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28 SEP 2010

## MEMORANDUM

From:   
J.R. Hamilton, CDR  
Investigating Officer

Reply to: CDR Hamilton  
Attn of: (206) 217-6270

To: J. R. Castillo, RADM  
District Eleven

Subj: REPORT OF ARTICLE 32 INVESTIGATION: U.S. V. BM3 RAMOS, USCG

Ref: (a) RCM 405, Manual for Courts Martial, 2008 Edition

1. As directed by Enclosure (1), I conducted an Article 32 investigation at the District Eleven courtroom from 07-10 September 2010 into the charges (Enclosure (2)) preferred against BM3 Paul A. Ramos, USCG. This report is submitted in accordance with the requirements of reference (a).

2. LCDR Andrew Myers, USN, and CDR Brian Koshulsky, USCG, represented the accused during the investigation. They are both qualified in accordance with RCM 405(d)(2) and RCM 502(d).

3. LCDR Myers submitted the following objections in writing (Enclosure 3):

a. **Unsworn Statements:** BM3 Ramos objects to my consideration of any unsworn statements including any summaries contained in reports of investigation. BM3 Ramos also objected to my consideration of the CGIS investigation in its entirety – IO Exhibit 12. I did not consider any of the unsworn statements or IO Exhibit 12 in making recommendations regarding BM3 Ramos.

b. **Situs:** BM2 Howell, BM3 Ramos and BM3 Rasmussen all objected to the hearing being held in Alameda instead of San Diego. The thrust of the argument is that witnesses were unavailable due to the hearing being over 100 miles from the situs of the mishap and the inability for the IO to conduct a site visit. Further, BM3 Ramos avers there was no showing of an impact on the operations of Station San Diego. You denied the defense request for relocation on 02 September. Considering the breadth of material presented at the hearing, including the CGIS investigation and AIM Enclosures as well as the appearance of several witnesses with both in person and telephonic testimony over a four day hearing; it is my opinion that I was able to complete a thorough investigation. IO exhibit 4 and the verbatim transcript contain correspondence regarding this objection.

**c. Joint Article 32:** BM2 Howell, BM3 Ramos and BM3 Rasmussen all objected to a joint Article 32 investigation. The objection mainly stems from the fact that their clients had competing interests at the Article 32. You denied the defense request for severance on 02 September. IO exhibit 4 and the verbatim transcript contain correspondence regarding this objection.

**d. Presence of Non-Testifying Victim Witnesses:** BM2 Howell, BM3 Ramos and BM3 Rasmussen all objected to the presence of non-testifying victim witnesses at the Article 32 hearing. I noted their objection but recommended to you that the victims be allowed to attend the hearing. The basis for that recommendation was 18 USC 3771(a)(3), MRE 615 and RCM 405(h)(3), which clearly delineate that a crime victim should not be excluded from a proceeding unless there is clear and convincing evidence that the testimony by the victim will be materially altered by hearing testimony at the proceeding. Defense did not proffer facts that established clear and convincing evidence that the victim witness testimony would be materially altered. Accordingly, Mrs. DeWeese, Mr. and Mrs. Mills and Mr. Stanard were allowed to attend. Per the request of counsel for BM3 Ramos, they were each individually invited to testify. All five victim witnesses declined their invitations to testify. IO exhibit 2 and the verbatim transcript contain correspondence regarding this objection.

**e. Presence of Mr. DeWeese for the testimony of MK3 Koelmel after Mr. DeWeese testified:** BM2 Howell, BM3 Ramos and BM3 Rasmussen all objected to Mr. DeWeese being allowed to observe the testimony of MK3 Koelmel after Mr. DeWeese testified at the Article 32 hearing. I noted their objection. 18 USC 3771(a)(3), MRE 615 and RCM 405(h)(3) clearly delineate that a crime victim should not be excluded from a proceeding unless there is clear and convincing evidence that the testimony by the victim will be materially altered by hearing testimony at the proceeding. Mr. DeWeese was allowed to observe the proceeding because defense was unable to proffer clear and convincing evidence that Mr. DeWeese's victim witness testimony would be materially altered. Mr. DeWeese was present solely for the testimony of MK3 Koelmel. See verbatim transcript.

