

REVIEW OF THE STAFF JUDGE ADVOCATE		DATE 24 SEP 1982		
TO Commanding General HQ US Army Western Command Fort Shafter, HI 96858		FROM Staff Judge Advocate HQ US Army Western Command Fort Shafter, HI 96858		
1. THE RECORD OF TRIAL BY GENERAL COURT-MARTIAL of the following-named accused having been referred to me under the provisions of Article 61, Uniform Code of Military Justice, before action thereon by the convening authority, I submit herewith my review, with opinion and recommendation and reasons therefor, as required by paragraph 85g of the Manual for Courts-Martial, United States, 1969 (Revised edition).				
2. SYNOPSIS OF THE RECORD AND OF THE OPINION AND RECOMMENDATION:				
a. Personal Data:				
NAME (Last, First, Middle Initial)		SSAN		
SPENCER, THOMAS W.				
GRADE	ARMED FORCE	ORGANIZATION		
E-4	US Army	1st Bn, 19th Inf, 25th Inf Div, Schofield Barracks Hawaii 96857		
TRIED AT		DATE SENTENCE ADJUDGED		
Port Shafter		26 June 1982		
RESTRAINT	NO. OF DAYS	CURRENT SERVICE		
Arrest or Restriction	0	9 April 1981		
Confinement	35	PRIOR SERVICE		
Total Awaiting Trial	35	2 years 6 months 21 days		
DATE OF BIRTH	LENGTH OF CREDITABLE SERVICE			
2 December 1959	3 years 9 months 9 days			
INTELLIGENCE (AFQT or GT Score)	CHARACTER OF SERVICE			
106	Conduct N/A			
EDUCATION	EFFICIENCY N/A			
High school graduate	PREVIOUS CONVICTIONS			
MARITAL STATUS	None			
Single	PSYCHIATRIC REPORT			
NO. OF DEPENDENTS	N/A			
One				
PAY PER MONTH				
\$821.70				
CONTRIBUTION TO FAMILY OR QUARTERS ALLOWANCE				
None				
b. Sentence:				
	Discharge	Confinement	Forfeiture	Reduction
Maximum Sentence Based on Correct Findings	DD	Life	Total	E-1
Sentence Adjudged by Court	DD	Life	\$275/month	E-1
Pretrial Agreement (None)				
Recommendation of SJA	DD	Life	\$275/month	E-1
Place of Confinement or Temporary Custody	United States Disciplinary Barracks, Fort Leavenworth, Kansas			

DIVORCED →

IV-JA Form 78-105, 1 Nov 78

REPLACES SCH-JA Form 10

443294

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c. Summary

Charge	Article	Specification	Nature of Offense	Pleas	Findings	Correct
I	118	1	Murder with Pre-meditation, Derek Kusumoto, 5 February 1982	Not Guilty	Guilty*	Yes
		2	Murder Derek Kusumoto while attempting to commit a felony 5 February 1982	Not Guilty	Guilty**	Yes
II	125		Commit Sodomy upon Derek Kusumoto, 5 February 1982	Not Guilty	Guilty***	Yes
Additional Charge	134		Indecent Acts with a child, 5 February 1982	Not Guilty	Guilty****	

* Guilty, except the words, "with premeditation" and "and by other unknown means," substituting therefore the words, "with the intent to commit sodomy, commit an assault upon" and "or by other unknown means." Not guilty of a violation of Article 118, UCMJ, but guilty of a violation of Article 134, UCMJ.

** Guilty, except the words, "and by other unknown means," substituting therefore the words, "or by other unknown means."

*** Guilty, except the words, "commit sodomy," substituting therefore the words, "wrongfully attempt to commit sodomy." Not guilty of a violation of Article 125, UCMJ, but guilty of a violation of Article 80, UCMJ.

**** Guilty, except the words, "biting the body of the child" and "and by other unknown means," substituting therefore the words, "or by other unknown means."

