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November 2, 2007

General James Mattis
Commanding General
One Marine Expeditionary Force
Box 555300
Camp Pendleton, CA 92055

Dear General Mattis:

I hope you will take into account the following information as you consider my recommendation for clemency in the case of Sgt. Lawrence Hutchins, USMC. I realize the difficulty of this decision.

As you may be aware, prior to my election to Congress in 1996, I served as the elected District Attorney in the metropolitan Boston area for nearly 22 years. While American jurisprudence focuses on individualized justice, there is also significant weight placed upon precedent and ensuring reasonable uniformity in sentencing for similar cases. Homicide committed in a combat zone – with all that that reality implies – is, in and of itself, a mitigating and extenuating circumstance. Given the on-the-ground realities of the war in Iraq and the totality of the circumstances, I equated the tragedy that occurred at Hamadaniyah to what would be the equivalent of manslaughter in the context of criminal jurisprudence. When murder charges were withdrawn against Sgt. Hutchins' co-defendants, I had hoped that a similar disposition would occur in his case. The decision to proceed with his case came as a surprise.

Accordingly, I directed my staff to provide whatever help we could for Sgt. Hutchins, his family, and his attorneys. I should note that I was particularly impressed with the dedicated work of the Marine Corps Judge Advocate. The professionalism of Lt. Col. Joseph Smith and Lt. Col. Brian Cosgrove reflected well on the U.S. Marine Corps. This support has also included legal research provided by Harvard Law School, substantial community-based support for Sgt. Hutchins, and a recognition of the special circumstances of a combat zone by former Marines and combat veterans from all over the country. (See clemency filing prepared by Lt. Col. Smith, and accompanying letters from Marine Corps League members and others.)

I also requested my counsel, John P. Kivlan – himself a former Marine, my former first assistant district attorney, and a former trial prosecutor of homicides and other major cases – to attend Sgt. Hutchins' Court Martial. Mr. Kivlan attended the Court Martial at Camp Pendleton, which began on July 24 and concluded with Sgt. Hutchins' conviction and sentencing on August 3. He heard and observed the testimony of all the witnesses, as well as the findings of the members of the Court

Martial. I will defer to Sgt. Hutchins' Counsel, Lt. Col. Smith, to highlight from the record of the Court Martial the matters that he believes warrant your consideration for clemency. We do, however, wish to make the following observations regarding what appeared to be unduly restrictive evidentiary rulings at the Court Martial – rulings which may, in fact, have prejudiced Sgt. Hutchins in his defense.

1) Evidentiary rulings barred the introduction of classified information concerning the Iraqi killed, as well as his possible involvement in or association with the insurgency and terrorist activity, including truck bombings.

2) Evidentiary rulings unduly restricted the examination of witnesses with respect to the NCIS investigators' conduct during interrogations of the defendants/witnesses. This includes promises, rewards and inducements made to those witnesses that may have consciously or unconsciously influenced their testimony. (See transcript of interview of co-defendant, Bacos exhibit.)

3) Evidentiary rulings unduly restricted the examination of witnesses and the introduction of evidence related to the conduct, communications, acts and omissions of the Company Commander, Platoon Commander, and others that may or may not have led to non-judicial punishment growing out of the same offenses for which Sgt. Hutchins was charged or convicted.

4) Inadequate instructions were provided to the Members of the Court Martial regarding the specific intent required for murder, as opposed to the lesser charge of manslaughter.

5) There is an absence of Sentencing Guidelines under the UCMJ, and instructions to the Members of the Court Martial were inadequate with respect to matters they could consider in extenuation or mitigation, or which would otherwise constitute grounds for clemency. These include the disparity between the disposition of the co-defendants' cases and the non-judicial punishment, if any, of the Company Commander, Platoon Commander, and others growing out of the same offenses for which Sgt. Hutchins was charged or convicted. (See UCMJ, Rule 101, Sentencing Subsection A, Matters in Mitigation; and Rule 1105, Matters Concerning Clemency to be Submitted to the Convening Authority.)

It is this final point regarding the disparity between dispositions that serves as my primary ground for recommending clemency.

The Federal Courts employ Sentencing Guidelines precisely to avoid creating a disparity in sentencing among criminal defendants facing similar charges. The UCMJ does not employ Sentencing Guidelines. For comparative purposes, however, the number of Marine Corps murder cases that have occurred in combat zones in recent history are finite in number, and the disposition of those cases – including sentences and clemency action – are well documented.

