saw a man herding goats. BANUELOS said the individual with the goats saw the Marines and fired at them and then he moved a couple of steps and fired again. BANUELOS said he believed the individual saw them because he raised his weapon in their direction a couple of times prior to shooting at them. The individual then moved to the Marines' right flank and continued moving north to the point where he was eventually shot. BANUELOS said he followed the individual because he did not want the individual to flank them. BLOOD and BANUELOS moved parallel to the individual, with BLOOD on BANUELOS' right. BANUELOS fired at the individual because he had shouldered his weapon, and BANUELOS thought the individual was about to shoot BLOOD.

RODRIGUEZ then asked if the Marines identified themselves, and BANUELOS said yes, I went "pow" (indicating gun shot), and yelled, "U.S. Marines". When asked whether the identification was in Spanish or English, the Marines advised as a group they don't speak Spanish.

CASTENADA said the Marines appeared scared; they seemed concerned about what CASTENADA would think about their shooting.

CASTENADA asked SPENCER if the Sheriff had been contacted and if BANUELOS' casing had been found. CASTENADA asked BANUELOS the location he had shot from.

CASTENADA, RODRIGUEZ, SPENCER, BANUELOS, GALLEGOS, and USBP Agent MARTIN CASIO went to search for BANUELOS' casing. BANUELOS located his spent cartridge. The cartridge was not taken into evidence at this time.

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When BANUELOS saw the cartridge he said, "there it is.". At this time, CASTENADA was approximately six to eight feet away from BANUELOS. CASTENADA thought BANUELOS' locating the cartridge was an honest finding as there was nothing to suggest otherwise. CASTENADA did not actually witness BANUELOS find the cartridge.

CASTENADA asked SPENCER if it would be okay for the Marines to walk through the area to explain what happened. CASTENADA asked BANUELOS to do a walk through, and BANUELOS said he would like to have the other Marines with him.

During the walk through, BANUELOS again said he saw a man riding a horse from their hide site and the Marines moved to the observation post to keep the rider in view. It was from the observation post that BANUELOS saw a man with a herd of goats carrying a weapon. BANUELOS said he could tell that the subject had seen them. At this time, TORREZ was furthest south, closest to the river, then from south to north was BLOOD, WIELER, and BANUELOS.

TORREZ was hiding behind a creosote bush. BLOOD was on one knee, WIELER was prone, and BANUELOS was kneeling.

Subject then raised his weapon and fired. All four Marines heard the shot and said the round went overhead between BLOOD and WIELER. Subject took two steps and fired a second round. CASTENADA said BANUELOS was telling the story but he got the impression BANUELOS did not actually hear the second round. CASTENADA remembers WIELER stating he heard the second round.

BLOOD and BANUELOS then followed subject, moving parallel to subject. WIELER stayed at the observation point, and TORREZ stopped on the next rise with the radio. BANUELOS and BLOOD continued to follow subject, paralleling his movements. When the subject was near the house, he brought his gun up, and BANUELOS fired.

CASTENADA remembers only BLOOD and BANUELOS followed subject. CASTENADA believes TORREZ told him he stayed on the rise with the radio.

CASTENADA suggested TAYLOR needed to secure BANUELOS' weapon and to check with the Marines' supervisor about securing

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the weapon. CASTENADA never heard Corporal BANUELOS refuse to give up his weapon.

GALLEGOS asked BANUELOS for his weapon.

CASTENADA then went to talk to the victim's father, Mr. HERNANDEZ, SR. No one else was with CASTENADA at this time.

Mr. HERNANDEZ said his son and the rest of the family were at the house and his son was studying a driver's manual. His son left about 5:45 p.m. to graze the goats. His son told Mr. HERNANDEZ, SR. he was taking his rifle because there had been a pack of dogs bothering his goats.

After talking to Mr. HERNANDEZ, SR., CASTENADA returned to his vehicle.

BANUELOS never said whether HERNANDEZ was right or left handed.

Some time later CASTENADA heard there had been a heated discussion between GALLEGOS and a cousin of the family. CASTENADA heard the cousin had kicked SPENCER's vehicle.

It was reported to CASTENADA that District Attorney VALLADEZ had told someone that CASTENADA had witnessed the Marines exchanging "high fives" the night of the shooting. CASTENADA said he saw no such thing. CASTENADA described the Marines' behavior as professional and courteous. CASTENADA believes the Marines took the correct actions and they did the right thing by keeping the aggressor in their site.

CASTENADA did not see HERNANDEZ, SR. touch his son.

From what he heard, CASTENADA concluded the HERNANDEZ boy was right handed and had shouldered his weapon and was aiming in a north or northeasterly direction. CASTENADA agreed a north or northeasterly direction would not be pointed at the Marines, depending on how far north BLOOD was located from BANUELOS.

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FEDERAL BUREAU OF INVESTIGATION

Date of transcription 8/28/1997

Sheriff DANNY DOMINGUEZ voluntarily appeared at the RAMADA INN in Alpine, Texas. Present during the interview were FEDERAL BUREAU OF INVESTIGATION (FBI) Special Agent KYLE K. BONATH, Senior Supervisory Resident Agent TERRY R. KINCAID, UNITED STATES DEPARTMENT OF JUSTICE Special Counsel BARRY KOWALSKI, UNITED STATES MARINE CORPS (USMC) Major General (retired) MIKE COYNE, and USMC Major ROBERT MILLER. After being advised of the identities of those present, DOMINGUEZ provided the following information:

DOMINGUEZ arrived on scene at 7:40 p.m. It was cloudy and about to rain and there was a little wind, but DOMINGUEZ didn't feel the weather would have presented any problems with communication. Upon his arrival at the scene, either OSCAR GALLEGOS or GILBERT SPENCER stopped him from driving in on the road so as not to destroy any evidence.

GALLEGOS informed DOMINGUEZ that the HERNANDEZ boy was in the well. DOMINGUEZ asked GALLEGOS if the boy was okay. GALLEGOS told him the boy was dead and that the Marines had shot him. After GALLEGOS told him HERNANDEZ was dead, DOMINGUEZ went to look at the body. DOMINGUEZ didn't see any visible wounds or blood. DOMINGUEZ then noticed a small, pea size spot of blood on HERNANDEZ' shirt.

DOMINGUEZ noticed HERNANDEZ' father at the site and informed the father his son was dead, at which point the father began crying. DOMINGUEZ knew the HERNANDEZ family from when he was a deputy in Presidio County.