3. SUMMARY OF THE EVIDENCE: The accused was found guilty of Specification 1 of Charge I by exceptions and substitutions, however, not guilty of Charge I, but guilty of a violation of Article 134, Uniform Code of Military Justice; Specification 2 of Charge I and Charge I by exceptions and substitutions; the Specification of Charge II by exceptions and substitutions, however not guilty of Charge II, but guilty of a violation of Article 80, Uniform Code of Military Justice; and, the Specification of the Additional Charge and the Additional Charge by exceptions and substitutions.

a. For the Prosecution:

(1) The accused pled Not Guilty to all Charges and Specifications (R 24B).

(2) Lieutenant Colonel Howard H. Kusumoto, US Army, 2d General Hospital, Landstuhl, Germany, was sworn and testified that he had been assigned to the United States Army Health Clinic, Schofield Barracks, Hawaii and lived with his family in quarters on Schofield Barracks from August 1981 until March 1982. He had two adopted twin sons, Derek and Dominic. Derek Kusumoto was 14 years old, having been born on 16 September 1967. Derek Kusumoto

bite mark saliva tests indicated O-Type blood

suffered from bronchial asthma and was medicated through pills and an inhaler. When he suffered an asthma attack, it was manifested by short quick breaths and, if it was severe, headaches and unconsciousness. Derek Kusumoto relieved the attacks by sitting down, hunching his shoulders upwards, and taking short, quick breaths. If the attack resulted from smoking, it would pass, if it was due to an allergic reaction it would not pass. Derek Kusumoto did not like his condition because he felt that it limited his activities and often resulted in having to have injections. On 5 February 1982, Derek Kusumoto was happy because he had attained the honor roll. Derek and Dominic Kusumoto departed the quarters to go bowling at 1800 hours to 1830 hours. They were to return home by 2130 hours, and in no event later than 2200 hours. Prior to his departure, LTC Kusumoto was not aware of any abrasions, bruises, or contusions on Derek Kusumoto's body or whether he had been in any fights. It was later discovered that he had departed his home without his inhaler. Dominic Kusumoto returned to the quarters alone at 2130 hours. LTC Kusumoto became concerned and departed the quarters at 2200 hours in order to look for Derek Kusumoto. The military police were notified at 2300 hours. LTC Kusumoto went to the military police at 0200 hours and again notified them that his son was still missing. At 2250 hours, 6 February 1982, the Health Clinic commander requested that LTC Kusumoto go to Tripler Army Medical Center and identify the body of a young, male child. At 2230 hours, 6 February 1982, LTC Kusumoto identified the body as that of Derek Kusumoto. Derek Kusumoto knew his way to the post exchange, his quarters, and the bowling alley. He was trusting and had several friends who were soldiers (R 378-389).

NOTE:
The CID did not check additional fingerprints other than the initial six suspects

(3) Master Dominic Kusumoto, civilian, was sworn and testified that he was Derek Kusumoto's brother and that they had a close relationship. Derek Kusumoto was "pretty adventurous" and friendly. He had one friend, Curt Lockhart, who was a soldier and did not have any enemies. Derek Kusumoto was allergic to many things and did not like his asthma condition. He was medicated with an inhaler and some other medication. When he suffered an attack, he would sit down, hunch his shoulders and open his mouth. Derek Kusumoto went to the bowling alley frequently but did not know Schofield Barracks very well. Derek and Dominic Kusumoto departed their quarters at 1800 hours, 5 February 1982, and walked to the bowling alley. They arrived at 1810 hours. They met George Campos, Curt Lockhart, Michelle Bolts and Kim Lane at 1845 hours to 1900 hours. They went outside frequently but Dominic Kusumoto was not sure whether Derek Kusumoto was having breathing problems. Prior to 2030 hours, George Campos, Michelle Bolts, Kim Lane, Dominic Kusumoto and Derek Kusumoto went outside of the bowling alley. Derek Kusumoto and Kim Lane smoked what Derek Kusumoto said was marijuana. Between 1930 hours and 2000 hours, Derek Kusumoto experienced breathing problems and was told to go outside and get some fresh air by Dominic Kusumoto. At 2030 hours, Derek Kusumoto told Dominic Kusumoto to meet him at the front doorsteps of their quarters so that their parents would not know that they had been separated. Derek Kusumoto departed the bowling alley. There were three doors at the bowling alley, the front entrance; a door which led toward a parking lot; and, a door which led toward the Enlisted Men's Club. Dominic Kusumoto did not know which door Derek Kusumoto used and did not see him alive subsequent to that time. To the best of Dominic Kusumoto's recollection, Derek Kusumoto had not been in any fights nor did he have any cuts, bruises, or scratches on his body (R 390-407).