In Vietnam, there were 27 cases of Marines convicted in the murder of Vietnamese non-combatants. These cases took place between 1965 and 1971 (see copy of Appendix E from *Marines and Military Law in Vietnam: Trial by Fire*, written by former Marine officer Gary D. Solis.) A review of those cases shows that after completion of clemency action, only two of the court-martial sentences exceeded 10 years – 12 years in one case, 19 in another. Seventeen of the other sentences were reduced to **less than five years'** confinement, and charges were dismissed in two cases. The average time served by the 27 convicted murderers was **less than four years**. In the case of the 19-year sentence, one R.T. Taylor served a total of seven years and eight months in custody. (See chart on page 12 of Solis' 2000 *Iowa Law Journal* article, "Military Justice Civilian Clemency: The Sentences of Marine Corps War Crimes in Vietnam.")

As documented in Appendix F of *Trial by Fire*, many of these cases – unlike Sgt. Hutchins' case – involved multiple charges of premeditated murder, multiple charges of unpremeditated murder, and one case of multiple pre-meditated murder, rape and attempted rape. In the latter case, *U.S. v. Potter*, Potter was convicted of five pre-meditated murders, rape, and attempted rape, and received a life sentence that was reduced after clemency to 12 years – three years less than Sgt. Hutchins' sentence. According to Solis and the U.S. Navy and Marine Corps Clemency and Parole Board records, the 12 years and one month served by Potter represents the longest period of confinement for a war crime served during the Vietnam conflict. (It is also the longest since the Vietnam conflict, as laid out in the enclosed October 16 letter and documents from Marine Corps Legislative Liaison Lt. Col. James L. Cox, USMC.)

The last known prosecution resulting in a conviction of Marines for murder in a multiple-defendant case was in the case of *U.S. v. Schwartz* and *U.S. v. Green*, and the related cases of *U.S. v. Boyd*, *Herrod*, and *Kritchen*. The details of these cases are taken from Court Martial transcripts, official Marine Corps records, and statements of principal witnesses, and are recounted in *Son Thang, an American War Crime*, also by Solis. These cases involved the murders of 16 Vietnamese women and children at Son Thang, Vietnam in 1970, and are alternatively referred to by some as the Marine Corps My Lai¹ case.

In separate Court Martials, Herrod, the squad leader of the patrol responsible for the murders, was acquitted, as was Pfc. Boyd. Lance Corp. Kritchen was given immunity in return for his testimony against the others. Private Schwartz was convicted of premeditated murder of 12 of the 16 Vietnamese women and children, and sentenced to life in prison. Pfc. Green was convicted of the unpremeditated murder of 15 of the 16 Vietnamese women and children, and was sentenced to **five years** in prison.

Company Commander Lt. Ronald Ambort, who formed the squad and designated it a “killer team” briefed the group just before their departure on the patrol during which the murders occurred. Ambort – by his own account to the prosecutor at his Article 32 hearing – stated that “he told them to go out and get some, to pay the mf's back, to pay them back good. To shoot everything that moved. To shoot first and ask questions later and to give them no slack...If the killer team saw anyone moving along a trail, and if they saw anyone cutting across a rice paddy, that they were to shoot these people.” (See page 105 of *Son Thang*). Lt. Ambort's Article 32 hearing resulted only in a letter of reprimand for making a false official statement in the aftermath of the murders with respect to the patrol's activities and the recovery of an enemy rifle.

Faced with the disparities between the Court Martials of the five Marines in the patrol and the non-judicial punishment of the Company Commander, the Convening Authority, General Charles F. Widdecke, sought to restore equity in the cases. After review, Gen. Widdecke granted clemency in Schwartz's case by reducing his sentence from life to one year and Green's five-year sentence to one year. (See Chapter 8, “Appeal Denied Clemency Granted,” under the subtitle “Seeking Equity” on page 297 of *Son Thang* for a detailed account of Gen. Widdecke's decision to grant clemency.)

This account was taken from official Marine Corps records, as well as a first-hand account from Gen. Edward Simmons, Widdecke's assistant division commander, who wrote the forward to *Son*

¹ At Mylai, Army Lt. William Calley was convicted in the murders of 22 Vietnamese non-combatants. He received a life sentence. After Clemency Action, his sentence was reduced to 10 years. He served a total of four months and three weeks in the stockade, and was released on parole after serving 3.5 years under house arrest.

Thang. In the forward, Gen. Simmons notes that "sentencing guidelines were lacking" (page 53). It is now 2007, and under the UCMJ, sentencing guidelines are still lacking.

According to Simmons, Widdecke, himself a highly decorated combat veteran, was disturbed by the discrepancy in the outcomes of the Court Martials as he pondered what action to take. In Simmons' view, Widdecke's ultimate decision restored a degree of equity to the widely disparate sentences in the Son Thang cases.