**f. Release of unwarned statements:** BM2 Howell, BM3 Ramos and BM3 Rasmussen all sought the release of unwarned statements made by the crew members of CG33118 immediately following the accident. LT Schultz testified that per direction of CDR Pearce, a Coast Guard aviator and Sector San Diego Response Chief, he directed the boat crew to make statements. LT Schultz sequestered all five crewmembers in separate rooms, directed them to make statements, and did not provide them with Article 31(b) warnings. LT Schultz wasn't exactly sure what he told the crew members but he believes he told them that the statements were for a safety investigation. LT Schultz's testimony was unclear as to whether and to what extent promises of confidentiality were made. A Mishap Board has not been convened.

After the statements were made, LT Schultz briefly reviewed the statements, placed them in a blue folder and then handed the folder to CDR Knolte, a PHS flight surgeon. When I requested copies of the statements Government Counsel asserted the safety privilege under MRE 506 on behalf of the Coast Guard.

Due to the assertion of the safety privilege under MRE 506 I determined that the statements were not reasonably available at the time of the Article 32 hearing. I based that determination partially on the fact that an Article 32 Officer does not have the authority to conduct an in camera review and issue a protective order. IO exhibit 5.

However, it should be noted that **when a military judge conducts the legal balancing test between the asserted safety privilege and RCM 701 these statements will have to be made available to each of the accused.** Specifically, R.C.M. 701(a)(2)(A) requires disclosure to an accused of any statement he/she may have made. Further, *Brady v. Maryland*, 373 U.S. 83 (1963) requires disclosure to an accused of any statement he may have made. Accordingly, at a minimum, the Government will have to provide each accused with their statements. Further, if there is exculpatory evidence in the statements made by the other crew members the Government will have to produce those statements as well.

It should also be noted that I have serious concerns with the assertion of the safety privilege in this case. The Coast Guard Safety and Environmental Health Manual requires that safety investigations be separate and distinct from other legal investigations such as AIM and claims investigations. There are also specific procedures that should be followed. In this case no safety investigation has been completed. Further, it appears the Coast Guard did not follow the procedures outlined in the Safety and Environmental Health Manual. See IO Exhibit 5.

**g. Release of the deliberative portions of the AIM:** BM2 Howell, BM3 Ramos and BM3 Rasmussen all sought the release of the findings of fact, opinions, and recommendations of the AIM. I initially found that the AIM was not releasable because the final action has not been approved. Coast Guard policy as defined in Chapter 6 of the Coast Guard Administrative Investigations Manual is that all findings of fact, opinions and recommendations in an IR are deliberative process and thus exempt from discovery. Government Counsel followed this policy by withholding the draft findings of fact, opinions and recommendations and by providing all exhibits underlying the AIM investigation. IO exhibit 15.

After listening to the testimony of CDR Roche and additional objections from Defense Counsel, I requested the release of the AIM investigation with a protective order prohibiting its public release. IO exhibit 18. Acting District Eleven Commander, Captain Metruck, subsequently requested CG-0944's input on release of the AIM investigation under a protective order. IO exhibit 26.

**h. Decision to close the Article 32:** BM2 Howell, BM3 Ramos and BM3 Rasmussen all sought to keep the Article 32 open due to the outstanding request for the AIM. See the verbatim transcript. I elected to close the hearing because I feel I have received appropriate testimony and evidence to make an informed recommendation to you regarding the charges at hand. If the AIM is released and provides amplifying information that would be helpful to further inform my recommendations, you can re-open the Article 32 and direct me to consider the AIM recommendations.

4. A verbatim transcript of the sworn testimony of each witness is appended to this report. Mr. David Endert, S/A Barahura, Mr. Alan DeWeese, MK3 Jarett Koelmel, and CDR Brian Roche testified through personal appearance.

a. Defense Counsel for Petty Officer Ramos requested the personal appearance of several witnesses. I conducted RCM 405 balancing tests to make reasonable availability determinations for each witness. I determined that Mr. David Endert, Ms. Kacie Endert, S/A Linn Foust and Mr. Thomas Beckman were reasonably available and should be invited to attend in person. I further determined that Officer Lanham, Corporal Marshall, Officer Rodriguez, OS1 Brian Ramirez and one of three potential witnesses (either Mr. Mark Eddo, Mr. Eric Solzenberg or ET3 William Glenn) were not reasonably available but should be made available for telephonic testimony. I also found that Corporal J. Spearal, Corporal Sweeney, Officer Robershaw, S/A VanArsdale, S/A Stanton, Mr. Padial, Mr. Bogart, Mr. Chipperfield and Mr. Hallameyer were not reasonably available. A more thorough witness availability determination is included as Exhibit 3.

