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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. BM2 HOWELL, 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 BM2 Ian M. Howell, USCG. This report is submitted in accordance with the requirements of reference (a).

2. LT Carrie Theis, USN, and LCDR Janine Donovan, USCG, represented the accused during the investigation. They are both qualified in accordance with RCM 405(d)(2) and RCM 502(d).

3. LT Theis submitted the following objections in writing (Enclosure 3):

a. **Individual Military Counsel (IMC) Requests:** BM2 Howell renewed his request for an IMC. In that request he noted disparate treatment of officers versus enlisted IMC requests as well as a potential overbroad unavailability definition within the Military Justice Manual (MJM) which precludes an adequately trained Coast Guard JAG from serving as IMC. Over the course of two months BM2 Howell submitted three requests for an IMC. You denied the first two requests because the requested IMC was unavailable per the MJM and RCM 506(b)(1). BM2 Howell's latest request for LCDR Pickrell was submitted on 31 August and forwarded by the District Eleven Staff Judge Advocate (SJA) to the Legal Services Command (LSC) for an availability determination on 01 September. LSC did not respond to the request prior to the start of the hearing on 07 September and still had not responded at the close of the hearing on 10 September. BM2 Howell requested a continuance to wait for a decision on the IMC request. On 07 September you denied BM2 Howell's request for a continuance. The hearing was conducted with LCDR Donovan and LT Theis representing BM2 Howell. Both counsel are qualified to serve as defense counsel in accordance with Article 27 (b) and previously sworn under Article 42 (a) of the UCMJ. IO Exhibit 1 contains correspondence regarding the IMC requests.

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. 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 Defense Counsel, 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 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.

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

c. 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.

d. Counsel for Petty Officer Ramos chose not to call any of the aforementioned witnesses 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. The list of witnesses and 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:

As charged, the elements of specification 1 are:

1) That BM2 Howell had a duty to enforce the requirement for the coxswain to complete a risk assessment or designate lookouts prior to the CG33118 getting underway;

BM2 Howell was assigned as the Station San Diego OOD/Duty Section Leader the evening of 20 December 2009 (testimony of MK3 Koelmel, CDR Roche). Station San Diego OOD/Duty Section Leaders are required to enforce all regulations and policies of the OIC (paragraph 4-A-2 of the Station San Diego Standard Operating Procedures, Enclosure 85 to IO Exhibit 7). One of those policies is paragraph 4.b. of the Station San Diego Navigation Standards, STASDINST 3503.3D, dated 6 June 2008 and in effect on 20 December 2009, which 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).

As proffered by his Defense, BM2 Howell does not appear to have a formal letter designating him as OOD. Further, BM1 Stacey, the previous OOD/Duty Section Leader was relieved of her position as OOD/Duty Section Leader for this duty section approximately nine days prior to the mishap (Testimony of LT Schultz). However, according to testimony of the Acting CO at the time of the collision, LT Schultz, there were no additional requirements to serve as OOD/Duty Section Leader (i.e. no PQS or JQR). The position of OOD/Duty Section Leader was assigned to the senior most in rank qualified coxswain. BM2 Howell met those requirements and was assigned as OOD/Duty Section Leader on 20 December 2009.

2) That BM2 Howell actually knew or reasonably should have known of the assigned duties;

BM2 Howell'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.

Defense argued at the Article 32 and likely will be able to establish that BM2 Howell did not complete additional formal training and did not have a signed qualification letter for the position of OOD/Duty Section Leader. The lack of a formal training program and the short duration of BM2 Howell's tenure as Duty Section Leader are certainly mitigating factors. However, BM2 Howell was a qualified coxswain who had read and signed Station San Diego's Navigation Standards and Standard Operating Procedures. He was serving as OOD/Duty Section Leader on

20 December 2009 and he should have known and enforced the duty to conduct a pre-underway brief which included a GAR model and assignment of lookouts.

There is also 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 three different CG Station San Diego small boat crews he sailed with for sea trials 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 GAR models 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 of Station San Diego coxswain's to conduct thorough pre-briefs.

3) That on or about 20 December 2009 at or near USCG Station San Diego, BM2 Howell was derelict in the performance of those duties by failing to enforce the requirement to complete a risk assessment or designate lookouts.

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

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.

