UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Defense Motion
For Appropriate Relief

Access to Intelligence Interrogators

26 September 2008

1. Timeliness: This motion is filed within the timeframe established by R.M.C. 905 and the Military Commission Trial Judiciary Rules of Court.

2. Relief Sought: The defense respectfully requests that this Commission order the government to make certain intelligence interrogators (specifically those identified by the government as Interrogators 2, 3, 10, 11, 15, 17, and 18) available for interview by the defense.

3. Burdens of Proof & Persuasion: As the moving party, the defense bears the burden of establishing any factual issues necessary to resolve the motion by a preponderance of the evidence. R.M.C. 905(c)(2)(A).

4. Facts:

a. On 4 March 2008, the defense moved the Commission to compel the government to identify all U.S. government personnel involved in the interrogation of Mr. Khadr since the time of his capture. (Def. NOM of 4 March 2008, D-035.) On 13 March 2008, the Commission granted the defense motion, ordering the government to provide the defense with a list identifying (at least by number) all personnel who interrogated the accused. (Ruling on D-035.)

b. In response to an *ex parte* filing by the government under the provisions of M.C.R.E. 505, the Military Commission subsequently revised its order of 13 March 2008. On 7 May 2008, the Military Commission issued an order requiring the defense to specifically request permission from the government to speak with intelligence interrogators, and in connection with such requests, to provide a showing of how the defense would expect the interrogator to provide information that is material or exculpatory. (*See* 7 May 2008 Order on D-035.)[1]

c. Under the terms of the 7 May order, the defense was required to submit such requests no later than 23 May 2008. However, the government did not provide the defense with the list required by the Commission's original ruling on D-035 until *22 May 2008*, making it virtually impossible for the defense to comply with the terms of the order. (Ona e-mail of 22 May 2008 (Attachment A); *see also* Prosecution 16 Jun 08 list of interrogators (Attachment I); Ona email of 18 Sept 08 (Attachment J).) Moreover, the list was apparently incomplete, sparking months of back and forth between the parties regarding the substance of the list and

[1] The order is itself classified, however, all references to the order herein are to unclassified sections thereof.

whether the government has discharged its obligation under the terms of the Military Commission's orders. (Snyder email of 31 May 08 (Attachment B); Snyder email of 15 Aug 08 (Attachment C); Petty email chain of 18 Aug 08 (Attachment D); Snyder email chain of 18 Aug 08 (Attachment E); Groharing email chain on 6 Sept 08 (Attachment F); Snyder email of 22 Sept 08 (Attachment G); Snyder email chain of 25 Sept 08 (Attachment H).) As of the date of this motion, the defense believes that the government has still not identified all personnel who participated in interrogations of Mr. Khadr.

d. On 17 August 2008, the defense asked to speak with certain intelligence interrogators who had participated in interrogations of Mr. Khadr during or before periods of his detention when key statements were taken. Although the "materiality" of the interrogators' potential testimony should have been facially obvious, and despite the fact that the prosecution failed to provide the defense with a complete list of interrogators prior to the 23 May deadline under the Military Commission's order, the government denied the defense requests. (*See* Petty email thread of 18 Aug 08 (Attachment D).)

e. On 23 September 2008, the defense submitted a subsequent request, setting forth in detail the basis for each requested interview. On 25 September 2008, the government denied the defense requests. (Snyder email chain of 25 Sept 09 (Attachment H).)

5. <u>Argument</u>:

a. **The Military Commission should order the government to make the requested intelligence interrogators available for interview by the defense.**

(1) To begin with, the fact that the defense requested to speak with intelligence interrogators after the original 23 May 2008 deadline should have no impact on this matter. The date was set in different circumstances, long before entry of the current scheduling order governing this case. Compliance with the date was rendered impossible by virtue of the government's failure to identify all interrogators prior to 23 May 2008. Moreover, even if the government identified all interrogators in its initial disclosure of 22 May 2008, it would have been virtually impossible for the defense to digest the information and competently submit interview requests the next day. There is no prejudice to the government in having to make these witnesses available now, as opposed to May of this year. The Military Commission should therefore grant the requested relief notwithstanding the fact that the defense requested to speak with intelligence interrogators after the initial 23 May 2008 deadline.