b. Counsel for Petty Officer Ramos chose not to call any of the aforementioned witnesses at the Article 32 hearing.

c. Defense Counsel for Petty Officer Howell requested the personal appearance of two witnesses, BM1 Pat Avelino and S/A Bruce VanArsdale. I conducted RCM 405 balancing tests to make reasonable availability determinations for each witness. I determined that BM1 Avelino was not reasonably available but should be made available for telephonic testimony. I also found that S/A VanArsdale was not reasonably available. A more thorough witness availability determination is included as Exhibit 3.

d. Counsel for Petty Officer Howell chose not to call BM1 Avelino at the Article 32 hearing.

e. Counsel for BM3 Rasmussen requested the personal appearance of MK3 Koelmel, LT Schultz, BMC Grimmatt, Mr. Huff, BM2 McHenry, CDR Roche, Mr. Alan Deweese, Mr. Brandon Crespo, BM3 Ramos, BM2 Howell, MK3 Teague, BM1 Martin, BM1 Toledo, BM1 Alexander, BM2 Damanis and BM2 Helt. I conducted RCM 405 balancing tests to make reasonable availability determinations for each witness. I determined that LT Schultz and BMC Grimmatt were reasonably available and should be invited to attend in person. I further determined that Mr. Hunt, Mr. Crespo and one of five potential witnesses (either BM1 Martin, BM1 Toledo, BM1 Alexander, BM2 Damanis, or BM2 Helt) were not reasonably available but should be made available for telephonic testimony. I also found that S/A VanArsdale and BM2 McHenry, were not reasonably available. Further, the co-accused in this case, BM3 Ramos and BM2 Howell, were present and available to testify or make rights elections if asked to testify. Another co-accused, MK3 Teague, elected to exercise his right to remain silent. A more thorough witness availability determination is included as Exhibit 3.

f. Counsel for BM3 Rasmussen called LT Schultz who appeared in person and BM2 Helt who provided telephonic testimony.

5. Lists of the witness statements and the exhibits received during the investigation are attached as Enclosures (5) and (6) respectively.

6. The following information is provided regarding the truth of the matters set forth in the charges and the recommended form of the charges:

a. Charge I: Violation of Art. 92, UCMJ- two specifications of dereliction of duty:

1) As charged, the elements of specification 1 are:

a) That BM3 Ramos had a duty as a coxswain to complete a risk assessment or designate lookouts prior to getting the CG33118 underway;

BM3 Ramos was the coxswain of CG33118 the evening of 20 December 2009 (testimony of MK3 Koelmel, CDR Roche). Paragraph 4.b. of the Station San Diego Navigation Standards, STASDINST 3503.3D, dated 6 June 2008 and in effect on 20 December 2009, required coxswains to conduct a mission brief prior to getting underway. That mission brief "shall" include a risk assessment and appointment of a lookout (See Enclosure 88 to IO Exhibit 7). Further, the Boat Crew and Seamanship Manual clearly delineates that a coxswain must position lookouts so they can effectively and safely perform their duties under the operating conditions (See IO Exhibit 24).

b) That BM3 Ramos actually knew of the assigned duties;

BM3 Ramos's signature is included on signature pages to the Station San Diego Navigation Standards and Standard Operating Procedures (See Enclosures 85 and 88 to IO Exhibit 7). His signature acknowledges that he read those instructions and thus he was aware or should have been aware of his assigned duties.

There is evidence that thorough pre-briefs which included the designation of lookouts and GAR risk assessments did not occur on a routine basis at Station San Diego prior to the mishap. CDR Roche personally observed that the three different CG Station San Diego small boat crews he sailed with after the accident, when they would be on their best behavior, had difficulty completing the GARs and did not designate lookouts. From these observations CDR Roche concluded that it wasn't standard practice for CG Station San Diego coxswains to properly complete a GAR model prior to getting underway. BM2 James Helt also testified that while he conducted pre-briefs that included the assignment of lookouts and GAR models, it was not the standard practice for Station San Diego coxswain's to conduct thorough pre-briefs. MK3 Koelmel testified that pre-briefs were normally conducted, but they were not as thorough or consistent as on his previous afloat unit. The lack of routine pre-briefs IAW the SOP is evidence in mitigation. However, it does not negate BM3 Ramos' knowledge of his duty as evidenced by his signature in the SOP.

c) That on or about 20 December 2009, at or near USCG Station San Diego, BM3 Ramos negligently failed to perform his duty.