(4) Master Stephen L. Savage, civilian, was sworn and testified that he was not enrolled in school and was not working. He had lived at Schofield Barracks, Hawaii for two and one-half years. He knew Derek Kusumoto through a class at school and was

not aware whether Derek Kusumoto had any enemies. At 1800 hours, on 5 February 1982, as Stephen Savage approached the bowling alley, he observed Derek Kusumoto, Dominic Kusumoto and Michelle outside smoking a cigarette. He saw Derek Kusumoto enter the bowling alley shortly thereafter. He talked with him about a history test. At approximately 2215 hours, he saw Derek Kusumoto enter the bowling alley through the front door, go to the water fountain and exit through the side door which led toward the Enlisted Men's Club. Stephen Savage exited the same door at 2300 hours and looked toward the Enlisted Men's Club but did not see anyone. Finally, Stephen Savage had told SA Glader that he saw Derek Kusumoto enter the bowling alley between 2230 hours and 2300 hours, but had been wrong (R 419-426).

(5) Special Agent George R. Steinbarger, Hawaii District, 6th Region, United States Army Criminal Investigation Command, Schofield Barracks, Hawaii, was sworn and testified that he had been a CID agent for approximately four and one-half years. He was the case agent of the investigation into the death of Derek Kusumoto and, as such, was responsible for coordinating investigative efforts, conducting the investigation, collecting evidence and keeping commanders informed. The investigation began on 5 February 1982 and had not been completed. Initially, eight to ten case agents were involved in the investigation, including SA Glader, SA Ley, SA Merker, SA Swindell, SA Brewster, and SA Norman. Eighty to ninety people were interviewed during the first week of the investigation. On 6 February 1982, SA Steinbarger was the duty agent at 1710 hours and received notification from the Military Police desk sergeant that a body had been found at the bottom of a bunker at the end of Matthews Street. SA Steinbarger told the desk sergeant to have the body checked for signs of life and to get medical personnel to the scene. SA Steinbarger arrived at the scene at 1721 hours, along with SA Glader and SA Ley. The weather was overcast and the ground was wet. Artificial illumination was not needed on the outside of the bunker. Upon his arrival at the scene, SA Steinbarger met with SP4 Lietz, the responding military policeman. Also present were Fleck, Cote, White, and the accused. SA Steinbarger spoke to CPT Mortyak, M.D., who told him that, at 1718 hours, the body had shown no signs of life and the body was cold and naked below the waist. SA Steinbarger, SA Ley, and SA Glader proceeded to the top of the small hill where the bunker was located and looked down into it. SA Steinbarger saw clothing three-quarters of the way down and two "white spots" at the bottom. At the time, the focus of the investigation was in the area of the two large trees and the bunker area. The entrance to the bunker was four feet wide, with a distance from front to back of ten feet. There were forty-four steps leading down into the bunker, which was approximately forty-feet deep. The steps were at a forty-five degree angle. Each step was approximately eight inches wide. SA Steinbarger proceeded into the bunker. At step number seventeen he observed a pair of blue jeans with a white stripe, approximately three inches by three-quarters of an inch deep. The white was revealed to be a pair of white underwear. It appeared as if somebody had taken off the pants, turned them inside out, while the underwear had remained inside the pants. On steps number thirty-three and thirty-four, SA Steinbarger found a blue denim jacket. The deceased's two knees rested upon step number forty-three, with the head pointed in a northward direction. The body of the deceased had on a black t-shirt with white writing upon it. There were a pair of socks rolled down to the ankles. The socks were dirty on the bottom. Approximately one foot from the head and adjacent to the wall, a pair of tennis shoes were found. There was a small hallway which led back into the bunker. On 6 February 1982, a walk-through of the area around the bunker was conducted. The grass around the trees measured between six inches and twenty-four inches in height. The grass underneath the trees was matted down and there was a bald spot between the trees. Within