(2) For reasons set forth in the 23 September 2008 defense request (*see* Snyder email chain of 25 Sept 08 (Attachment H)), each intelligence interrogator sought by the defense is likely to possess information that is material to the preparation of the defense or exculpatory. As the defense has set forth in separate filings before the Commission, it is the *intelligence* interrogations of Mr. Khadr – not the "law enforcement" interrogations that are the key to this case. The defense request is narrow – limited to just seven intelligence interrogators, out of more than approximately twenty-seven intelligence interrogators (the exact number is unknown to the defense), who had responsibility for Mr. Khadr during critical periods in the course of his detention.

(i) Interrogators 2 and 3 had responsibility for interrogating Mr. Khadr, along with SGT C (a.k.a. Interrogator 1) (*see* pleadings and attachments filed in connection with D-027), during his initial detention at Bagram, when the hand grenade story forming the basis for Charge I initially took shape. Interrogators 2 and 3 can potentially corroborate Mr. Khadr's allegations of harsh treatment by SGT C and provide information on Mr. Khadr's general condition, i.e., the extent to which his wounds, fatigue and sedation – all conditions noted by the interrogators in their interrogation summaries – would have impacted his statements. (*See, e.g.*, Interrogator Notes, Report # IN T257-01-0812 (Attachment K) ("This is a conflicting part of the story perhaps due to the sedation and fatigue of the detainee. . . . detainee is fatigued and injured . . . .").) Moreover, they can provide information on what information SGT C reviewed or assumptions he may have held about Mr. Khadr's participation in the 27 July 2002 firefight (e.g., whether they and SGT C erroneously believed Mr. Khadr was the sole survivor of the bombardment that preceded the ground assault). Lastly, they can provide critical information about how the substance of these early intelligence interviews would have been transmitted to law enforcement personnel who interviewed Mr. Khadr after Department of Defense spokesmen began to make public statements regarding Mr. Khadr's responsibility for SFC Speer's death.

(ii) Interrogators 10 and 11 are likewise critical. They appear to have had responsibility for Mr. Khadr upon his transfer to GTMO in the fall of 2002. This is the period when he made key statements to law enforcement agents on which the government intends to rely at trial. The *intelligence* interrogators' assumptions and treatment of Mr. Khadr during this critical period – e.g., what information they took from the interrogations at Bagram, whether they subjected Mr. Khadr to extended periods of isolation consistent with the Camp Delta SOP, and what consequences they would have imposed for a lack of "cooperation" on Mr. Khadr's part – are vital to the defense's theory regarding the admissibility of statements taken by law enforcement agents during this period. The prosecution's response that they have asked the *law enforcement* agents whether Mr. Khadr would have suffered adverse consequences as a result of non-cooperation is unresponsive as the defense's theory is that law enforcement interrogations were influenced by consequences imposed, in part, by intelligence interrogators. The prosecution's effort to sidestep the thrust of the defense's inquiry is itself suggestive.

(iii) Interrogators 15, 17, and 18 are likewise critical. Mr. Khadr is alleged to have made a number of incriminating statements about his role in the firefight shortly after his arrival at JTF-GTMO. He largely recanted these statements after being afforded access to Canadian government officials in February 2003. He did not make another incriminating statement about the firefight until December 2004. In the interim, he was subjected to brutal treatment at the hands of U.S. government personnel, described in Mr. Khadr's affidavit, and substantiated, in part, by documents that have come into the possession of the defense as a result of litigation in Canada. (*See* R. Scott. Heatherington Memo 20 August 2004, para. 6 (describing Mr. Khadr's subjection to "frequent flyer" sleep deprivation program (Attachment L).) The 8 December 2004 interview summary reveals, on its face, that Mr. Khadr was scared of what his "other interrogator" might do to him for what the agents described as his initial lack of candor (i.e., his failure to tell them what they wanted to hear). (*See* 8 Dec 04 CITF ROI (Attachment F to Def. Mot. for App. Relief, D-084).) Clearly, whether Mr. Khadr would have been subjected to maltreatment if he failed to confess as the law enforcement agents desired is relevant to determining the reliability of Mr. Khadr's 8 December 2004 statement. Of course, what