MK3 Koelmel testified that no risk assessment or designation of lookouts occurred prior to CG33118 getting underway. No GAR score was recorded or reported to Sector San Diego.

Furthermore, the acting CO, LT Schultz, testified that he was not notified that the GAR was in the amber as is required by 6-A-12 of the Station San Diego Standard Operating Procedures (See Enclosures 85 to IO Exhibit 7). Considering the environmental factors that evening – a crowded harbor with confused lighting – if conducted, the GAR score would have been in the amber.

There was a period of time prior to getting underway that MK3 Koelmel was separated from the other crew members. However, there is no evidence that a pre-brief or GAR was conducted during that time period. Further, MK3 Koelmel stated that on other occasions he was included in the pre-briefs.

Recommendation: It is my opinion that reasonable grounds exist to believe the accused committed this offense. This opinion is based largely on the testimony of MK3 Koelmel.

Form of the Specification: Is legally sufficient.

2) As charged, the elements of specification 2 are:

a) That BM3 Ramos had a duty as a coxswain to maintain a safe speed;

All Coast Guard coxswains are required to pass the Rules of the Road exam as part of their qualification process. The Rules of the Road exam includes numerous questions derived from the International Rules of the Road (COLREGS) and Inland Rules of the Road. The Station San Diego Navigation Standards, STASDINST 3530.3D, dated 6 June 2008 and in effect on 20 December 2009, incorporate the Inland Rules of the Road by reference, stating its applicability to all coxswains. See Enclosure 88 to IO Exhibit 7. The Station San Diego Navigation Standards also clearly state:

“reduced visibility, either from night or weather conditions, usually dictates the need for reduced speed, even when responding to a potential life threatening case. Indeed, rule 6 clearly outlines the coxswain’s responsibility to proceed at a safe speed at all times. Special consideration must be given to the fact that back ground lights on shore will make the identification of vessel traffic more difficult...”

The Inland Rules of the Road apply in San Diego Harbor. Inland Navigation Rule 6 states: “Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions.”

BM3 Ramos was a qualified Coast Guard Station San Diego coxswain who had passed the Rules of the Road exam. See Enclosure 12 to IO Exhibit 7.

b) That BM3 Ramos actually knew or reasonably should have known of this duty;

BM3 Ramos signed the signature page of the Station San Diego Navigation Standards, indicating that he had reviewed them (See Enclosure 88 to IO Exhibit 7). BM3 Ramos had also previously passed the Rules of the Road exam and passed a board and check ride to become qualified and certified as a coxswain (See Enclosure 12 to IO Exhibit 7).

c) That on or about 20 December 2009 at or near San Diego Bay, California, BM3 Ramos negligently failed to maintain a safe speed.

Rule 6 of the Inland Navigation Rules is clear – a vessel must travel at a speed that allows her to take proper and effective action to avoid collision and to be stopped within a distance appropriate to the prevailing circumstances and conditions. As both houses of Congress concluded in enacting the Inland Navigational Rules Act of 1980, under Rule 6 “the prudent mariner must use his best judgment in determining what constitutes safe speed for his vessel in order that proper effective action can be taken to avoid collision.” See S. Rep No 96-979 (1980), at 7-8, reprinted in 1980 U.S. Code Cong. & Admin. News 7068, 7075.

Rule 6 includes a non-exclusive list of factors to be taken into account in determining safe speed. Factors delineated that are most relevant to this collision include traffic density and the presence of background light at night such as from shore lights or in this case scatter from the multiple lighting configurations from vessels participating in the parade of lights. Safe speed must be constantly reassessed as circumstance change.

S/A Barahura and CDR Roche testified that numerous eye witnesses estimated that CG33118 was traveling at a high rate of speed when it collided with CF 2607 PZ. Specifically, Mr. Endert estimated the speed of CG33118 as 25-30 kts and testified that he said “he’s going to kill someone tonight” when he saw how CG33118 was operating that night. CDR Roche and S/A Barahura conducted numerous interviews and based on those interviews estimated the speed of 33118 at 25-30 kts. MK3 Koelmel, a crewmember onboard CG33118, estimated the speed prior to collision at 25 knots. Mr. DeWeese estimated the speed of the CG33118 as approximately 30 knots just before it struck his vessel. The Swanson video, at marker 08:00, shows CG33118 operating at a very high rate of speed (See Enclosure 143 to IO Exhibit 7). The narrator of the video describes CG33118 as “super fast.” Subsequent to the crash, Mr. Swanson can be heard stating “Why the hell was he going 20 knots” or words to that effect.

