UNITED STATES OF AMERICA v. MOHAMMED JAWAD	)	IN THE COURT OF MILITARY COMMISSION REVIEW BRIEF ON BEHALF OF APPELLEE CASE No. 08-004 Interlocutory Appeal from the 19 November 2008 Ruling of the Military Judge on the Defense Motion to Suppress Out-of-Court Statements By the Accused Made While in U.S. Custody, D-021 Presiding Military Judge Colonel Stephen R. Henley

TO THE HONORABLE CHIEF JUDGE AND JUDGES OF THE COURT OF MILITARYCOMMISSION REVIEW

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Issues Presented

1. DID THE MILITARY COMMISSION APPLY THE CORRECT LEGAL STANDARD IN SUPPRESSING STATEMENTS MADE TO U.S. AUTHORITIES AT FOB 195 AS THE PRODUCT OF TORTURE PURSUANT TO M.C.R.E. 304(a)(1)?

2. ARE THE MILITARY COMMISSIONS' FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTED BY THE RECORD?

Statement of Statutory Jurisdiction

Appellee concurs with the Appellant's statement of statutory jurisdiction.

Statement of the Case

The Appellant makes several misleading factual assertions in this section of the brief and includes numerous facts which are irrelevant to the issue before the Court. Appellee generally concurs with the Appellant's statement of the procedural history and offers this more concise summary of the chronology of the case.

Mr. Jawad is charged with Attempted Murder in Violation of the Law of War in connection with a grenade attack in Kabul, Afghanistan on 17 December 2002. Appellant Exhibit K. Charges were sworn on 9 October 2007 and referred for trial by military commission on 30 January 2008. *id.* On 19 June 2008, pursuant to motion D-007, the Military Commission dismissed Charge II and its three specifications alleging Intentional Infliction of Serious Bodily Injury in Violation of the Law of War as lesser included offenses of Charge I.[1]

On 18 September 2008, Detailed Defense Counsel filed two motions seeking to suppress statements allegedly made by Mr. Jawad. Appellant Exhibits I and J. One motion directed toward statements allegedly made to Afghan authorities in Kabul, Afghanistan on 17 December 2002. Appellant Exhibit J. The second motion directed toward all statements made by Mr. Jawad while in U.S. custody later that day and night. Appellant Exhibit I. The government filed

[1] The military judge granted the defense motion D-007orally on the record. The ruling was not reduced to writing.

a consolidated response on 22 September 2008. Appellant Exhibit H. The Military Commission held a hearing on 25-26 September 2008 where evidence on both motions was received. Transcript at 679-1082, Sept. 25-26, 2008.

A relevant portion of the hearing was conducted in a closed session. Transcript at 954. Proposed findings of fact pursuant to R.M.C. 806(2)(A) were submitted and adopted by the Military Judge, specifically finding that testimony regarding interrogation of the accused on 17 and 18 December 2002 by U.S. agents is properly classified. AE 104, Transcript at 953.

Near the end of the hearing on 26 September 2008, the Military Judge ordered supplemental briefs be filed by 3 October 2008 on the issue of torture and that both parties file responses by 10 October 2008. Transcript at 1032-33. The requested briefs and responses were filed by the parties. Appellant Exhibits D, E, F, and G.

On 28 October 2008, the Military Judge issued a ruling suppressing statements allegedly made by Mr. Jawad while in Afghan custody in Kabul, Afghanistan. Appellant Exhibit C. This ruling was not appealed.[2] On 19 November 2008, the Military Judge issued a ruling suppressing statements allegedly made by Mr. Jawad in U.S. custody at FOB 195 in Kabul, Afghanistan. Appellant Exhibit B (subsequently amended by Appellant Exhibit A).

The Government filed a Notice of Appeal on 24 November 2008, appealing only the 19 November 2008 Ruling suppressing statements made in U.S. custody. The Government's brief was filed on 4 December 2008, within 10 days of filing the Notice of Appeal as required. Detailed Defense Counsel filed a timely brief within 10 days of the filing of the Government's brief.