Recommendation: It is my opinion that reasonable grounds exist to believe the accused committed this offense. However, as articulated above, BM2 Howell's lack of formal training as OOD/Duty Section Leader combined with the lack of proper pre-underway briefs at Station San Diego are mitigating factors that might raise doubt regarding BM2 Howell's knowledge of his duty to enforce pre-underway briefs.

Form of the Specification: The form of the specification should be amended to include the term "as Duty Section Leader" following the words "who knew of his duties..." This modification provides notice that BM2 Howell's duty to enforce the Standing Orders arises from his position as Duty Section Leader.

As charged, the elements of specification 2 are:

1) That BM2 Howell had a prescribed duty, that is: acting as a lookout onboard CG33118; The Boat Seamanship Manual, COMDTINST M16144.5C, which is dated September 2003 and was in effect on 20 December 2009, requires all boat crewmembers to perform lookout duties unless otherwise directed (See IO Exhibit 24). Additionally, CDR Roche testified that the requirement for all boat crewmembers to serve as a lookout is a duty established by service custom. Further, CDR Roche testified regarding the duty of lookouts to call out contacts to assist the coxswain with safe navigation.

2) That BM2 Howell actually knew of the assigned duty;

The Station San Diego Navigation Standards, which BM2 Howell signed, incorporate the Boat Crew Seamanship Manual by reference (See Enclosure 88 to IO Exhibit 7). As a qualified coxswain, BM2 Howell also should have been aware of his duties as a lookout (See Enclosure 13 to IO Exhibit 7).

3) That on or about 20 December 2009 at or near San Diego Bay, California, BM2 Howell negligently failed to perform as a lookout.

MK3 Koelmel's testimony that no CG33118 crewmembers, including BM2 Howell, reported contacts the night of 20 December 2009, notwithstanding the heavy vessel traffic, is sufficient to establish the minimal threshold of reasonable grounds to believe BM2 Howell committed this offense.

While the minimum evidentiary standard has been met, it should be noted that there is substantial mitigation evidence including but not limited to:

During speed trials CDR Roche observed that the stern of the 33 squats and the bow rises until the 33 reaches a plane at approximately 35 or 40 kts. The sea trial video makes it clear that the bow gets higher and higher until the 33 reaches a plane, making it very challenging for any crew members to see over the bow (Enclosure 108 to IO Exhibit 7).

CDR Roche further discussed how a two deck high ferry, over one mile away, was obscured by the 33s bow when the 33 was coming up to a plane during his observations at sea trials. These sea trials were conducted during day light hours on a clear day with limited vessel traffic. This collision occurred while CG33118 was transiting at a high rate of speed, at night, in a crowded harbor, with confused lighting from the shore and vessels participating in the parade of lights.

Mr. Dewese and Mr. Endert indicated that the stern light of the CF 2607 PZ was on. However, the CF 2607 PZ was riding low in the water due to its thirteen passengers. CDR Roche estimated that CF 2607 PZ's stern light was only about four feet above the water line. If a two deck high ferry over a mile away was obscured, it seems reasonable that a low profile pleasure craft in a parade of lights would also be obscured.

CDR Roche also observed Station San Diego boat crews underway on 33s after the mishap. CDR Roche was alarmed that during these underway trips lookouts failed to call out contacts. In fact, CDR Roche recounted how he personally started calling out contacts during the video-taping of the sea trials. This highlights a training deficiency, but also further establishes that Station San Diego lookouts were derelict in the performance of their duties on a routine basis.

While these are all mitigating facts and likely demonstrate that even if BM2 Howell would have adequately performed his duties as lookout he may not have prevented the accident, they do not contradict the testimony of MK3 Koelmel that none of the lookouts were calling out contacts.

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 regarding the lack of call outs by the lookouts that evening. Considering the dense vessel traffic, all crew members should have been keeping the coxswain well informed of contacts to avoid. That said, at trial the defense may be able to raise the defense of impossibility: the speed of the CG33118, its known blind spot as it comes up to a plane, the confused visibility due to the

combination of vessels participating in the parade of lights and lights from the shore, and the CF 2607 PZs low profile in the water (approximately 4 feet above the waterline) would have made it extremely difficult for BM2 Howell to have spotted CF 2607 PZ prior to impact.