According to the testimony of CDR Roche, MK3 Koelmel, S/A Barahura, Mr. Deweese and Mr. Endert there were hundreds of vessels on the water for the parade of lights (POL). There are numerous other accounts and pictures of the crowded San Diego Harbor. (See IO Exhibit 7 and 16). San Diego Harbor was a congested waterway and the visibility was further confused and diminished due to the unusual lighting configurations of vessels participating in the POL and the background lighting of the harbor. There was minimal moonlight and the accident occurred after dark.

According to S/A Barhura, CDR Roche, Mr. Endert, and Mr. Deweese: CF 2607 PZ was transiting in a northerly direction at clutch speed. Mr. Endert and Mr. Deweese both testified that CG 2607 PZ’s navigation lights were on, specifically the stern light was on. Forensic evidence also verified that the stern light was on. (See Enclosure 148 to IO Exhibit 7). CG33118 transiting at a high rate of speed was overtaking CF 2607 PZ when it collided with the pleasure crafts stern at a high rate of speed. Mr. Dewesse, Mr. Endert and MK3 Koelmel all testified that CG33118 did not change its course or speed prior to the collision.

There was significant testimony and evidence including a video speed trial that clearly demonstrates that CG33118 has a known blind spot unless the vessel is operated at clutch speed (less than 7 kts) or over approximately 35 kts when the vessel reaches a plane. Specifically, CDR Roche testified and the sea trial video demonstrates that the stern squats and the bow rises blocking the horizon from view.

Considering that CG33118 was operating at night, in a high traffic area, with confused and excessive lighting from the shore and vessels participating in the parade of lights, CDR Roche estimated that CG33118 should have transited at no faster than 15 kts. Accordingly, a reasonable fact finder would likely determine that **CG33118 was not operating at a safe speed for the conditions in San Diego Harbor during the Parade of Lights on 20 December 2009.**

Some mitigating factors include: prior to this mishap it had been standard practice for coxswains at Station San Diego to operate the 33s at high speeds in San Diego Harbor to reach a plane. CDR Roche and BM2 Helt testified to serious training deficiencies at Station San Diego that could have exacerbated poor boat handling practices such as transiting at high speeds in the harbor. Further, CDR Roche testified that the Coast Guard delivered 33s to Station San Diego with little to no doctrine or training tactics and procedures. In fact, at the time of the mishap, SMTC did not have a training course for 33 coxswains. These are all mitigating factors but will likely not rise to the level of an affirmative defense

The Defense also seemed to be attempting to demonstrate that it was reasonable for BM3 Ramos to be operating at a high speed in order to respond to a MARB. That argument is without merit. A MARB is issued solely for vessels not in distress. It is unreasonable to attempt to explain away excessive speed to respond to a non-emergent situation. Further, even if it was an emergent situation the coxswain is still required to operate IAW Rule 6 – namely at a speed appropriate for the circumstances.

Recommendation: It is my opinion that reasonable grounds exist to believe the accused committed this offense. As discussed above, there are mitigating factors that may rise to the level of an affirmative defense.

Form of the specification: is legally sufficient.

b. Charge II: Violation of Article 110, UCMJ – Hazarding of a Vessel:

1) As charged, the elements of the sole Specification of Charge II are:

a) That on or about 20 December 2009, at or near San Diego Bay, California, CG33118, a vessel of the armed forces, was hazarded; and

The testimonies of Mr. Endert, Mr. DeWeese and MK3 Koelmel demonstrate that CG33118 was a vessel of the armed forces and was involved in a collision with CF 2607 PZ on the night of 20 December 2009. Actual damage is conclusive evidence that a vessel has been hazarded; the testimony of S/A Barahura, as well as the photographs presented in Enclosures 30 and 34 to IO Exhibit 7, demonstrate that the CG33118 suffered scrapes, paint transfer, a nick in the motor's lower unit, and glass embedded in its collar.

b) That BM3 Ramos hazarded CG33118 by failing to designate lookouts or to maintain a safe speed.