[2] The Appellant states in its Brief at FN 8, p. 23 that the "Government believes that the Commissions 28 October ruling was erroneous." Appellant claims that the government did not appeal the ruling because they did not want to delay the trial, but nonetheless the Appellant is now attempting to persuade this court to review the central finding of that ruling that the accused was tortured. The Appellant presents no authority in support of the proposition that the earlier final non-appealed ruling can be reviewed in this appeal.

Statement of Facts

On December 17, 2002, Mohammad Jawad was arrested in Kabul, Afghanistan by Afghan authorities and transported to the 2nd District Police Station in Kabul in connection with a hand grenade attack on a vehicle carrying two U.S. Special Forces Soldiers and their Afghan interpreter. Appellant Exhibits A, B, and C; AE 87, AE 88, AE 106. The arrest occurred at approximately 1530 on 17 December 2002. Appellant Exhibits A, B; AE 87, AE 88, AE 89, AE 90, AE 91; Transcript at 868.[3] There was at least one other person arrested at the scene of the incident and several others arrested in connection with the attack. AE 106; AE 88; Transcript at 971-972. Mr. Jawad was a juvenile, perhaps around the age of 15 or 16, at the time of his arrest. Appellant Exhibits A, B. Transcript at 799, lines 11-12; Transcript at 971, line 7. At the point of arrest and during interrogation by Afghan authorities, Mr. Jawad appeared to be under the influence of drugs. Appellant Exhibits A, B; Transcript at 812-813, 871; Exhibit J, Page 3, ¶ i. Several high-ranking Afghan government officials were present at the police station and involved in the interrogation. Appellants Exhibits A, B; Transcript at 735, 870; AE 90, page 42, lines 20-22. Most, if not all, present were carrying firearms, which were visible to Mr. Jawad. Appellant Exhibits A, B and C; AE 106. Afghan officials observed that Mr. Jawad was scared. AE 106; Exhibit J, Page 3, ¶i. Mr. Jawad initially denied throwing the grenade. Appellant Exhibits A, B; The Afghan interrogators did not accept his denials. Appellant Exhibits A, B. Someone then told Mr. Jawad, "You will be killed if you do not confess to the grenade attack," and, "We will arrest your family and kill them if you do not confess," or words to that effect. Id.; AE 106. The commission found that the speaker meant what he said and that it was a credible threat. Id.; AE 98. Mr. Jawad subsequently made self-incriminating statements.

[3] There are conflicting reports regarding Mr. Jawad's apprehension. According to Special Agent E, an Afghan Military Force (AMF) Soldier claimed to have held a gun to Mr. Jawad's head. Transcript at 868. According to Mr. M, Mr. Jawad was wrestled to the ground by Mr. M, a self proclaimed "judo master." AE 87, AE 90 page 9, line 20.

Appellant Exhibits A, B; AE 87, AE 88. These statements were obtained by torture. Appellant Exhibit C. At some point while in Afghan custody Mr. Jawad was grabbed by the neck and hit on the nose with something, possibly a gun. AE 106.

Afghan government officials then informed U.S. military authorities, who had previously requested the Afghans turn over the perpetrators of the attacks for questioning, that Mr. Jawad had confessed. Appellant Exhibits A, B; Transcript at 839. U.S. officials were present at the 2nd District police station while the Afghan authorities had custody of Mr. Jawad. AE 90, page 40, lines 20-22. Mr. Jawad observed Americans to be present and perceived that they were fighting over custody of him with the Afghan officials. AE 106. Mr. Jawad's fear escalated as he as turned over to the enemy and armed U.S. government personnel took control of him directly from the Afghan police around 2200 hours on December 17, 2002. Appellant Exhibits A, B. He was handcuffed, hooded, blindfolded and transported by armed guards to Forward Operating Base (FOB) 195 at the Kabul Military Training Center in Kabul, Afghanistan. Appellant Exhibits A, B; Transcript at 799, 830; AE 107. Upon receipt of Mr. Jawad, U.S. military personnel at FOB 195 assumed him to be responsible for the earlier attack and referred to him as an "assassin." Transcript at 839-840; AE 97. Nearly immediately upon arrival at FOB 195, Mr. Jawad was strip-searched and subjected to humiliating and degrading photographs while a sizable group of personnel from FOB 195 observed.[4] AE 103, Appellant Exhibits A, B; Transcript at 832, 841-42. Photographs of Mr. Jawad document that he had a fresh injury to his nose. AE 105; Transcript at 832-833, 850. He was subsequently questioned by U.S. interrogators for several hours. Appellant Exhibits A, B at ¶ 2. Mr. Jawad still appeared to be under the influence of drugs. Appellant Exhibits A, B; transcript at 813, lines 9-16; transcript at 1039-1040. The interrogation by U.S. authorities began at about roughly sometime between