DOMINGUEZ noticed COSTENADA and SPENCER walking with one or two of the Marines and others following further behind.

DOMINGUEZ asked for the area to be secured. Texas Ranger DAVE DUNCAN arrived on scene, and DOMINGUEZ asked DUNCAN to take over the investigation.

Investigation on 8/28/1997 at Alpine, Texas
 File # 282A-EP-32400 Date dictated 8/28/1997
 by SA KYLE K. BONATH

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DANIEL ARETA, SPENCER, and RUSTY TAYLOR separated the Marines and took them to different vehicles so they could get the Marines' statements.

DOMINGUEZ saw a Lieutenant in civilian clothes at the site but the Lieutenant was unknown to DOMINGUEZ. DOMINGUEZ couldn't recall if he talked to the Lieutenant, but it was either DOMINGUEZ or Deputy RUSTY TAYLOR who told the Lieutenant they would need statements from the Marines. The Lieutenant had no objections and did not have any conditions for the Marines giving statements. The Lieutenant did not order the Marines to give statements.

DOMINGUEZ talked to one or more of the Marines about giving statements and about their rights. One of the Marines asked to talk to his Lieutenant. DOMINGUEZ didn't know if the Marine ever talked to his Lieutenant.

The Advise of Rights form is used to ensure all statements can be used in court.

DOMINGUEZ was not present for any of the statements.

DOMINGUEZ said the Marines left the site during the time when he and DUNCAN went to the Redford convenience store to call the FBI. DOMINGUEZ did not instruct the Marines to stay at the scene.

DOMINGUEZ left the site later in the evening and no one was left behind to keep the area secure.

While DOMINGUEZ was on scene during the investigation, the shortest Marine directed DOMINGUEZ to the place where HERNANDEZ had shot from. This same Marine, who DOMINGUEZ learned was Lance Corporal JAMES MATTHEW BLOOD, told DOMINGUEZ that HERNANDEZ had fired two shots, then proceeded further north. DOMINGUEZ said BLOOD was cooperative while giving directions and did it voluntarily without being ordered to do so by his Lieutenant.

DOMINGUEZ asked HERNANDEZ' father if HERNANDEZ was right or left handed. The father said his son was right handed. DOMINGUEZ also asked the father if HERNANDEZ shot right handed, and his father said he also shot right handed.

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Corporal ROY TORREZ, JR. told DOMINGUEZ what happened. TORREZ saw the boy who fired at them and when the boy raised his rifle to attempt to shoot again, Corporal CLEMENTE MANUAL BANUELOS shot him. It was DOMINGUEZ' impression that TORREZ did not actually see HERNANDEZ raise his rifle.

DOMINGUEZ said TORREZ was calm and polite and was cooperative in describing what happened, but he wouldn't make much eye contact and acted like what happened was no big deal. DOMINGUEZ described TORREZ as having no emotion, similar to a hunter who had just shot an animal.

The next day, May 21, 1997, DOMINGUEZ was at the Port of Entry when the Marines were being interviewed by the TEXAS RANGERS and the FBI. DOMINGUEZ saw two or three Marines in the waiting room either before or after their interviews. The Marines appeared to DOMINGUEZ to be pissed off.

DOMINGUEZ said where HERNANDEZ shot was "open range". "Open range" means the property is owned, but not fenced.

It is DOMINGUEZ' opinion that the Marines escalated the situation when they left their original location and pursued HERNANDEZ when he proceeded northward. DOMINGUEZ said that from where the Marines' shot HERNANDEZ they would not be able to see HERNANDEZ raise his rifle and aim it at them, not only because of the distance involved but also because the sun was behind HERNANDEZ and he would have been silhouetted from the Marines' position. DOMINGUEZ believes BANUELOS' shot was not a reactionary shot that BANUELOS was already sighted in on HERNANDEZ and when HERNANDEZ moved, BANUELOS shot. It is DOMINGUEZ' opinion that if BANUELOS hadn't already been sighted in on HERNANDEZ, HERNANDEZ could have gotten off a shot.

DOMINGUEZ does not know whether HERNANDEZ ever saw the Marines. DOMINGUEZ believes if HERNANDEZ shot right handed, the Marines' version is not possible and, if HERNANDEZ shot left handed, maybe their version is possible.

It is DOMINGUEZ' opinion that HERNANDEZ should not have died. Had this involved law enforcement with proper police training instead of the Marines, the situation would never have happened. DOMINGUEZ also believes if the BORDER PATROL had

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responded in a timely manner, the situation could have been averted.

DOMINGUEZ said HERNANDEZ' father saw his son's body earlier, but he doubts he could have seen the entry wound, and that the father would have no reason to lie about his son being right handed.

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 8/27/1997

Chief Deputy RUSTY TAYLOR, PRESIDIO COUNTY SHERIFF'S OFFICE (PCSO), voluntarily appeared at the RAMADA INN in Alpine, Texas. Present during the interview were FEDERAL BUREAU OF INVESTIGATION (FBI) Special Agent KYLE K. BOMATH, Senior Supervisory Resident Agent TERRY R. KINCAID, UNITED STATES DEPARTMENT OF JUSTICE Special Counsel BARRY KOMALSKI, UNITED STATES MARINE CORPS (USMC) Major General (retired) MIKE COYNE, and USMC Major ROBERT MILLER. After being advised of the identities of those present, TAYLOR provided the following information:

At approximately 6:30 p.m., TAYLOR was notified that a shooting had occurred in Marfa. TAYLOR arrived at the shooting site about 7:45 p.m. but didn't know anything other than a shooting had occurred. TAYLOR was not aware Marines were stationed in the area.

When TAYLOR arrived, Sheriff DANNY DOMINGUEZ was on site talking with family members.

TAYLOR saw Agent GILBERT SPENCER, of the PERMIAN BASIN DRUG TASK FORCE, walking with two men who were wearing guille suits and had the faces painted. TAYLOR later found out the two men in camouflage were Marines.

Deputy OSCAR GALLEGOS, PRESIDIO COUNTY SHERIFF'S OFFICE, showed TAYLOR the crime scene and HERNANDEZ' rifle.

The spot where the Marines found HERNANDEZ' rifle was marked with orange spray paint. TAYLOR was told BANUELOS had refused to give up his weapon.

TAYLOR was concerned about what GALLEGOS had or had not done with respect to medical treatment for the subject.