Form of the specification: is legally sufficient.

Government Counsel requested a recommendation regarding whether to prefer an additional charge for dereliction based on a failure to follow the concepts of Team Coordination Training (TCT). I recommend against preferring additional charges. As CDR Roche testified, TCT is a concept focused on positive and pro-active communication between all crew members. While this training is required and the concepts are becoming common place throughout the Coast Guard, it does not appear to be an ingrained concept at Station San Diego. CDR Roche testified that the Station San Diego boat crews he sailed with failed to follow these concepts.  Holding a junior petty officer criminally liable for a concept that was not adequately taught or enforced by their superiors violates the principals of fundamental fairness.

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

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

1) 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.

2) That BM2 Howell by omission (by failing and neglecting to advise the coxswain to maintain a safe speed), negligently suffered CG33118 to be hazarded.

There are reasonable grounds to establish that the failure of the CG33118 to proceed at a safe speed so that she could take proper and effective action to avoid collision was a proximate cause of this mishap. For a more thorough discussion see my analysis in (6)(a)(2) and (6)(b) in U.S. v. Ramos.

However, BM2 Howell's criminal liability is a more challenging question for the finder of fact. The vast majority of reported hazarding cases deal with the criminal liability of a ship's Commanding Officer-- see *United States v. MacLane*, 32 C.M.R. 732 (C.G.C.M.R. 1962); *United States v. Day*, 23 C.M.R. 651 (N.C.M.R. 1957). A Commanding Officer has a time honored inescapable duty to maintain the safety of his ship and crew.

In this case BM2 Howell is not a Commanding Officer but a crewman aboard CG33118 who is a qualified coxswain and was assigned as the OOD/Duty Section Leader on 20 December 2009. These positions/qualifications inform his background as a mariner but do not per policy provide additional duties underway. Unlike a Commanding Officer, it is not the OOD/Duty

Section Leader who is ultimately responsible for the safe navigation of a small boat, that duty belongs to the coxswain.

The first issue for this element of the charge is whether BM2 Howell was criminally negligent for failing to advise the coxswain to maintain a safe speed. Put a different way – was BM2 Howell negligent for failing to inform the coxswain to slow down. *Simple negligence is all that is necessary to prove this element.* It is consistent with the antecedent history of Article 110(b), with the high duty imposed, and with the substantial risks of injury involved, that no more should be required to convict than a finding that the accused did not exercise due care and prudence under the circumstances. *United States v. MacLane*, 32 C.M.R. 732, 738 (C.G.C.M.R. 1962).

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 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.

Several eye witness accounts describe the speed of CG33118 as too fast for the prevailing conditions. Mr. Endert estimated the speed of CG33118 at 25-30 kts. CDR Roche and S/A Barahura conducted numerous interviews and based on those interviews estimated the speed of CG33118 at 25-30 kts. Numerous civilian witnesses used colorful language to describe the speed. (See IO Exhibit 7 and 16). CDR Roche concluded that CG33118 should have been going no faster than 15 kts that evening.

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. 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.

CDR Roche testified that the principals of team coordination training and the service custom of senior personnel correcting juniors created a duty for BM2 Howell to inform BM3 Ramos to slow down and adhere to the requirements of Rule 6 of the Rules of the Road. A reasonable fact finder likely would concur that BM2 Howell had a duty to make that recommendation, but that duty is not delineated in regulation or policy.

That said, mitigating factors include the overall lack of training at Station San Diego coupled with even LT Schultz's reluctance to correct a coxswain underway.

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 BM2 Howell's failure to ask/direct the coxswain to proceed at a safe speed and the collision (i.e. but for BM2 Howell's omission 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. The question is what part BM2 Howell's decision not to ask the coxswain to slow down played in producing the collision and if it is sufficient to make him responsible. Considering the overwhelming evidence

that speed was a primary cause of this accident, a reasonable fact finder could determine that direction from BM2 Howell to the coxswain could have prevented this accident.

Recommendation: It is my opinion that reasonable grounds exist to believe the accused committed this offense. However, there are mitigating factors including lack of training at Station San Diego and imputing criminal liability on a crewmember for failing to make a recommendation.