[4] The accused was photographed in the nude. These photographs are Classified Secret.

2300 and 0100 on 17 December 2008. Transcript at 804, line 3, lines 19-21. The interrogation involved bringing Mr. Jawad into a dark room while he was hooded and blind-folded and his hands were cuffed, with two American interrogators and local interpreters yelling at him in loud voices while he was in a prone position. Transcript at 799-800, 802; Transcript at 969, lines 1-2, Transcript at 979. lines 7-13. The purpose of the interrogation was to reestablish the shock of captivity. Transcript at 802, lines 13-14; Transcript at 968, lines 5-7, lines 17-23.[5] In addition to the two interrogators, there were several other people in the room including at least two interpreters and someone running videotaping equipment. Transcript at 805, 807, 966, 975 at line 11. The government has lost the videotape. Transcript at 807, lines 19-21; and at 959 lines 19-22. Mr. Jawad was not provided Afghan or American legal counsel or told that his statements to the Afghan police could not be used against him. Appellant Exhibit A, B; Transcript at 974, lines 8-16. The first phase of the interrogation by U.S. authorities lasted approximately three to four hours. Transcript at 805, lines 5-6. Mr. Jawad appeared tired and scared throughout the interrogation. Transcript at 806, lines 7-11; Transcript at 970, line 8; Transcript at 977, lines 13-15. Mr. Jawad initially denied any complicity in the attack Transcript at 808, lines 14-21, Transcript p. 971 but subsequently, after being subjected to repeated and prolonged questioning, made self-incriminating statements.[6] Transcript at 795, 808; Transcript at 971, lines 1-4; Transcript at 984, lines 8-22. The incriminating statements were obtained from Mr. Jawad when he was under the influence of drugs (Transcript p. 973) and deprived of sleep. (Transcript p. 972 lines 17-19) Appellant Exhibit A, B at ¶ 4, Transcript at 806; transcript at 813, lines 9-16;

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[5] For a detailed description of the interrogation techniques used by U.S. Forces see transcript pages 955-1003.

[6] As the government has noted in their brief at p. 4, the Military Commission's recollection of the precise nature of the self-incriminating statement varies from the official transcript of the interrogator's recollection of what Mr. Jawad told him (Transcript at 796.) However, this minor discrepancy is irrelevant to the legal issue before this court on appeal. The content of the incriminating statement was not one of the factors cited by the Military Commission in determining that the statement was the product of torture.

transcript at 1039-1040. The interrogation at FOB 195 ended in the early morning hours of December 18, 2002. Appellant Exhibit A, B; Transcript at 836, lines 15-18. Immediately following the interrogation at the FOB, U.S. authorities transported Mr. Jawad to the prison at Bagram known as the Bagram Collection Point (BCP). Appellant Exhibit I, page 4, ¶n.

Errors and Argument

NO ERROR OCCURRED. THE MILITARY JUDGE APPLIED THE CORRECT LEGAL STANDARD IN SUPPRESSING STATEMENTS MADE TO U.S. AUTHORITIES AT FOB 195 AND HIS HOLDING THAT THE STATEMENTS WERE THE PRODUCT OF TORTURE IS FULLY SUPPORTED BY THE RECORD.