interrogators did to Mr. Khadr "months before" the December interview would be relevant to what he believed might result from a lack of "cooperation," making Mr. Khadr's treatment throughout the period of 2003 and 2004 material. Moreover, these interrogators (particularly 17 and 18) appear to be the only individuals who can explain certain matters contained in Mr. Khadr's DIMS records from that period.[2]

(iv) The need for interviews of these interrogators is compounded by the fact that much of the other evidence of Mr. Khadr's intelligence interrogations appears to have been lost or destroyed. In the case of the JTF-GTMO interrogations, this appears to have been the result of a deliberate effort to destroy materials containing "interrogation information" so that it would not be available in the event interrogators were called to testify in legal proceedings. (*See* matters contained in Def. Mot. to Dismiss, D-085, especially Attachment B to D-085, the "Tiger Team SOP.") This apparent misconduct on the part of government officials, at the very least, militates in favor of granting the defense access to interrogation personnel.

6. Witnesses & Evidence: The defense does not anticipate the need to call witnesses in connection with this motion. The defense relies on the following documents as evidence in support of this motion:

Attachments A through L

D-027 pleadings and attachments

8 December 2004 CITF ROI (Attachment F to Def. Mot. for App. Relief, D-084)

Def. Mot. to Dismiss, D-085 and attachments, particularly Attachment B (the "Tiger Team SOP")

7. Conference: The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

8. Attachments:

A. Ona e-mail of 22 May 2008

B. Snyder email of 31 May 2008

C. Snyder email of 15 August 2008

D. Petty email chain of 18 August 2008

E. Snyder email chain of 18 August 2008

F. Groharing email chain on 6 September 2008

[2] The DIMS records are classified. The defense will provide pertinent portions in connection with this filing when the parties next travel to GTMO.

G. Snyder email of 22 September 2008

H. Snyder email chain of 25 September 2008

I. Prosecution 16 June 2008 list of interrogators

J. Ona email of 18 September 2008

K. Interrogator Notes, Report # IN T257-01-0812

L. R. Scott. Heatherington Memo 20 August 2004

Respectfully submitted,

/s/
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LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
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UNITED STATES OF AMERICA	)	**D-092**
	)	**Prosecution Response to Defense**
	)	**Motion to Compel Access to**
v.	)	**Intelligence Interrogators**
	)	
	)	**3 October 2008**
OMAR AHMED KHADR	)	

1. **Timeliness:** This response is filed within the timeframe established by R.M.C. 905 and the Military Commission Trial Judiciary Rules of Court.

2. **Relief Sought:** The Government respectfully submits that the Defense's *Motion to Compel Access to Intelligence Interrogators* should be denied because the Defense motion has made no showing that such access is material to the preparation of the Defense or would yield any exculpatory information and because the motion is extremely untimely – more than four months untimely. The Defense also failed to follow the specific timeline instructions in the Military Judge's Order, D035 (SECRET//NOFORN), paragraph ¶¶ 4b and e.

3. **Overview:** The Defense seeks to interview seven Intelligence interviewers of the accused (identified by numbers: 2, 3, 10, 11, 15, 17, and 18). Contrary to Defense assertions in the instant motion that the government failed to timely provide the Defense with all of the identifying numbers of Intelligence interviewers of the accused, as required by Military Judge's Order, D-035 (SECRET//NOFORN) ("Order"), the government did so on May 22, 2008. This is evidenced by Defense Attachment "H," Groharing email, dated 25SEP08, page 2, paragraph 1.