Investigation on 8/27/1997 at Alpine, Texas

File # 282A-EP-32400 Date dictated 8/27/1997

by SA KYLE K. BOMATH

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TAYLOR proceeded from the location of the body to the area where Corporal CLEMENTE MANUAL BANUELOS shot HERNANDEZ.

The Marines were walking the scene with Assistant Chiefs DAVE CASTENDADA and RUDY RODRIGUEZ, UNITED STATES BORDER PATROL (USBP), OSCAR GALLEGOS, GILBERT SPENCER, and a Marine Lieutenant in plain clothes. TAYLOR called the group over and asked them not to walk through the area because they might damage evidence. He also told the Marines he would need to get statements from them. TAYLOR told BANUELOS he would need to relinquish his weapon. BANUELOS said he could not give up his weapon unless someone signed for it. The Lieutenant told BANUELOS to give his weapon to TAYLOR. TAYLOR took the rifle and three loaded magazines.

TAYLOR did not get any response to his request for the group not to walk through the crime scene. TAYLOR later learned that CASTENDADA had already walked the Marines through the area.

When TAYLOR told the Marines he would need them to make a statement, he got no response in the affirmative or negative from the Marines or the Lieutenant.

TAYLOR then asked exactly where HERNANDEZ was located when he fired toward the Marines. TAYLOR wanted to check the area to locate spent shells. TAYLOR and Sheriff DOMINGUEZ were shown the area by BLOOD. To pinpoint HERNANDEZ' exact location BLOOD and TAYLOR walked to the Marines' observation area and BLOOD instructed Sheriff DOMINGUEZ where to stand to approximate HERNANDEZ' position. There was already crime scene tape in the area HERNANDEZ was standing when he fired at the Marines. BLOOD had positioned Sheriff DOMINGUEZ in an area adjacent to the crime scene tape, so RUSTY also taped off the area where BLOOD had positioned Sheriff DOMINGUEZ.

BLOOD told TAYLOR that when HERNANDEZ fired at the Marines, they were in the area of their observation point. BLOOD was 30 meters north of BANUELOS, and WIELER was 10 meters south of BANUELOS, and TORREZ was another 10 meters south of WIELER.

While TAYLOR was taping off the area where BLOOD had positioned Sheriff DOMINGUEZ, the rain started pouring down. The body and rifle were not covered until shortly after the rain started.

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After the rain started, TAYLOR went to locate the Marines to get their statements about the incident. TAYLOR located all four Marines in a white Suburban with their Lieutenant. TAYLOR asked the Marines if they would give written statements; there were no objections. TAYLOR does not recall the Lieutenant saying anything. TAYLOR then directed each MARINE to a separate police vehicle to give their statements.

Lance Corporal RONALD HARRY WIELER, JR. was the last Marine to be directed to a vehicle, so TAYLOR placed WIELER in his vehicle so TAYLOR could get his statement. TAYLOR first advised WIELER of his rights, and WIELER said he understood his rights, but he asked to talk to his Lieutenant prior to giving a written statement.

RUSTY exited his vehicle on the driver's side and motioned for the Lieutenant. The Lieutenant came and got into TAYLOR's vehicle on the driver's side. WIELER and the Lieutenant talked for a while and then the Lieutenant got out of the vehicle, and TAYLOR got back in. The Lieutenant did not say anything to TAYLOR at that time. The Lieutenant then went to the passenger side window and said, "It's entirely up to you if you want to give statement or not. I'm not going to tell you to give a statement or to not give a statement." WIELER then said, "I'll give a statement."

TAYLOR asked WIELER to write what happened. After TAYLOR read WIELER's statement he asked WIELER a few questions and WIELER added to his statement to clarify.

TAYLOR asked if WIELER saw HERNANDEZ raise his rifle. WIELER responded his view was obstructed, and he couldn't see. TAYLOR asked WIELER to add that response to his written statement and WIELER did. It was TAYLOR's belief that WIELER was being very honest. There was no hesitation in WIELER's response and no indication that he was being evasive.

TAYLOR said if WIELER changed his story, he would like to know why he would make such a change.

After taking WIELER's statement, TAYLOR then went to locate DOMINGUEZ or Texas Ranger DAVE DUNCAN but could not locate either of them. Someone in civilian clothes who TAYLOR didn't

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know but assumed to be military came from the Suburban. TAYLOR let the Marines go because he didn't know DUNCAN had asked them not to leave.

Around midnight TAYLOR left the scene and went to the Annex Building. At the Annex Building DUNCAN collected the statements from the law enforcement officials.

On the evening of May 20th, TAYLOR noticed all four Marines had camouflage paint on their faces, were dressed in guille suits from head to ankles, and their weapons were wrapped in burlap material.

In TAYLOR's opinion, the Marines created a situation where they could shoot Hernandez by following HERNANDEZ knowing that he was going to raise his rifle again so they could shot him. BANUELOS said he was trained to not let anyone flank him. TAYLOR also was concerned after reading the Radio Log and the transmission "if he points his weapon down range, will take him out."

TAYLOR believes WIELER felt and seemed more concerned than the other Marines, by his demeanor and the sound of his voice. TAYLOR thought BANUELOS acted cocky. TAYLOR never talked to TORREZ.

TAYLOR believes one of the Marines recognized the sound of a .22 rifle being fired, but doesn't know which Marine.

The weapons of the other three Marines were not taken or examined.

TAYLOR looked at the body and noticed a small hole on the right side and a small lump on the left side.

HERNANDEZ's father said his son was right handed and that his son shot right handed. TAYLOR did not know if HERNANDEZ' father saw his son's body.

When TAYLOR arrived at 7:45, the weather condition did not hinder verbal communications.

0174

APPENDIX U

Memorandum

#18



MAR 90/9

Subject REDFORD INCIDENT (KRAMER)	Date JANUARY 2, 1998
To Jerry C. Agan Deputy Chief Patrol Agent Marfa, Texas	From Marilyn R. Chambers Sector Counsel Marfa, Texas

ATTORNEY WORK PRODUCT-PRIVILEGED AND CONFIDENTIAL

RELEASE OF THIS DOCUMENT TO ANYONE OTHER THAN THE CHIEF MAY DESTROY THE ATTORNEY-CLIENT PRIVILEGE

Per your request, this Memo provides a summary of information which has occurred in the past few days.