Summary of Argument

There are really only two issues properly before this Court: (1) Did the military commission apply the correct legal standard in ruling on the motion to suppress, and (2) Were the military commission's factual findings and conclusions supported by the record? Both questions should be answered in the affirmative. The Military Judge properly applied the legal standard required by Article 15 of the Convention Against Torture, as incorporated in the Military Commissions Act of 2006 (M.C.A.) § 948r(b) and implemented in Military Commission Rule of Evidence (M.C.R.E.) 304(a)(3). These laws direct that statements which are "the result of" "obtained by" or the "product of" torture are categorically excluded from military commissions for use as incriminating evidence against the speaker. This is the standard that the military commission applied. Based on the overwhelming weight of the evidence presented, the military commission made the following conclusion of law in the 19 December 2008 Ruling:

> Under the totality of the circumstances, the Military Commission concludes the effect of the death threats which produced the Accused's first confession to the Afghan police had not dissipated by the second confession to the U.S. government interrogator. In other words, the subsequent confession was itself the product of the preceding death threats.

Appellant's Exhibit A at ¶ 6. Accordingly, the commission granted the Defense motion and suppressed the statements. Appellant's Exhibit A at ¶ 8. The commission relied on the plain

language of the statute and the applicable rule of evidence, and well-settled principles of law in determining that the statement was the product of torture. Contrary to the unsupported view expressed by Appellant, confessions obtained by torture are not limited to confessions obtained during the active torture of an individual. A confession is the product of torture so long as it is made while the speaker is still under the effect of torture. Once torture has been established, it is proper to presume that statements obtained shortly thereafter are tainted by the torture. The commission properly assigned the burden of proof to establish that the statements were not the product of torture to the prosecution by a preponderance of the evidence. The government failed to meet its burden. The commission's conclusion, after considering the totality of the circumstances, that Mr. Jawad was still under the effects of torture by the Afghan authorities at the time he made incriminating statements to U.S. interrogators is fully supported by the in the record. The government's arguments are without merit and the relief requested must be denied.

Standard of Review

The standard of review regarding a ruling on a motion to suppress evidence is abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (1995). Motions to suppress statements involve mixed questions of law and fact. Under such circumstances, the military judge abuses his discretion if "his findings of fact are clearly erroneous or his conclusions of law are incorrect" *Id.*; See also, *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. (2007). The facts, as found by the Military Commission, are binding on this Court, unless clearly erroneous.[7] [8]

A. The Military Judge Correctly Applied the Rules Applicable to Military Commissions Which Set Forth the Legal Standard that a Statement Produced by Torture Must be Suppressed

[7] "We have reviewed the military judge's factual determinations applying a highly deferential standard of review mandating that findings of fact not be disturbed unless they are 'clearly erroneous.'" *United States v. Khadr* CMCR 07-001 (2007) citing, *Amadeo v. Zant*, 486 U.S. 214, 223 (1988); *United States v. Cabrera-Frattini*, 65 M.J. 241, 245 (C.A.A.F. 2007).

[8] Accord, *State v. Forbes*, 900 A. 2d 1114 (R. I. S.Ct. 2005).

Mr. Jawad was tortured on 17 December 2002 within the definition of M.C.R.E. 304(b)(3) while in the custody of the Afghan authorities, as found by the Military Commission in Ruling D022. (Appellant's Exhibit C) The government did not appeal that ruling. Thus, the question of whether Mr. Jawad was tortured is now conclusively settled and is not before this Court. Therefore, this Court must focus its inquiry to the narrow issue of the whether the self-incriminating statements made to the U.S. authorities during an interrogation session from the night of 17 December into the early morning hours of 18 December 2002 at Forward Operating Base (FOB) 195 were the product of this indisputable torture. If the statements obtained were the product of torture, as the military commission found, then the statements must be suppressed. M.C.R.E. 304(a)(3).

The provision of the M.C.A. precluding the admission of statements obtained by torture is derived from Article 15 of the Convention Against Torture (CAT), a binding international treaty to which the U.S. is a party, and is intended to effectuate the United States' obligations under this treaty.[9] Article 15 of the CAT states:

> Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

The State Department has formally acknowledged to the United Nations Committee Against Torture that Article 15 of the CAT applies to all proceedings involving detainees at Guantanamo.[10][11] In the official U.S. response to questions asked by the Committee on May 5,

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[9] United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, signed on behalf of the United States by Deputy Secretary of State John C. Whitehead on April 18, 1988. The United States Senate ratified the CAT on 21 October 1994. The Convention entered into force for the United States on November 20, 1994.