Form of the specification: is legally sufficient.

c. Charge III: 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:

As charged, the elements of the specifications are:

1) That on or about 20 December 2009 at or near San Diego Bay, California BM2 Howell, by culpable negligence (failing to advise the coxswain to maintain a safe speed), offered to do bodily harm to the twelve victims;

The primary issue with this element of the charge is whether failing to advise the coxswain to maintain a safe speed amounts to culpable negligence. The facts presented by the government meet the preponderance of the evidence standard for culpable negligence but likely will not be established beyond a reasonable doubt.

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)(b) above. To summarize, CG33118 was traveling at a high rate of speed in a crowded harbor with confused lighting. BM2 Howell should have recognized that CG33118 was transiting at a speed too fast for the prevailing circumstances and should have advised the coxswain to slow down.

However, the heart of the question is whether a reasonable person in view of all the circumstances, would have realized that a failure to advise the coxswain to slow down presented a substantial and unjustifiable danger. It seems reasonable that a finder of fact would determine that driving a small craft with a known blind spot at a high rate of speed in a crowded harbor would present a substantial danger. Extending liability to a crewmember, even if he is a qualified coxswain is a more difficult question. I found no cases directly on point where criminal liability for culpable negligence was imputed to a crewmember who failed to warn of a potential danger. This could be an intriguing case of first impression. However, my opinion is that BM2 Howell's failure to speak up seems to better fit in the arena of ordinary carelessness.

That said, what amount of negligence can be called culpable is a question of degree for the jury depending on the circumstances of each particular case. Stephen, *Dig. Crim. Law*, page 169.

A major mitigating factor and arguably an intervening cause is the lack of leadership at Station San Diego. LT Schultz testified that BMC Grimmett 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.

2) 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.

3) 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 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 these offenses. However, a reasonable fact finder likely will find that BM2 Howell's failure to advise the coxswain to slow down was mere negligence vice culpable negligence. Further, considering all of the mitigating factors, extending felonious liability to BM2 Howell for an omission seems counter to fundamental fairness.

Form of the specification: is legally sufficient. I concur that alleging twelve separate battery charges defeats the prudent rule of judicial economy. I do not recommend crafting additional novel charges under Article 134 for BM2 Howell.

d. Charge IV: Violation of Article 134, UCMJ – one specification of negligent homicide

As charged, the elements of the sole Specification of Charge IV are:

1) 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.

2) That Anthony DeWeese's death resulted from the failure of BM2 Howell to advise the coxswain to maintain a safe speed; and

As described in paragraph (6)(b) above, the excessive speed of CG33118 was the immediate cause of Anthony DeWeese's death. Per S/A Barahura's testimony, the towing pad of the CG33118 struck the back of Anthony DeWeese's head, causing the force of a 14,000 pound boat to focus on a few square inches of his skull, resulting in a depressed skull fracture and the severing of his spinal cord. There are reasonable grounds to find that had BM2 Howell taken some measure to correct the coxswain's unsafe speed Anthony DeWeese would not have been killed.

3) That the killing of Anthony DeWeese was unlawful;

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.

4) That BM2 Howell's failure to act amounted to simple negligence;

For the charge of negligent homicide the government need only prove simple negligence. As discussed in (6)(b) above, BM2 Howell's failure to advise the coxswain likely rises to the level of simple negligence.

5) BM2 Howell's conduct was to the prejudice of good order and discipline in the armed forces or was of nature to bring discredit upon the armed forces.

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 BM2 Howell's omissions, has had a dilatory affect on the public's perception of the Coast Guard.

Recommendation: It is my opinion that reasonable grounds exist to believe the accused committed this offense. However, the ample number of mitigating factors discussed in (6)(b) and imputing felonious criminal liability to a crewmember for failing to provide a recommendation to the coxswain should be given serious consideration.

Form of the specification: is legally sufficient.

7. Recommended Disposition: Special Court-Martial. These charges stem from BM2 Howell's failure to speak up (failure to call out contacts and/or tell BM3 Ramos to slow down). While these failures ultimately contributed to the death of a child and injuries to multiple others, to subject BM2 Howell to more than one year in the Brig for a mere inaction would be a gross miscarriage of justice. BM2 Howell was not the Commanding Officer of a ship and more importantly was not the coxswain of CG33118.

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

Copy: Defense Counsel  
Government Counsel  
Staff Judge Advocate