Another witness
and fellow classmate,
Miss Kim Lane, had
also seen the victim
at or around 10:30 p.m.
BUT CID NEVER
followed that lead

Steinbarger also
provided a similar
description of "white
basketball socks rolled
down to the ankles."

SA Steinbarger intended to cross-train in polygraphy
(the Unspoken Blue Rule)

the bald spot, there was dirt pushed away as if somebody had used his feet to push the dirt or where a struggle had occurred. At approximately 1215 hours 8 February 1982, the dependent identification card of Derek Kusumoto was found near the trees. SA Swindell found a buck knife on the left side of the bald area, close to the trees. It was buried by some debris and leaves. It was approximately six to eight feet away from where the identification card had been found. Between 0930 hours and 1100 hours, 8 February 1982, an autopsy was conducted by Dr. Wong. SA Steinbarger was present during the autopsy. He observed a small blade of grass under the foreskin of the penis. The blade of grass was approximately one eighth to one quarter of an inch long and was green in color. At 0730 hours, 7 February 1982, SA Steinbarger spoke to SA Glader who told him that the accused had given him a statement the previous night containing a large number of details. SA Steinbarger told SA Glader that they needed to reinterview the accused. The accused had told SA Glader that no one had tampered with the evidence and that the only thing he had touched had been the wrist of the deceased to check for a pulse. At approximately 0900 hours to 0930 hours, 9 February 1982, the accused arrived at the CID office. SA Steinbarger confronted him with the various details that he had given to SA Glader. The accused had told SA Glader that the socks had been up and that the socks must have been in order for him to have seen the colors. When the socks had been rolled down to the ankles the colors had not been visible. The accused maintained that the socks had been up and he mentioned the colors, blue, red, and blue. He stated that he had had nothing to do with the body having been in the bunker and was willing to do anything to prove that fact. Prior to that time, SA Steinbarger had not been aware of the names of PFC Courtney nor PFC Hubbard. The accused was told to return to the CID office the following day so that some hair samples could be processed. On 6 or 7 February 1982, the accused voluntarily turned over his Kodak instamatic camera and boots to the CID. SA Steinbarger supervised the development of the film found within the camera. The film revealed that it contained photographs of the bunker, bunker area, air vents, and what appeared to be the inside of the bunker. Between 1330 hours or 1400 hours, 10 February 1982, the accused was transported to the emergency room by Investigator Denny Bernd where samples of head hairs and pubic hairs were taken from the accused. On 11 or 12 February 1982, head hairs and pubic hairs were taken from PFC Hubbard. At 2130 hours 11 February 1982, LTC Jackson authorized a search of PFC Hubbard's, PFC Courtney's and the accused's rooms for any evidence including evidence of dirt and debris. The accused's room was searched by SA Brewster and SA Norman. A laboratory examination request was prepared by SA Steinbarger. Hair samples from the accused, PFC Hubbard and PFC Courtney were submitted for comparison with any hairs which had been found in any of the items of clothing taken by the CID. The knife, which SA Swindell had believed to have a partial print on it, was submitted for examination. The laboratory report did not reveal the presence of any verifiable prints. A military policeman was left at the scene from 6 February 1982 until 10 February 1982, when a steel plate was placed over the bunker. The military policeman were instructed not to let anybody into the area and if anybody entered the area to fully identify them for a later interview (R 426-273).

(6) Prosecution Exhibit 3, an aerial photograph depicting Matthews Avenue and the bunker area exposed on 14 May 1982 was admitted into evidence without defense objection (R 430).