Negligence requires a breach of a duty that proximately caused this collision. BM3 Ramos failed to designate a lookout as delineated in (6)(a)(1) above thus breaching that duty. BM3

Ramos also breached his duty to maintain a safe speed as described in the discussion regarding (6)(a)(2).

The second hurdle for the Government is to show that such negligence was the proximate cause of the hazarding. *United States v. MacLane*, 32 C.M.R. 732, 736 (C.G.C.M.R. 1962). In other words, is there sufficient causal relation between BM3 Ramos's failure to designate lookouts and/or proceed at a safe speed and the collision (i.e. but for BM3 Ramos' failure to assign lookouts and/or maintain a safe speed the accident wouldn't have occurred).

After reviewing all of the exhibits and listening to the testimony it is apparent that there were multiple factors that lead to this mishap. That said, CDR Roche testified that the primary cause of the accident was speed. That is a logical deduction that would be reached by a reasonable fact finder. Operating CG33118 at an excessive speed for the conditions (i.e. a crowded harbor with poor/confused lighting) was the proximate cause of this collision.

Recommendation: It is my opinion that reasonable grounds exist to believe the accused hazarded CG33118.

Form of the specification: is legally sufficient. However, I recommend striking the words "to designate lookouts". The primary cause of this mishap was speed. CDR Roche testified and I observed in the sea trial video that the known blind spot as the vessel comes up to a plane likely would have obscured a lookout in the cabin from observing the CF 2607 PZ at the speed the CG33118 was transiting. CDR Roche further testified that it was unsafe to assign a lookout on the bow at the speed the CG33118 was transiting that evening.

c. Charge III: Violation of Article 119, UCMJ – one specification of involuntary manslaughter:

1) As charged, the elements of the sole Specification of Charge III are:

a) That Anthony DeWeese is dead;

The testimony of Mr. DeWeese, autopsy photographs and certificate of death prove this element. See Enclosures 4 and 150 to Exhibit 7.

b) That Anthony DeWeese's death resulted from the act or omission of the accused; and

Through the testimony of S/A Barahura, it is known that the towing pad on the prow of the CG33118 struck the back of Anthony DeWeese's head, causing his spinal cord to sever, resulting in his death. Hair and tissue found on the towing pad by investigators matched Anthony DeWeese's DNA, and a depressed skull fracture in his head correlated to the impact. See pictures 184 to 197 in Enclosure 24, pictures 1906, 1907 and 1924 in Enclosure 4, and Enclosure 149 to IO Exhibit 7. MK3 Koelmel identified BM3 Ramos as the coxswain of the CG33118 at the time of the collision, and was therefore in control of the vessel when it struck Anthony DeWeese.

c) That the killing of Anthony DeWeese was unlawful;

There is ample evidence that CG33118 was traveling at an excessive speed which led to a collision with CF 2607 PZ (Testimony of S/A Barahura, CDR Roche, Mr. Endert, Mr. Deweese). The collision was without legal justification or excuse.

Defense may attempt to demonstrate that it was reasonable for BM3 Ramos to be operating at a high speed in order to respond to a MARB. That argument is without merit. A MARB is issued solely for vessels not in distress. It is unreasonable to attempt to explain away excessive speed to respond to a non-emergent situation. Further, even if it was an emergent situation the coxswain is still required to proceed IAW Rule 6 – namely at a speed appropriate for the circumstances.

d) That the act by BM3 Ramos constituted culpable negligence.

There are reasonable grounds to find that BM3 Ramos's failure to maintain a safe speed for the prevailing conditions constituted culpable negligence.

The Military Judges' Bench Book defines culpable negligence as a degree of carelessness greater than simple negligence. Simple negligence is the absence of due care. The law requires everyone at all times to demonstrate the care for the safety of others that a reasonably careful person would demonstrate under the same or similar circumstances; this is what due care means. "Culpable negligence," on the other hand, is a negligent act or failure to act accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others, instead of merely a failure to use due care (*Military Judges Bench Book, pg 641*). Culpable negligence is conduct that involves the creation of a substantial and unjustifiable risk of which the person should be aware in view of all the circumstances.

The test for foreseeability is whether a reasonable person, in view of all the circumstances, would have realized the substantial and unjustifiable danger created by his acts. *United States v. Henderson, 23 MJ 77, 80 (CMA 1986)*. It is not necessary that the accused himself "be aware of the substantial risk he is creating, but only that a reasonable person would have realized the risk." *United States v. Brown, 22 MJ 448, 450 (CMA 1986)*.