On December 30, 1997, I was speaking with Agent James K. Kramer who informed me that on or about May 19, 1997, the night prior to the shooting of Ezequiel Hernandez, Jr., ("Zeke"), he and Martin Arredondo were relayed information that there was foot traffic at the Polvo Crossing. They went down there to check it out. At the "Chalupa" they encountered a person on horseback. That person was Zeke. Agent Kramer stated that he knew who he was because he had seen him at the High School. He further stated that he talked to Zeke and Zeke said he was "looking for his goats". The call regarding the foot traffic came from Hole # 3, the hole in which the Marines were stationed who shot Zeke.

I asked Agent Kramer if he had told anyone about this as this was the first I had heard about this incident. He stated that he had not as no one had asked him about it.

I did not question Agent Kramer further as I did not want to get into much more detail as I felt that the questioning concerning this incident should be handled by someone else.

I then notified you and we discussed the issue. Thereafter, I called Agent Arredondo to confirm Agent Kramer's recollection of the incident. Agent Arredondo was out of town and I did not speak with him until late on December 31, 1997.

Redford/Kramer Memo

Page 2

January 2, 1998

On December 31, 1997, I spoke with Agent Arredondo who informed me that he was on duty with Agent Kramer on or around May 19, 1997. He does not recall the exact date; but, he did recall the incident. He stated that they had gotten a call that there was a man on horseback who was assisting someone with suitcases. They traveled to the Poivo crossing and saw signs of a horse and shoes--he thinks they were sneakers; but, saw no people. They then traveled towards the "Chalupa" and somewhere between the crossing and the "Chalupa", they ran into Zeke. Agent Arredondo did not speak with him as he was only a trainee at the time; however, he did hear the conversation between Agent Kramer and Zeke. Zeke informed Agent Kramer that he was a USC; that he lived in the area; was looking for and/or herding his goats and that his house was right there. That was the end of the incident.

Agent Arredondo does not specifically recall telling anyone about the incident. He thinks he may have mentioned it around the station; but, can not recall to whom.

I did not question Agent Arredondo further as I felt that questioning of this incident should be done by someone other than me.

I then relayed the information to you. This morning we discussed this information and left a message for Dave Adams.

This information should be relayed to all the appropriate authorities so that all the facts are known.

If you have any questions, please let me know.

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 1-09-98

MARTIN ARREDONDO, (DOB 8-12-60) was telephonically contacted at the Border Patrol Office, Presidio, Texas. After being advised of the identity of the interviewing Agent and the purpose of the interview, he provided the following information:

ARREDONDO has been employed by the Border Patrol since April 1, 1996. On the evening of May 19, 1997, ARREDONDO was working an evening shift with JAMES KRAMER. ARREDONDO and KRAMER were working east of Redford, Texas and monitoring the Marines radio transmissions. The Marines at site three reported a person on horseback helping someone with a suitcase cross the river in the area of Polvo crossing. ARREDONDO and KRAMER responded to the scene in a marked Border Patrol vehicle. When ARREDONDO arrived in the area of Polvo crossing he did not see anyone on horseback in the area. There were horse tracks on the dirt in the area of Polvo crossing. ARREDONDO and KRAMER proceeded to move West about a quarter of a mile. In the area of a boat crossing they came across a young man on horseback approaching them from the South. KRAMER stopped the individual and identified him as ESEQUIEL HERNANDEZ JR. HERNANDEZ was known to KRAMER and after KRAMER determined HERNANDEZ lived in the area he called in on the Border Patrol radio code 10-71, which indicates normal traffic.

ARREDONDO stated they did not radio or specifically report anything back to the Marines. ARREDONDO did not see anything unusual or suspicious about HERNANDEZ riding in the area as it was close to HERNANDEZ' home. HERNANDEZ did not have any weapon on him. HERNANDEZ did not have any luggage with him and HERNANDEZ was not asked whether he had been assisting someone to cross the river. ARREDONDO assumed it was HERNANDEZ helping someone across the river because they did not locate or see anyone else on horseback in the vicinity. ARREDONDO did not have any additional contact with HERNANDEZ. ARREDONDO did not work on May 20, 1997.

Investigation on 1-6-98 at Midland, Texas (telephonically)
 File # 282A-EP-32400 Date dictated 1-9-98
 by SA KYLE K. BONATH

0537

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

APPENDIX V

MEMORANDUM

From: Barry Kowalski
Special Counsel

To: Jessica Ginsburg
Acting Deputy Chief

Subject: Potential Prosecution of Ronald Wieler

Date: September 8, 1997

This is to memorialize the evidence that currently exists to support indictment of the above subject for making false statement to the Federal Bureau of Investigation on May 21, 1997, in connection with the investigation of the shooting of Esequiel Hernandez.

I will be meeting with Wieler and his attorneys on September 11, 1997. At that time I anticipate we will gain his cooperation in return for immunity from federal prosecution and action by the Marine Corps. In the event this does not occur, I will question him after he has been required by the Marine Corps to submit to interview. What is stated in that interview will accordingly be compelled and I will no longer be in a position to prosecute Wieler on behalf of the United States. If Wieler is cooperative and truthful during that interview, I will so advise you. If not, I will also advise you, but, of course, will not reveal to you what he has said during that interview. You should then assign a untainted attorney to investigate and consider whether prosecution of Wieler is appropriate. I will continue to conduct the investigation of the shooting of Mr. Hernandez as a separate investigation.

There presently is sufficient evidence to support the indictment of Wieler for making a false statement to the FBI under 18 U.S.C. 1001. If Wieler is not cooperative, additional investigation should be conducted, as indicated in Attachment A hereto, to further develop the case and to determine the prosecutive advisability of bringing such a case. Wieler's written statement of May 21 to an FBI agent and Texas Ranger, as well as his oral statements to them, directly contradict his written statement to a local law enforcement agent and his oral statements to him on May 20, 1997, on an issue material to the investigation. The May 21 statement also contradicts a second written statement on May 20 by Wieler's to Marine authorities. The other witnesses identified in Attachment A can provide information regarding the on-scene investigation that also contradicts the May 21 statement on the same material issue.

10015

MARINE SHOOTING - CIVIL RIGHTS REVIEW

Brief Facts: Marine Cpl. Clemente Banuelos fatally shot Ezequiel Hernandez, Jr. on May 20, 1997, while engaging in a border surveillance mission. Twenty minutes before the fatal shooting, Hernandez had fired two shots in the direction of the four Marines, who then continued to follow Hernandez, allegedly in order to keep sight of him. Banuelos claims that he shot Hernandez only after Hernandez raised his rifle and pointed it at one of the Marines.

