

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

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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)