The government then properly denied Defense access to these government interviewers because they were not material or exculpatory to the Defense, in full

compliance with the Order. *See also*, D-092, Def. Mot., Attachment H, at 2 (Groharing email dated 25SEP08, ¶¶ 1, 4, and 5, detailing the government's full and timely compliance with all aspects of the Order).

Moreover, the Defense's extraordinarily untimely request to interview the seven Intelligence interviewers listed above is not supported by any showing that such proposed interviews would yield any material or exculpatory information and amounts to nothing more than a "fishing expedition" by the Defense, unsupported by any provision of the Military Commissions Act of 2006 (MCA) or the Manual for Military Commissions (MMC) or the underlying Order.

A list of witnesses whose testimony the defense considers relevant and necessary on the merits or on an interlocutory question shall include the name, telephone number, if known, and the address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony sufficient to show its relevance and necessity. RMC 703(c)(2)(B)(i).

Notably, the Defense cites no authority by way of case law or rule in its instant motion. This underscores the important point that the Defense can point to nothing in the MCA, MMC, or the Military Judge's Order that supports the disclosure of contact information for interview access to these specific interviewers given the failure by the Defense to show that such interviews would produce material or exculpatory information. While R.M.C. 701, 703 and the Military Judge's Order authorize proper discovery and even interview of government witnesses, this privilege is not unlimited. The Defense's access to these seven interviewers must be based on relevancy and materiality, neither of which the defense has shown, and certainly there is no showing that the requested

interviews would contain or lead to exculpatory information. The Defense request is best characterized as nothing more than an impermissible "fishing expedition." Of particular note, the Defense has been provided with all of the written reports for these seven interviewers as well as other government reports from government employees who did not participate in these Intelligence interviews themselves and are derivative of the original interview reports. All these Intelligence reports – original interview reports and derivative reports from non-interviewers – have all been provided and identified for the Defense as "MFRs," "SIRs," and "In" reports.

4. Burden of Proof: The Defense, as the moving party, bears the burden of establishing by a preponderance of the evidence that the accused is entitled to the requested relief. *See* Rule for Military Commissions ("RMC") 905(c)(2)(A).

5. Facts:

On 7 May 2008 the Commission issued Military Judge's Order, D035 (SECRET//NOFORN) ("Order"), setting forth limitations on the manner in which the Defense could request and the government could facilitate Defense access to Intelligence interviewers of the accused. The government identified all of these Intelligence interviewers by number to the Defense on 22 May 2008, in full compliance with the Order. Despite the fact that the Commission issued this Ruling on 7 May 2008 and the government identified all of the Intelligence interviewers by number on 22 May 2008, the Defense did not request access to interview these interviewers in compliance with the Order, *see* ¶ 4b, until 23 September 2008 – more than four months after the Commission issued its Order on how the Defense may request access to certain Intelligence Interviewers and the Government identified these interviewers by number. *See* D-092,

Def. Mot., Attachment H, at 3-4 (Kuebler email dated 23 SEP08); *see also* D-035 Order, ¶¶ b, d and e.

The Government has provided the Defense all of the reports of the seven government interviewers at issue in the instant motion and the Defense now seek untimely access to interview these interviewers based on the Defenses' following excerpted synopses of expected information to be gathered from these interviewers:

a. Interrogators 2 and 3: "…Interrogators 2 and 3 can ***potentially*** corroborate Mr. Khadr's allegation of harsh treatment by SGT C and provide information on Mr. Khadr's general condition…" D-092, Def. Mot., at 3, ¶ (i) (emphasis supplied).

b. Interrogators 10 and 11: "…They ***appear*** to have had responsibility for Mr. Khadr upon his transfer to GTMO in the fall of 2002…" D-092, Def. Mot., at 3, ¶ (ii) (emphasis supplied).

c. Interrogators 15, 17, and 18: "…Moreover, these interrogators (particularly 17 and 18) ***appear*** to be the only individuals who can explain certain matters contained in Mr. Khadr's DIMS records from that period…" D-092, Def. Mot., at 4, ¶ (iii) (emphasis supplied).