Autopsy: Although not conclusive, the autopsy findings on the bullet entry cast some doubt on the Banuelos' statement that the victim had raised his gun into a firing position at the time the fatal shot was fired.

Change in Statement/Possible Obstruction: When first interviewed by law enforcement, Banuelos was the only one of the four Marines who said he saw the victim raise his gun; the other three claimed not to be able to see the victim at that time. The next day, one of the witnesses, Wieler, changed his story, now claiming that he too saw the victim raise his rifle before he was shot. In the experience of the Civil Rights Division, a flagrant change in a witness' story is often indicative of obstruction of justice, i.e., another person told the witness to provide a false statement to investigators. There is currently no explanation about why the witness changed his statement in this fashion; it is expected that the witness' state grand jury testimony will address that issue.

Banuelos' Statement to FBI: During the questioning of Banuelos by the FBI and the Texas Rangers the day after the shooting, Banuelos was questioned about how he could tell who Hernandez was aiming at because of the slight angle between the position of the Marines. Banuelos became agitated and stated, I saw the guy aim at one of my men so I fuckin' capped him. Based on this statement and the inconsistency in Wieler's statements noted above, the FBI was concerned about the circumstances of the shooting.

Timing of Review: The Civil Rights Division has reviewed information provided by the military, the INS and the FBI. CRT has still not received the ballistics reports, most of the investigative materials from the DA's investigators, and, of course, the grand jury transcripts. The DA has agreed to make available the state and local investigators for interview by the military and the FBI on August 25.

**SUMMARY OF INTERVIEW OF
CPL RONALD H. WIELER, JR
4 AND 5 DEC 97 AT DEL MAR CAMP PENDLETON
INTERVIEW CONDUCTED BY
MAJOR GENERAL J. COYNE**

On 3 Dec 1997 I traveled to Washington, D. C. for the interview and polygraph examination of Cpl Wieler. The interview was held in the Washington Field Office of the FBI at 709 7th Street, N.W., Washington, D. C. beginning on Thursday, 4 Dec 97, at 1300. Cpl Wieler and his attorney, Dan Heygood, had arrived the evening before but, at the request of Dan Heygood, Cpl Wieler was permitted to sleep in late to be ready for the examination. The polygraph was conducted in a room where only the subject and the polygrapher were present. It was on a closed circuit television, however, and was viewed by Barry Kowalski and Jacques Spratt of the Civil Rights Division, DOJ, Dan Heygood, and myself.

The FBI polygrapher explained the procedure to Cpl Wieler with the knowledge that he had been polygraphed previously by a private polygrapher in Texas. Among the screening questions Cpl Wieler was asked was whether there was any reason why his emotional state might not be compatible with a polygraph examination. Examples, such as a recent death in the family, were offered. Cpl Wieler said there were no such events. It is noteworthy that, on the following day - after his poor performance on Thursday - he advised that on the 23rd of November he was involved in an accident where he killed a pedestrian. He said that it occurred in the mid-morning hours and he was driving his car with his wife as a passenger. He was not charged with any violation. Apparently the individual lingered for several days before expiring. The failure to provide that information to questions that were designed to elicit just such information was but one of several indicators that Cpl Wieler would prove to be a difficult witness to evaluate.

Pursuant to prior agreement between Barry Kowalski and Dan Heygood, Cpl Wieler was initially tested on the question of whether he saw Mr. Hernandez aim his weapon at the Marines. He testified that he did and the polygraph showed no deception for this answer. As a result he received transactional immunity. The immunity agreement is attached to this memorandum.

As agreed he was then examined with respect to any discussions that he may have had with Cpl Bamuelos between the time the shots were fired at the Marines until Cpl Bamuelos shot Mr. Hernandez. His answer that there were no discussions revealed deception when he was tested. The FBI agent then questioned Cpl Wieler further about the incident. Cpl Wieler next recalled that Cpl Bamuelos had said that he wanted the Marines to "close with and neutralize" Mr. Hernandez. The word "neutralize" was actually suggested to Cpl Wieler by the FBI agent during the interview. But, when I suggested that it did not sound like what I would expect from Cpl Bamuelos and the FBI agent said this to Cpl Wieler, he strongly defended it as a common artillery expression and insisted it was used.

Cpl Wieler then took the polygraph examination with respect to this statement and again it showed deception. It should be noted that the examiner uses several control questions and

~~CONFIDENTIAL~~
1 of 2 Pages.

ENCLOSURE (2)

generally only one - at the most two - questions are focus questions. The FBI rule is that if one fails on any one question he fails as to all. After further questioning Cpl Wieler was encouraged to go with his attorney and get a good dinner and a good night's sleep so he could be examined again on the following day. He was driven to his hotel together with his attorney by Mr. Kowalski.

On Friday morning Cpl Wieler returned for a re-interview. Discussions prior to his arrival by the polygrapher, Mr. Kowalski and myself resulted in the judgment that it would probably be of no value to polygraph him that day. However, a final decision was reserved pending a group interview of Cpl Wieler by Kowalski, the FBI agent, Dan Heygood and myself.

During that interview Cpl Wieler mentioned the fact of the fatal traffic accident which reportedly had been revealed to his attorney for the first time during dinner conversation the prior evening. He also said that he had misstated what Banzelos said. He now says that what Banzelos said was that the Marines "should get on line and get off the skyline." He said that it was he who understood that to mean that they would close with and neutralize Mr. Hernandez and that is why he said what he did the day before.

Mr. Kowalski, the polygraphers and I discussed the value of a polygraph on the new version of the facts and all agreed that it would be of little value. The FBI polygrapher and the technical review expert particularly felt strongly on this issue. They said he was guaranteed to show deception.

Accordingly, Cpl Wieler was simply talked to again by all the parties and strong efforts were made to get him to realize that his story was not credible. He is simply unable to answer questions in a fashion that makes his answers believable. The FBI agent told him in particularly strong terms that he was not telling the truth and that he personally would not be able to polygraph him in the future because he believed so strongly that he was consciously deceptive in several areas.

I suggested to Barry Kowalski afterwards my belief that Cpl Wieler is presently incapable of knowing what the truth is and, for that reason, will not be a good witness for either side should a prosecution develop. Barry indicated that he thought I was right.

It is Kowalski's plan to try one last time with Wieler and Torrez. He will take them before a grand jury in January - probably on the 8th - and see if he can get the truth from them. He will check with his supervisors regarding their willingness to extend a further grant of immunity for our purposes in interviewing Cpl Torrez and Cpl Wieler following his December grand jury session.