(7) Prosecution Exhibit 4, an establishing photograph of a view of the outside of the bunker was admitted into evidence without defense objection (R 433).

SA SWINDELL RECEIVED EARLY RETIREMENT IN MAY '82
SA GLADER RECEIVED P.C.S. TO GERMANY IN APRIL '82
SA LEY RECEIVED P.C.S. TO KOREA IN MAY '82

DEBATE OVER
SOCKS' DESCRIP.
WORD AGAINST WORD

SA DENNY BURNS
HANDLED E.O.
Complaint Invest.
of Hubbard from
Australia

(8) Prosecution Exhibit 5, an establishing photograph of the inside of the bunker taken from the top of the bunker and exposed with natural light, was admitted into evidence without defense objection (R 433).

PHOTO OF PRINTS →

(9) Prosecution Exhibit 6, a photograph depicting the body and its clothing and exposed with a flash, was admitted into evidence without defense objection (R 438).

NO KODAK

(10) Prosecution Exhibit 7, a photograph of the hallway depicting a pair of tennis shoes, concertina wire and a small stool was admitted into evidence without defense objection (R 440).

NEGATIVE FILM STRIP →
AT NORMAL SIZE

(11) Prosecution Exhibit 18, contacts made from the film taken from the accused's camera, was admitted into evidence without defense objection (R 458).

PARTIAL THUMPRIINT
ON KNIFE

(12) Prosecution Exhibit 8, a photograph of the grassy area and of the "bald" spot between the trees, was admitted into evidence without defense objection (R 446).

(13) Prosecution Exhibit 9, a photograph of the knife as it was found on the ground, was admitted into evidence without defense objection (R 448).

(14) Prosecution Exhibit 19, a partial map of F, E, D, C Quads, the bunker area, Matthews Avenue, Toyland, and the Enlisted Men's Club, was admitted into evidence without defense objection (R 460).

NO DNA TESTS
AVAILABLE IN '82

(15) Prosecution Exhibit 20, a blue denim jacket, was admitted into evidence without defense objection (R 461).

(16) Prosecution Exhibit 21, a pair of blue trousers and a pair of white underwear, was admitted into evidence without defense objection (R 462).

(17) Prosecution Exhibit 22, a tennis shoe, was admitted into evidence without defense objection (R 462).

(18) Prosecution Exhibit 23, a tennis shoe, was admitted into evidence without defense objection (R 462).

FOUND NEATLY FOLDED →
UNDER VICTIM'S STOMACH

(19) Prosecution Exhibit 24, a pair of brown glasses, was admitted into evidence without defense objection (R 462).

(20) Corporal Jeffrey Fleck, US Army, Company A, 1st Battalion, 14th Infantry, 25th Infantry Division, Schofield Barracks, Hawaii, was sworn and testified that he was the motor pool NCO and a mechanic. For the most part, he worked in a motor pool. There was a path that led past a bunker and to the motor pool. On 6 February 1982, he was performing duties at the motor pool. Shortly after 1700 hours, as he was entering the staff duty van, he heard someone yelling to call an ambulance and get the MPs. Neither he nor anyone else paid much attention to it until the yelling became closer and they could hear it more clearly. As they got out of the van, the accused ran down to them and said that somebody was hurt or that there was a body in the shaft. The accused looked pale and frightened. CPL Fleck ran up to the bunker, passing the accused. At the bunker, CPL Fleck ran down into the shaft. It was dark and he did not see the body until he had reached the fourth or fifth step from the bottom. The accused had a flashlight and he shined it upon the body. CPL Fleck noticed that there were socks on the body but did not know whether they were up or down. At no time did he see anybody roll the socks down to the ankles. At the bunker, the accused still appeared to be frightened. The accused touched the deceased's neck to check for a pulse. He was the only one who touched the body. The accused stated that he was "stoned-cold dead." After he had touched the body, the accused laughed occasionally but it was not a steady stream of hysterical laughter. When they got out of the bunker, the military