Mere lack of foresight, stupidity, irresponsibility, thoughtlessness, or ordinary carelessness, however serious the consequences may happen to be, does not constitute culpable negligence. There must exist in the mind of the party charged, at the time of the act or omission, a consciousness of the probable consequences of the act, and a wanton disregard of them. *Am. Jur. 2d, Criminal Law § 289*.

In a vehicular manslaughter case, "culpable negligence" has been defined as negligence demonstrating a reckless disregard for the value of human life, or such an indifference to the consequences under the surrounding circumstances as to render the actor's conduct willful. *Gibson v. State, 503 So.2d 230 (Miss. 1987)*.

The relevant facts leading up to the collision are discussed in 6(a)(2)(c) above. To summarize, CG33118 was traveling at an excessive rate of speed in a crowded harbor with confused lighting when it was collided with the stern of CF 2607 PC.

Numerous witnesses testified that CG33118's speed was unsafe for the circumstances. CDR Roche testified that excessive speed was the primary cause of the mishap. If the boating public and CDR Roche recognized the danger of traveling at a high rate of speed during the POL, it follows that the reasonable person could have reasonably foreseen a collision was a natural and

probable outcome of operating in that manner. BM3 Ramos has extensive operating hours on CG 33s including night hours. See Enclosures 15 and 108 to IO Exhibit 7. He was aware that CG33118 had a blind spot and should have been able to recognize the danger of transiting at a high rate of speed with a blind spot in a crowded marina with confused lighting. It follows that there is a preponderance of the evidence for culpable negligence.

There is no evidence of contributory negligence on behalf of CF 2607 PC. S/A Barahura and Mr. DeWeese testified that the pleasure craft was transiting at clutch speed and was the stand on vessel in an overtaking situation. Due to CG33118's high rate of speed there wasn't time for the pleasure craft to determine it was in extremis and change course or speed. CF 2607 PC's stern light was on. See Enclosure 148 to IO Exhibit 7.

A major mitigating factor and arguably an intervening cause is the lack of leadership at Station San Diego. LT Schultz testified that BMC Grimmatt was relieved of command nine days prior to this incident for an inappropriate relationship with BM1 Stacey. In fact, LT Shultz assumed the duties as Acting CO of Station San Diego only three days before the collision. BM1 Stacey had previously been the OOD/Duty Section Leader for this duty section. These reliefs and general lack of leadership are potentially relevant for the following reasons. 1) BM3 Ramos was involved in a prior mishap where he damaged a 33 when he allided with a pier (Testimony of CDR Roche and BM2 Helt). BM2 Helt and several of the other coxswains believe BM3 Ramos's coxswain qualification should have been pulled at that point. BM2 Helt testified that there were rumors at Station San Diego that BM3 Ramos's coxswain qualifications were not pulled due to the inappropriate relationship (i.e. so BM1 Stacey could have more time off). 2) When BM1 Stacey was relieved, BM2 Howell became the Duty Section Leader. BM2 Howell had less experience than BM1 Stacey. If BM1 Stacey would have been the inport OOD that night it is possible that a GAR model would have been conducted, lookouts assigned, and a safe speed would have been maintained. Without question there would have been more experience at Station San Diego and likely on the water that night. 3) LT Shultz testified the parade of lights was a known event but no night orders had been left for the coxswain or OOD. 4) The lack of leadership at Station San Diego allowed the coxswains to violate the standing orders. CDR Roche noticed that the boat crews had difficulty conducting GAR models after the mishap, despite the fact they knew they were under strict scrutiny. 5) When CDR Roche transited with Station San Diego boat crews he noticed they failed to call out contacts. 6) BM2 Helt testified that the training program at Station San Diego had gone down hill and unqualified trainers were training the boat crews.

Another mitigating factor is the Coast Guard's failure to provide appropriate training and oversight for this type of vessel. CDR Roche testified that the 33s were speed boats designed for open water operations. 33s were not designed for inner harbor operations. However, the Coast Guard delivered these platforms to Station San Diego with no overall training program and very limited guidance (testimony of CDR Roche). This appears to have resulted in boat crews operating 33s for missions they arguably weren't designed for – i.e. inner harbor operations.