Even a complete reading of the entire Defense synopses of interviews contained in the Defense instant motion, D-092, pages 2 through 4, and Defense attachment "H" Kuebler's email dated 23 SEP08, pages 3 and 4, make no showing that the requested interviews would yield any material or exculpatory information as required by the Military Judge's Order.

6. Discussion:

The Government has complied with its discovery obligation by providing

all written reports made by the requested Intelligence interviewers of the accused to the Defense and all reports derivative to these interview reports. The interviewers and those written derivative reports have been identified by number and disclosed to the Defense. The witnesses, contact information, and interviews requested by the Defense are cumulative to those reports, not material and certainly not exculpatory or otherwise discoverable. The Fact Section above shows that the Defense request for access to Intelligence interviewers is based on speculation not fact. The Defense's request to interview Intelligence interviewers and their synopses underscore the inadequacy of its discovery demands. Under Rule for Military Commission ("RMC") 703(c)(2)(B)(i), the Defense must justify access to a given witness by providing "a synopsis of the expected testimony sufficient to show its relevance and necessity." Here, however, the Defense has simply recapped its conclusory assertions without any showing the interviews will produce any material or exculpatory information. *See* Facts section above.

Moreover, even if this Commission were a Federal court, the Defense still would not be entitled to the witnesses or their contact information, given that the Defense offers no factual basis for its claim that the information sought conceivably possesses potentially exculpatory or material information. *See*, *e.g.*, *United States v. Quinn*, 123 F.3d 1415, 1422 (11th Cir. 1997) (holding the Government was not required to disclose the contents of personnel files simply based on the defendant's unsupported speculation as to whether the material would contain relevant or exculpatory evidence because to do so would "convert *Brady* [*v. Maryland*, 373 U.S. 83 (1963)] into a discovery device"; *Brogdon v. Blackburn*, 790 F.2d 1164, 1168 (5th Cir. 1986) (per curium) ("The prosecution has no duty to turn over to the defense evidence that does not exist."); *cf. United States v. Merlino*, 349 F.3d 144, 154 (3d Cir. 2003) (noting the Government's

prior conclusion that certain tapes of witnesses' conversations contained no *Brady* material, and denying the Defense's "open-ended fishing expedition" for additional information).

The MCA, RMC, and Military Judge's Order govern the Government's discovery obligations in connection with this motion**.** In addition to RMC 701, discovery in the military commissions is governed by the discovery provisions contained in the MCA and RMC 703. MCA § 949j(a) provides: "Defense counsel in a military commission under his chapter shall have a reasonable opportunity to obtain witnesses and other evidence *as provided in regulations prescribed by the Secretary of Defense*." *Id.* (emphasis added). RMC 703(a), prescribed by the Secretary, provides, "The defense shall have reasonable opportunity to obtain witnesses and other evidence as provided *in these rules*." *Id.* (emphasis added) One of the rules promulgated by the Secretary specifically requires the Defense to make a preliminary showing of "relevance and necessity" before demanding access to a witness, *see* RMC 703(c)(2)(B)(i), but the Defense has not done so here. *See* D-092,

Def. Mot., at 3-4; *see also* D-092, Def. Mot., Attachment H, at 3-4. The Defense has not shown how evidence potentially adduced from the requested interviewers will be material or exculpatory. Specifically, the Defense failed to proffer, either in writing or orally how interviewing additional persons would provide relevant, material, exculpatory and non-cumulative information.

Even where the defendant is an American citizen with constitutional rights under the Due Process and Compulsory Process Clauses, and even where the would-be witness is "essentially not accessible to the defense," the defense *nonetheless* must synopsize the

expected testimony, and the synopsis must be more than "conjecture or surmise." *See*, *e.g.*, *United States v. Dorgan*, 39 M.J. 827, 830-31 (A.C.M.R. 1994). *See also United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982) (holding Government can deport illegal-alien witnesses without violating the Compulsory Process Clause, absent the Defendant's showing that "the testimony of a deported witness would have been material and favorable to his defense").