J. T. GOYNE
Major General, USMCR
Investigation Officer

ROY TORREZ, JR;
 RONALD HARRY WIELER, JR.;
 CLEMENTE MANUAL BANUELOS;
 JAMES MATTHEW BLOOD;
 U. S. MARINES;
 EZIQUIEL HERNANDEZ, JR. (DECEASED) - VICTIM;
 COLOR OF LAW - FORCE/VIOLENCE;
 282A-EP-32400

12/7/97

A potentially significant and previously unknown fact was developed on 12/4/97 during interview of subject Wieler. Wieler advised that after the victim had allegedly fired a couple of shots in the direction of the subjects, subject Banuelos made a statement that he was going to, "Move forward, and neutralize him (referring to the victim)". It was after this statement made by Banuelos that Banuelos moved from a secured defensive position, through a ravine, and thereafter shot the victim. If Banuelos' activities, as related in this interview by Wieler, are substantiated, Banuelos apparently violated the Rules of Engagement in effect for U.S. Marines assigned to the Southwest Border/Joint Task Force-Six, involved in counter drug matters. It is noted that Barry Kowalski, line attorney, U. S. Department of Justice, Civil Rights Division (DOJ-CRD) had previously been skeptical of Wieler's first hand accounts regarding the shooting of the victim, primarily because Wieler had previously made inconsistent statements.

Prior to this development on 12/4/97, Kowalski was preparing to introduce his last witnesses to a Federal Grand Jury at Midland, Texas, on 12/11- 12/97, and thereafter close the investigation because there was apparently insufficient evidence to win a conviction in jury trial. It is further noted that subject Blood previously passed an FBI administered polygraph and that Blood did not reveal any deception during the polygraph examination. It is also believed that Blood was not physically near Banuelos when Banuelos made a statement regarding "neutralizing" the victim, and that Blood was probably not aware of Banuelos' statement.

It is not known what impact this recently developed information may have with liaison Kowalski has established with the U. S. Marine Corps (USMC). It is noted that the interview of Wieler on 12/4/97 was conducted by an FBIHQ Polygraph Unit Supervisor. Wieler is still in the USMC, stationed at Camp Pendleton, California. Arrangements were made by the USMC for Wieler to fly from San Diego, California, to Washington, D. C. for the interview, at Kowalski's request.

(It is noted that Kowalski is aware of impending indictments against other current and former USMC personnel, and that Kowalski has personally discussed his liaison with and cooperation from USMC upper command with DOJ-CRD line attorney John Mott who is preparing indictments at San Diego, re [REDACTED] F

You will be apprised of further developments.

Not suitable for dissemination outside the FBI.

FBI-0000890

12/8/97 282A-EP-32400

On Monday, 12/8/97, Kyle Bonath called to advise the following:

Subject Wieler showed up for his continued polygraph on 12/5/97, but was not polygraphed.

He recanted his statement from 12/4/97 (wherein he said subject Banuelos had made a statement re "neutralizing" the victim), and said he had not been truthful when he made this statement, attributed to Banuelos, on 12/4. He could not (and did not) explain why he had lied about this statement.

B. Kowalski is not sure where to go from here, other than to have Wieler testify before a FGJ in January, 1998 (too late now to schedule him for 12/97).

A problem with Wieler's testimony is that B. Kowalski had given Wieler "Transactional Immunity" if Wieler passed a polygraph on a question re the victim's position when firing the .22 cal rifle. Wieler passed on that crucial question, and now, Wieler cannot be charged or prosecuted for Obstruction of Justice and/or perjury.

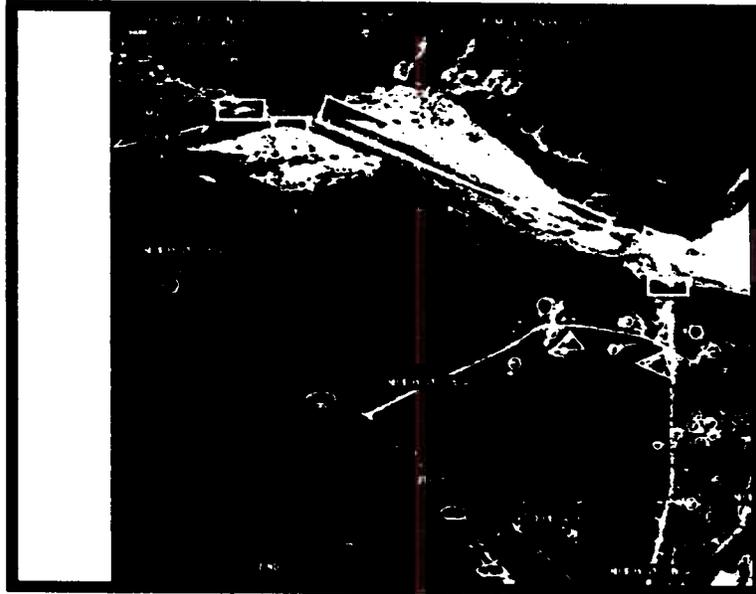
Steve Rogers and Mark Johnson, Bu polygraphers were involved in the polygraph on 12/4/97.

FBI-0000894

APPENDIX W

Redford

Events, Consequences and Recommended Actions



Events, Consequences and Recommended Actions:

Preparing the Immigration and Naturalization Service and the Department of Defense for Future Coordinated Action

Events of May 20, 1997

On May 20, 1997, Corporal Clemente M. Banuelos, US Marine Corps, shot Mr. Ezequiel Hernandez, Jr., in Redford, Texas. Banuelos was part of a Department of Defense contingent conducting border surveillance duty at the request of the Immigration and Naturalization Service Border Patrol. The operation, conducted by Marines from Camp Pendleton, California placed small teams of Marines in four spots along the border where drug smuggling has been known to occur. Banuelos' four-man team was assigned to a location known as Hole 3 along the Rio Grande River overlooking an area known as Polvo Crossing, located south of the town of Redford.

The Marines, under the control of team leader Banuelos, shot Hernandez, armed with a rifle, in response to the threat of deadly force he presented them. No Border Patrol agents were at the scene at the time of the shooting. A formal investigation, led by the Texas Rangers, presented evidence to a Presidio County Grand Jury in Marfa, Texas, on the issue of whether Corporal Banuelos should be indicted for the unlawful killing of Mr. Hernandez. On August 14, 1997, the Grand Jury returned a "No-Bill" indicating that it did not find sufficient grounds for an indictment.