[10] John Bellinger, Legal Advisor to the State Department, "United States Response to the Questions Asked by the Committee Against Torture," Q.42, May 5, 2006, available at: http://www.state.gov/g/drl/rls/68561.htm

2006, U.S. State Department Legal Advisor John Bellinger provided the following answer to the question of how Article 15 of the Convention was being applied to detainees at Guantanamo:

> Article 15 of the Convention is implemented in the Combatant Status Review Tribunal and Administrative Review Boards proceedings. Article 15 of the Convention is a treaty obligation of the United States, and the United States is obligated to abide by that obligation.[12]

Mr. Bellinger made it clear that Article 15 also applied to military commissions. Although the military commission in existence at the time was one created by executive order rather than by statute, the rule of evidence adopted for both forms of commissions is virtually identical. According to Mr. Bellinger:

> On Article 15, the United States would like to draw the Committee's attention to an important recent development with regard to the implementation of that article in military commission proceedings. On March 24, 2006, an instruction was adopted that provides that "the commission shall not admit statements established to have been made as a result of torture as evidence against an accused, except as evidence against a person accused of torture as evidence the statement was made."[13]

Language virtually identical to Article 15 of the CAT was included in the Military Commissions Act of 2006 (M.C.A.) to comply with the United States obligation under the CAT. The only major difference was that the words "made as a result of" were changed to "obtained by." The relevant portion of the M.C.A. states:

> "EXCLUSION OF STATEMENTS OBTAINED BY TORTURE.—A statement obtained by torture shall not be admissible in a military commission under this chapter except against a person accused of torture as evidence that the statement was made.

10 U.S.C. § 948r(b). This provision of the M.C.A. was incorporated into the Military Commission Rules of Evidence (M.C.R.E.) in Rule 304 which states: "A statement obtained by

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[11] Incredibly, but fully consistent with Appellant's pattern of failing to cite relevant legal authority, the CAT is not even mentioned in the Appellant's brief.
[12] United States Response to the Questions Asked by the Committee Against Torture, Q.42, *supra* note 10.
[13] *Id.*

use of torture shall not be admitted into evidence against any party or witness, except against a person accused of torture as evidence that the statement was made." M.C.R.E. 304(a)(1). The rule continues in a subsequent paragraph to explain that, "A statement produced by torture. . .may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule." M.C.R.E. 304(a)(3).

Having previously determined that Mr. Jawad had been tortured (a ruling not subject to review[14]) the task of the Military Judge in Motion D-021 was simply to determine if the statements sought to be introduced by the government were "a result of," "obtained by" or "produced by" this torture, in other words, whether there was some causal relationship between the torture and the confession.

Appellant attempts to mischaracterize the Ruling of the Military Commission and confuse the issues by selectively seizing on one of several legal conclusions embedded in the Ruling, focusing particularly on the commission's use of the word "tainted" to suggest that the commission applied a Constitutionally-based derivative evidence rule which does not exist in military commissions. Appellant Brief at 7. Specifically, the government relies on the following