Accordingly, the Defense's request lacks specificity and would not produce information in addition to that already provided by the Government. Therefore, this motion amounts to no more than a "fishing expedition" disapproved of by a variety of courts. *Cf.*, *e.g.*, *Sterling v. Tenet*, 416 F.3d 338, 344, 346 (4th Cir. 2005) (where the claim threatened to disclose information that would compromise sources and methods quoting *United States v. Zolin*, 491 U.S. 554, 571 (1989)); *United States v. Tokash*, 282 F.3d 962, 971 (7th Cir. 2002) (the subpoena authorized by the Federal Rules of Criminal Procedure is "not a discovery device to allow criminal defendants to blindly comb through government records in a futile effort to find a defense to a criminal charge. Instead, it allows only for the gathering of specifically identified documents which a defendant knows to contain relevant evidence to an admissible issue at trial."); *United States v. Gaines*, 726 F. Supp. 1457, 1466 (E.D. Pa. 1989) ("[W]here the defendants could not indicate that the witness would present any relevant testimony and where it appeared that he was called simply to conduct a fishing expedition, his testimony was properly excluded. To rule otherwise would invite defense counsel to interview and then call an array of witnesses when presenting pre-trial motions to conduct fishing expeditions."). Denying the defense's motion in these circumstances is supported by

various Rules for Military Commissions. For example, RMC 703(c)(2)(D) provides that the Defense is not entitled to interview or otherwise compel access to witnesses who may divulge sources and methods.

Summary. In summary, the Defense Motion must fail. The evidence sought is cumulative or irrelevant, not material or exculpatory. Furthermore, the requested access and contact information is not authorized by the MCA or the MMC (the only applicable law), given the Defense's failure to demonstrate the relevance, materiality and non-cumulative nature of the potential witnesses' testimony. The Defense has all the written reports of all the requested witnesses. The Government, of course, will remain attentive to all of its discovery obligations, not only with respect to information pertaining to Khadr's Intelligence interviews, but in all other facets of the case as well. Simply requesting contact with potential witnesses whose testimony can only be cumulative and is certainly not exculpatory is insufficient to justify a motion for access in *any* forum, not just the military commissions. Denial of the Defense's motion under these circumstances clearly would not deny Khadr an "adequate opportunity to prepare [his] case", pursuant to RMC 701(j).

7. Oral Argument: The Government does not believe oral argument is necessary to deny the Defense's motion.

8. Witnesses: The Government does not believe that witness testimony is necessary to deny the Defense's motion. To the extent, however, that this Court decides to hear evidence on this motion, the Government respectfully requests the opportunity to call witnesses.

9. Conference: Not applicable.

10. Additional Information: None.

11. Submitted by:

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UNITED STATES OF AMERICA	)	**RULING**
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	)	**Defense Motion**
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OMAR AHMED KHADR	)	
a/k/a "Akhbar Farhad"	)	**D-092**
a/k/a "Akhbar Farnad"	)	
a/k/a "Ahmed Muhammed Khali"	)	

1. The Defense requests the Commission order the Government to make certain intelligence interrogators available for interview by the defense. The Government opposes this motion.

2. On 7 May 2008 the Commission ordered the Government to provide certain information concerning intelligence interviewers of the accused. The Government complied with that order on 22 May 2008. The Commission also gave the Defense a suspense date to meet if it desired to talk to any of the interviewers. The Defense asked the Government to grant it access to the interviewers several months after the Commission imposed suspense date. The Government denied the Defense access to those interviewers on the basis that they were not material or exculpatory to the Defense and because the request was untimely. The Defense subsequently filed this motion.

3. Clearly, the Defense did not seek access to the interviewers in a timely manner and did not provide an adequate explanation for its failure. However, in the interests of justice the Commission will grant some relief. The Government will provide the phone numbers for each of the interviewers to the Defense or arrange for the Defense counsel to meet the interviewers whichever is more convenient for the interviewers.

4. The Government will comply with this ruling no later than 14 November 2008.

So Ordered this 23rd day of October 2008.

Patrick J. Parrish
COL, JA
Military Judge