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Consequences

The events in Redford, Texas on May 20, 1997 resulted in the death of 18 year old Ezequiel Hernandez, and caused anguish for his family, his friends, and his community. The Federal government, the Marine Corps, the Department of Defense, the Immigration and Naturalization Service and the Border Patrol have also suffered negative consequences.

Hernandez' death and subsequent reports on the official investigations were circulated in the local and national media for months. The Grand Jury proceedings and related investigation caused the community of Redford and individuals throughout the nation to become disaffected with drug interdiction operations and with the organizations that participated in them. Border Patrol agents and Marines involved in the incident became the subjects of various external investigations, internal reviews and media interest, and perceived themselves to be under attack. Individuals and organizations that had charged in the past that personal liberties and foreign relations were being threatened by "militarization of the border" renewed those charges. After the Redford incident, the Department of Defense and the Immigration and Naturalization Service, in effect, shelved all joint LP/OP operations, reducing the ability of the Border Patrol to interdict drug smugglers between the Ports of Entry.

What Went Wrong

In retrospect, the decision to expose armed, combat orientated personnel to an essentially domestic law enforcement environment set the forces in motion that caused the Redford incident. The differences in purpose and in training of combat soldiers and of civilians trained to enforce immigration and drug laws are substantial. The INS and DOD recognized those differences and attempted to compensate for them by setting up a system of bureaucratic controls, training, checks, and cross checks to regulate jointly conducted drug surveillance post operations. The Border Patrol's review of the events leading up to May 20, 1997 indicates that the system that the INS and DOD had constructed failed, with tragic consequences. In addition to the underlying systemic failures, the Border Patrol failed to recognize that DOD and Border Patrol personnel had different understandings of key operational elements.

In organizing cooperative counter-drug efforts, DOD and INS have always shared the assumption that no DOD personnel should assume a law enforcement role. Interaction between smugglers and DOD personnel was to be avoided if at all possible. According to plans, DOD was not to make contact with, interview, or arrest suspects if any other avenue was open to them. DOD staffed Listening and Observation Posts (LP/OP) operations were designed so that the DOD personnel would have very limited interaction with the local residents or the criminal element. In the Redford incident, DOD personnel were unable to avoid contact with Hernandez, and reacted as they deemed appropriate.

DOD and INS planners agreed that DOD, not Border Patrol, would maintain tactical control (detailed and direct control of movements and maneuvers of personnel) over armed DOD personnel assigned to LP/OPs on the border. The Border Patrol set parameters under which the DOD would perform LP/OP missions on behalf of the Border Patrol, and assigned the DOD team the responsibility to manage their activities within those parameters. In the Redford incident, the parameters set by the Border Patrol and DOD did not prevent the incident from occurring.

Headquarters Border Patrol's coordination mechanisms were not designed to fully assess to what degree Border Patrol participation in LP/OP operations was compliant with the guidelines agreed to between DOD and INS. Border Patrol staff in Operation Alliance and the Border Patrol Coordination Center, working closely with JTF-6, organized hundreds of Border Patrol/DOD cooperative counter drug initiatives ranging from engineering missions to LP/OPs. Once these missions were organized, Border Patrol Headquarters handed the initiatives over to the Sectors to manage. Headquarters oversight of those missions after hand-off was limited. In the Redford case, as in all other LP/OP operations, it was not part

LIMITED OFFICIAL USE

of standard operating procedures for headquarters to directly oversee the integration of the DOD team with the Border Patrol Sector. Headquarters did not have procedures in place to critically evaluate the degree to which Sectors were in compliance with established procedures.

Managers and supervisors in Marfa Sector did not anticipate the degree to which DOD's unique perspective influences their reactions. Sector managers assumed that DOD LP/OP personnel would react to a law enforcement incident in the same way as Border Patrol agents would. Their assumption was colored by the own experience. Supervisory controls used by the Border Patrol to guide Sector operations are not the same as the command and control relationships that govern military operations. Patrol Border Patrol Sectors manage a large enforcement operation, the primary focus of which is enforcement of the immigration laws. Sector operations are built around a highly trained and sophisticated agent staff. The agents conduct their assigned law enforcement functions in the public eye, with at least a moderate degree of independence and individual initiative. In the Redford incident, Marfa Sector's assumptions regarding DOD's perspective did not take into account the supervision, training, experience, and sophistication of DOD personnel assigned to this mission. At Redford on May 20, 1997, the Border Patrol was not available when and where needed to provide the benefit of their experience and training to DOD personnel during a critically sensitive law enforcement incident. Absent Border Patrol guidance, DOD personnel relied on their own training and experience.

The Border Patrol personnel involved with the DOD teams during this deployment did not have a clear understanding among themselves or with DOD personnel regarding the Border Patrol's commitment to respond in a timely manner.

The Border Patrol personnel involved with the DOD teams did not have a clear understanding among themselves or with DOD personnel regarding when the DOD team would be moving from their hide site to their observation post.

Border Patrol supervisors failed to conduct a rehearsal of their response to a call from the DOD teams.

The lead Border Patrol manager for the Redford area was transferred after the mission was approved and before the DOD teams were deployed. The outgoing manager provided a cursory briefing regarding the mission and the incoming manager did not ask for a more detailed report.

Border Patrol's intelligence collection and dissemination system failed to capture and distribute information regarding a previous incident involving Hernandez firing shots while Border Patrol agents were in the area. The agents involved evaluated the importance of the incident in terms of its value to local agents already familiar with the area, and not in terms of its value to visiting DOD teams.

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Recommendations

The Border Patrol has already instituted a number of measures to ensure that the tragic events of May 20 1997 are not repeated. At the heart of the new measures is the principle that the Border Patrol will increase its control over operations conducted in its area of primary responsibility, the land border between the Ports-of-Entry. In the future, any armed military personnel working on the border on behalf of the Border Patrol will be under the Border Patrol's operational control.

The decision to expose armed, combat orientated personnel to an essentially domestic law enforcement environment will be reevaluated by the INS. No LP/OP operations involving military units will be authorized by the Border Patrol until a new set of parameters acceptable to both DOD and the INS are agreed to.

Reaction by DOD to unintended contact with civilians will be specifically addressed in written guidelines that will be incorporated into LP/OP rehearsals and training scenarios.

Headquarters Border Patrol's coordination mechanisms will be redesigned to include a headquarters evaluation of the compliance of the Sectors with LP/OP guidelines.

Sector management and supervisors will be fully briefed on the capabilities, limitations, and expectations of the DOD teams assigned to their area of operations.