COACHED BY Cpt.
BEISACON - CHANGE
OF TESTIMONY

FLECK NEVER WENT
INTO THE BUNKER,
I NEVER CHECKED
FOR A NECK PULSE

AND FLECK WAS P.C. SED TO GERMANY OR STATESIDE

Spindle was first
inside the bunker,
NOT Fleck

police had arrived. CPL Fleck did not know how he reacted to stress. He thought the fact that the accused had a flashlight was strange and began to focus his attention on him. According to CPL Fleck, Prosecution Exhibit 4 was an accurate representation of how the inside of the bunker from the top looked to him on 6 February 1982. Finally, Prosecution Exhibit 7, was a picture of the body as it appeared when the light was first shined upon it (R 475-486).

(21) Special Agent Clyde N. Swindell, US Army, Hawaii District Office, 8th Region, United States Army Criminal Investigation Command, Schofield Barracks, Hawaii, was sworn and testified that he went to the scene on 8 February 1982 and found it surrounded by white engineer tape. He did not recall having seen any military policeman in the area but did see two agents in area. Between 1210 hours and 1215 hours, 8 February 1982, he was showing SA Puma around the crime scene. In particular, he was showing him the area around the two large trees which was approximately 150 feet east of Building 2031. Approximately twelve to eighteen inches to the east of the base of the tree, while poking around with a stick, he pushed some leaves back and saw what appeared to be a buck knife pushed down into the ground. The knife was in an open position and its blade was shiny. Prior to picking the knife up, it was photographed. There was a small amount of a rust-like stain on the top surface of the blade. It did not appear as if it had been there very long, however, he was not a metallurgist and no tests were done to determine the length of time that it had been there. He picked up the knife, placed it into a bag, and labeled it with the date, time, and his initials. The knife was handled in a manner so as to preserve any discernible finger prints. The knife had initials on the front portion of the metal handle and a nine digit number on the rear position of the metal handle. Those engravings were discovered the next day and upon closer examination. It was found that the number belonged to a SP5 Thompson stationed at Schofield Barracks, Hawaii (R 486-494).

(22) Prosecution Exhibit 25, a knife found by SA Swindell was admitted into evidence without defense objection (R 489).

(23) Dr. Richard Y.K. Wong, M.D., Office of the Medical Examiner for the City and County of Honolulu, was sworn and testified that he was graduated from the Northwestern University Medical School in 1948, performed one year as an intern and two years of residency in surgery and pathology at Wesley Memorial Hospital. He spent two years in the United States Army Medical Corps and one year in surgery and pathology at Queen's Hospital, Honolulu, Hawaii. He became a Deputy Medical Examiner in 1961, had been the Chief Medical Examiner for ten years and then became a Deputy Medical Examiner. The medical examiners conducted autopsies in cases of death resulting from violence or suspected violence, death in institutions, and deaths unattended by physicians. He testified in one to three court cases per month since 1961. The procedures for an autopsy were to become acquainted with the report pertaining to the death; identify the body; perform an external examination of the body, open the chest and examine the internal organs; and, remove a portion of the skull and examine the brain. He conducted an autopsy of Derek Kusumoto on 8 February 1982, in the presence of CID agents. There were numerous abrasions and contusions on the head, neck, chest, abdomen, right and left upper extremities, posterior portion of the chest, and, the right and left knees. Dirt and mud covered the surface of the body. Abrasions were superficial scrapings of the skin and contusions were bruises. They resulted from a force applied to the body or the body striking a firm object. Dr. Wong observed numerous injuries including: contusions and abrasions on the external surface of the lips, chin and shoulders; a contusion with slight swelling surrounding the upper and lower left eyelid; a contusion

EARLY RETIREMENT
IN MAY '82

Recently passed
away in 2005

PROGRAMS FROM "AMER. JUSTICE" STATE MOST VICTIMS WOULD HAVE
SELF-CHEW MARKS IF ANY OBSTRUCTION OF BREATHING OCCURRED.