On December 15, 1970, Widdecke sent a message to the Commandant explaining his action to grant clemency. He stated "that a careful study of the (Schwartz) record of trial... revealed certain mitigating factors," among them the lack of a proper patrol briefing, the harsh combat environment and the dissimilar sentence and findings in the companion cases. In granting clemency, Gen. Widdecke stated that "the sentence awarded by the court appeared disproportionate and accordingly has been reduced." As noted, Gen. Widdecke reduced both Schwartz's and Green's sentences to one year, while simultaneously upholding Schwartz's dishonorable discharge and remitting Green's dishonorable discharge to a non-punitive general discharge.²

Gen. Widdecke further explained his action in a December 15, 1970 memo to the Commandant, stating that "in the total context of Schwartz's own background, the real or imagined nature of the combat environment and the disposition of the cases of the other participants in the Patrol, the sentence by the Court appeared disproportionate and has been reduced" (see page 3 of Gen. Widdecke's memo.)

Apart from the greater magnitude of 12 convictions for premeditated murder and 15 convictions for unpremeditated murder, the parallels of these cases and the disparity they presented to the respective Convening Authorities are striking.

Like the Son Thang case, the Hamadaniyah (3/5) case also resulted in disparate outcomes. All seven co-defendants were described as "willing participants in the murder" by the prosecution. Nevertheless, the prosecution withdrew the murder charge against five co-defendants and the remaining two were acquitted of murder. Similar to the Son Thang case, Sgt. Hutchins' Platoon Commander received no punishment or non-judicial punishment for his supervision of Sgt. Hutchins and his patrol prior to and on the date resulting in the murder conviction³. (See Lt. Phan's testimony at Sgt. Hutchins' Court Martial.)

With respect to the Son Thang case, it should be noted that squad leader Herrod, who was acquitted, had been ordered as a result of a previous Court Martial to be reduced in rank from Lance Corporal to Private. Yet, as reported by Solis, he was made the de facto squad leader by virtue of his combat experience, or "bush rank." Coincidentally, during the Court Martial of Sgt. Hutchins' co-defendant, Cpl. Thomas, the prosecution reportedly argued that Cpl. Thomas had greater responsibility for the killing in light of his more extensive combat experience. Cpl. Thomas was on his third combat tour in Iraq, whereas Sgt. Hutchins was on his first.

While Sgt. Hutchins' rank and position as squad leader may be relevant in considering his disposition and sentence, it is important to acknowledge the willing participation of all of the co-

² This did not actually occur until after current U.S. Senator and former combat-decorated Marine Officer and Secretary of the Navy James Webb, while a Georgetown Law student, appeared on Green's behalf before the Board for Correction of Naval Records.

³ I have requested that Lt. Col. Cox provide me with formal documentation pertaining to the disposition of those charges and/or non-judicial punishment, if any.

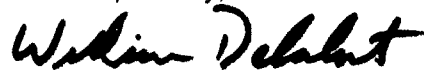
defendants as principals in the killing, as well as the disposition of their cases. Each and every one of them, by his own admission, participated in carrying out every aspect of the killing – and most, if not all, actually fired at the victim. In the words of Corpsman Bacos at Sgt. Hutchins' Court Martial, he was "excited and couldn't wait to step off" after discussing the plan with the squad. (As previously noted, the murder charge against Bacos was withdrawn, he served less than a year in the brig, and he is currently back on active duty in the Navy.)

Clearly the disposition and sentence in Sgt. Hutchins' case, like that in the Son Thang case, is grossly disproportionate to that of his co-defendants, all of whom had their murder charges withdrawn or were acquitted of murder and have now been released from custody after a maximum of 17 months. Four even received non-punitive discharges. Given that the Son Thang case is the last multiple-defendant Marine Corps case in a combat zone that resulted in similar convictions and sentences, it provides a compelling precedent for you, as Convening Authority, to correct the inequity in Sgt. Hutchins' case.

Absent formal guidelines, you are of course not required to follow the precedent set by Gen. Widdecke and restore equity to Sgt. Hutchins' disparate disposition and sentence. In light of Sgt. Hutchins' exemplary record as a Marine and his support from within the community, however, I am hopeful that you – an experienced and highly respected combat commander with a reputation for courage and fairness – will be guided by this precedent.

In the meantime, I look forward to discussing this case and the grounds for clemency with you at your convenience. I thank you for your service to our country.

Respectfully,



William D. Delahunt

Enclosures: Transcript of taped interview of Corpsman Bacos by NCIS
Marines and Military Law: Trial by Fire, by Gary D. Solis
Son Thang: An American War Crime, by Gary D. Solis
Iowa Law Journal article, "Military Justice Civilian Clemency: the Sentences of
Marine Corps War Crimes in Vietnam."
October 16, 2007 letter and documents from Lt. Col. James L. Cox, USMC.
December 15, 1970 memo of Convening Authority, General Charles F. Widdecke,
to the Commandant regarding Clemency Action in the Son Thang cases

Cc: Lt. Col. Joseph Smith, USMCR
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