Border Patrol interaction with DOD LP/OP teams will be increased during preparation for and conduct of LP/OP missions. Border Patrol response times will be clearly stated and rehearsed at the time of deployment. The movement and maneuver of armed DOD personnel will be under the Border Patrol's operational control.

Border Patrol pre-mission briefings for DOD LP/OP teams will include a description of the local traffic and community members that are known to frequent the area.

REDFORD SHOOTING

OIA OVERVIEW

May 20, 1997

On May 20, 1997, Mr. Esequiel Hernandez, Jr. died near Redford, Texas, after being shot by Corporal Clemente M. Banuelos, U.S. Marine Corps (USMC), during a mission in support of the U.S. Border Patrol (USBP). The following are issues that involve the USBP with their planning and execution of this Listening Post/Observation Post (LP/OP) at a location known as "Hole 3" along the Rio Grande River that is located south of Redford, Texas.

ISSUES INVOLVING THE U.S. BORDER PATROL

Response Time

Intelligence Briefings

Interagency Coordination

Radio Communication Issues

Lack of First Aid administered

1. During the site visit [2/97] Captain (Capt.) Lance McDaniel (USMC LP/OP Commander) met with Patrol Agent in Charge (PAIC) David McCuthen at the USBP Station in Presidio, Texas. Capt. McDaniel stated that during a discussion with PAIC McCuthen they agreed upon a 15 minute required response time to each LP/OP site.
2. PAIC McCuthen and BPA Krammer did a site survey with McDaniel and approved the LP/OP sites and again agreed upon the 15 minute response time during operational hours of darkness between sunset and sunrise. McDaniel understood from his earlier dealings with McCuthen that he would position agents on either end of the "holes." (There were four LP/OP posts, ["holes"], utilized for this mission.) When interviewed, McCuthen stated that he agreed to position the agents on both ends of the "holes." McCuthen was transferred on April 11, 1997, shortly after this initial walk-through to the Uvalde USBP station. McCuthen does not recall briefing his temporary replacement, Mario Vargas, about the placement of the agents nor does he recall attending any other briefings.

3. Mario Vargas stated that he understood that the USBP was to provide a 15 minute response to the "holes" only during the hours of darkness between sunset and sunrise. However, McCuthen did not brief Vargas concerning the positioning of agents at either end of the "holes." Vargas stated that his understanding was that the Marines normally would not move during daylight hours. Vargas did not do a final walk-through with the Marines. He told Assistant Chief Patrol Agent (ACPA) Rudy Rodriguez, Marfa Sector, that the mission was ready to proceed. ACPA Rodriguez approved this mission based on Vargas' statement. Based on Rodriguez's approval, "Operation Alliance" in El Paso, signed the paperwork to allow this mission to continue.

4. The Joint Task Force Six (JTF-6) coordinated this mission with the USBP "Operation Alliance" in El Paso, Texas. The JTF-6 confirmed the 15 minute response time and did a preliminary walk-through with Vargas. They asked that Vargas do a drill of the response time. Vargas stated that the response time in case of an emergency would be with lights and sirens and that he did not think a drill was necessary. At a subsequent interview, McCuthen also stated a drill was not necessary. McCuthen stated that he had handled previous missions and was confident in the time that it would take to get to the "holes" once the agents were in place along either end of Rt. 170.

5. Major Hester of JTF-6 stated that they agreed upon the 15 minute response time at briefings with Operation Alliance. It was the understanding of JTF-6 and McDaniel that the response agreement was to be 24 hours a day with no exceptions. Associate Chief Patrol Agent Larry Caver, Operation Alliance, stated that he attended this briefing and remembers discussing the response issue. Caver stated that JTF-6 told him that the USMC would not leave their "hide site" during the daylight hours. Based on this discussion, he felt that the USMC understood that the USBP response units would arrive close to the "holes" only after darkness, not 24 hours a day.

6. On April 24, 1997, the "Operations Order" (OPORD) was signed by McDaniel, JTF-6, and Caver. The OPORD provided, in part, "The teams will maintain a vigilant watch of their assigned sector throughout the hours of darkness . . . Teams may elect to move to a hide site during the day . . . The USBP will have agents close enough to our holes to respond in short order (15 minutes or less.)"

7. Chief Patrol Agent (CPA) Jerry Agan, Marfa Sector, stated that he was not involved in the planning phase of this mission. During this period, the "Republic of Texas" incident was in progress and all of his efforts were directed toward that situation. He stated that all of the previous missions went satisfactorily and he felt confident that McCuthen had handled the coordination of this mission.

8. McCuthen had not briefed Vargas concerning agent positioning, thus Vargas did not brief the agents assigned to the Presidio Station of the exact location of the "holes." This attributed to the increased response time of the agents on the night of the shooting. Vargas told the agents assigned to the area that the Marines would call them if they needed help.

9. There was no clear understanding with the USMC as to the expected emergency response time of the USBP.

10. The agents who responded to the call of an individual with a gun took approximately 38 minutes to arrive at the scene of the shooting incident. The agents returned to the Presidio Station to obtain rifles instead of directly responding to the scene.

11. The USBP did not properly brief the USMC about the conditions in the area. They told the USMC about recreational shooters, but not about Hernandez shooting at the USBP months prior.

12. Several days before the shooting incident, "hole 3" (Banuelos Team) called in a sighting to the USBP concerning a male on a horse near the border. The USBP told the Marines that this area was a "Class B crossing" and that this individual was OK. (A "Class B" crossing is an area that the U.S. Customs Service (USCS) previously designated as a legal crossing where U.S. citizens (USC) could cross back and forth over the border. The only requirement that a USC had to do was to notify the USCS that they were in Mexico. This type of crossing is no longer in effect; however, the USBP still refers to the area in Redford as a "Class B.") This individual was later identified as Hernandez and the USMC was concerned that "hole 3" was not properly briefed. The sharing of intelligence between the USBP, JTF-6, the USMC was inadequate. Numerous individuals ranking from the CPA down, assumed that this mission would run as smoothly as the previous missions in the Marfa Sector.

13. The Marines had their own command post and the USBP did not have a supervisor monitoring the radio communication between the USBP and the Marines.

14. The agents who responded to the shooting scene called for an ambulance after they detected a "very weak pulse." BPAs at the scene did not know that Hernandez had been shot. Their initial observation of Hernandez suggested that he may have broken his neck when he fell in the well.

SSA David M. Adams

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