Recommendation: It is my opinion that reasonable grounds exist to believe the accused committed the crime of involuntary manslaughter. However, there are mitigating factors including the lack of a proper training program at Station San Diego and the Coast Guard's failure to provide proper training or TTP for 33 coxswains or commands. These mitigating

factors will likely not rise to the level of an affirmative defense, but might weigh into a fact finder's determination of whether the collision was the result of negligence or culpable negligence.

Form of the specification: is legally sufficient. However, pursuant to *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010), negligent homicide does not meet the elements test to be considered a lesser included offense of involuntary manslaughter. In *Jones* CAAF clearly returned to a literal interpretation of the *Teeters* elements test. Accordingly, because negligent homicide includes the additional terminal elements of Article 134 it has an additional element and must be charged to be considered by a Court Martial.

There is ample evidence to support the service discrediting element. The fact that the CG33118 killed a member of the public is service discrediting in fact. Further, the presence of the media at the Article 32 hearing demonstrates that the death of Anthony DeWeese, which was the result of BM3 Ramos's actions, has had a dilatory affect on the public's perception of the Coast Guard.

Negligent homicide should be charged because reasonable grounds exist to believe the accused committed that crime. Further, a reasonable fact finder might find that the evidence is merely negligence vice culpable negligence. I wasn't aware of the holding in *Jones* when I conducted the Article 32 investigation and thus was operating under the construct of the MCM as written (which indicates that negligent homicide is an LIO of involuntary manslaughter). Accordingly, I investigated the charge of negligent homicide despite the fact I did not notify the accused of this potential uncharged misconduct at the hearing.

d. Charge IV: Violation of Article 128, UCMJ – Six specifications of assault by culpable negligence, and six specifications of assault by culpable negligence on a child under 16 years:

1) As charged, the elements of the specifications are:

a) That on or about 20 December 2009 at or near San Diego Bay, California BM3 Ramos, by culpable negligence (failing to maintain a safe speed), offered to do bodily harm to the twelve victims;

The twelve victims and their dates of birth are in the CGIS Report of Investigation. Mr. Deweese testified that all members onboard CF 2607 PZ were injured and details regarding those injuries are included in the CGIS ROI.

The primary issue with this element of the charge is whether BM3 Ramos's action rose to the level of culpable negligence. As described in (6)(c)(1)(d) above, there are reasonable grounds to find that BM3 Ramos's failure to maintain a safe speed for the prevailing conditions constituted culpable negligence.

b) BM3 Ramos did so with a certain means;

MK3 Koemel testified that BM3 Ramos was the coxswain of CG33118.

c) That the offer of bodily harm was done with unlawful force or violence;

There is ample evidence that CG33118 was traveling at an excessive speed resulting in substantial damage to CF 2607 PZ and injuries to all onboard (testimony of S/A Barahura, CDR Roche, Mr. Endert, Mr. Deweese). The collision was without legal justification or excuse. The same facts that establish culpable negligence establish unlawful force or violence. See (6)(c)(1)(d) above.

d) That six of the victims were children under the age of 16.

Mr. Deweese and S/A Barahura testified there were seven children under the age of 16 onboard CF 2607 PZ. Six children under the age of 16 were injured and are included in the assault charges. Anthony Deweese was the seventh child.

Recommendation: It is my opinion that reasonable grounds exist to believe the accused committed the twelve alleged aggravated assaults. However, I recommend charging simple assault vice aggravated assault. BM3 Ramos has substantial exposure for the other charges at hand, including hazarding a vessel and negligent homicide. While he is the most culpable of the crewmembers, he was a very junior petty officer with limited experience. It is also worth noting that several of the family members received only minor injuries. Further, all of BM3 Ramos's experience as a coxswain was obtained at Station San Diego where he was trained in what appears to be a somewhat questionable manner. The lack of command oversight, marginal unit operational training program, and dearth of sufficient direction from the Coast Guard in the form of TTP or training for 33 coxswains also contributed greatly to this extremely unfortunate mishap.

Form of the specification: is legally sufficient.

7. Recommended Disposition: General Court-Martial.

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Enclosure: (1) Appointment Letter  
(2) Article 32 Rights Advisement and Charge Sheet  
(3) Written Objections  
(4) Government Closing  
(5) List of Witnesses  
(6) List of Investigating Officer Exhibits

Copy: Defense Counsel  
Government Counsel  
Staff Judge Advocate