[14] Appellant appears to be indirectly challenging the commission's finding of torture in by the Afghan authorities (Appellant Exhibit C) by suggesting that the commission improperly admitted and improperly relied upon a signed declaration of Mr. Jawad submitted by the defense (AE 106), and by making misleading claims of unfair surprise. The military judge was well within his discretion to admit and consider the signed declaration pursuant to M.C.R.E. 803(b)(1) and as a remedy for the government's failure to provide timely discovery, pursuant to R.M.C.701(l)(3). The government was well aware of Mr. Jawad's assertion that he had been tortured by the Afghan authorities and was specifically placed on notice by Defense Motion (Appellant Exhibit J) of the fact that the Afghan authorities had threatened to harm Mr. Jawad and his family. The government's claim that they were "lacking any ability to probe the validity of Mr. Jawad's assertions" is misleading. Despite several weeks to prepare for the suppression hearing, the government failed to arrange to have the appropriate witnesses attend the hearing or otherwise be available. The government had ample opportunity to rebut Mr. Jawad's account after it was offered into evidence, but simply failed to present any persuasive, admissible rebuttal evidence in a timely manner. The defense notes that the government offered and the commission admitted hearsay within hearsay testimony from U.S. agent, "Mr. E" based upon interviews through an interpreter conducted over 5 years ago, despite the fact that Mr. E had lost his notes of the interviews and the government failed to provide any contact information for the witnesses. Transcript at 727-729. As to both Mr. Jawad's declaration (AE 106) and the hearsay testimony, the Military Judge was competent to assess the credibility of each and give the evidence the appropriate weight.

statement: "The Military Commission concludes that the Accused's statements to the U.S. authorities were tainted by his earlier confession to the Afghan police." Appellant's Exhibit B at ¶ 5. This statement suggests that it was not the torture itself which was the basis for suppression, but rather the first confession. But, the commission made it clear in subsequent paragraphs that the existence of the first confession was not essential to his ruling and that the second confession was itself the product of torture.

> [T]he Military Commission concludes the effect of the death threats which produced the Accused's first confession to the Afghan police had not dissipated by the second confession to the U.S. government interrogator. In other words, the subsequent confession was itself the product of the preceding death threats.

Id. at ¶6. The words "which produced the Accused's first confession to the Afghan police" are superfluous. The critical words are: "the effect of the death threats. . .had not dissipated by the second confession" and "the subsequent confession was itself the product of the preceding death threats." These two conclusions are based on a straightforward application of M.C.R.E. 304. When an appropriate motion to suppress has been made at the trial court, "the prosecution has the burden of establishing the admissibility of the evidence." M.C.R.E. 304(e). "The military judge must find by a preponderance of the evidence that a statement by the accused comports with the requirements of this rule before it may be received into evidence." M.C.R.E. 304(e)(1)

Appellant's brief complains of having to overcome an unfair rebuttable presumption. The military commission did indicate that the confession was "presumptively tainted" and that the government must "overcome this presumption." However, a close reading of Commission's Ruling reveals that this presumption did not actually increase the government's evidentiary burden. Once the Defense motion was made to suppress the evidence under M.C.R.E. 304(a), the burden was on the government to establish the admissibility of the evidence under this rule.

M.C.R.E. 304(e). Admissibility would be established be proving by a preponderance of the evidence that a statement was not the product of torture. M.C.R.E. 304(e)(1). All the military commission did was hold the government to its burden: "the Government must demonstrate by a preponderance of the evidence intervening circumstances which indicate the coercion surrounding the first confession had sufficiently dissipated." Ruling D-021 ¶ 4.

The rule applied by the commission on the presumption of taint on subsequent confessions when torture or coercion is proven is supported by numerous American precedents going back 140 years. For example, in *Strady v. State*, 45 Tenn. 300, 309-310 (1868), the Supreme Court of Tennessee reversed a conviction on the grounds that confessions obtained by torture had been improperly admitted, citing the following as the "rule of law in such cases":

> [A]lthough the original confessions may have been obtained by improper means, yet, subsequent confessions of the same or of like facts, may be admitted, if the Court believe, from the length of time intervening, or from proper warning of the consequences of confessions, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confessions were obtained, were entirely repelled. In the absence of such circumstances, the influence of the motives proved to have been offered, will be presumed to continue and to have produced the confessions, unless the contrary is shown by clear evidence; and the confessions will, therefore, be rejected.

This basic formulation of the rule has been continuously applied, without deviation, in numerous U.S. courts.[15]

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[15] *See, e.g.*, *Burns v. State*, 61 Ga. 192 (1878) (after ruling the confessions of two defendants, aged 12 and 15, inadmissible due to brutal torture by the crowd that arrested them, the Georgia Supreme Court held that the defendant's subsequent and identical confession, made to a deputy sheriff and others while being transported to jail in another city, was inadmissible, ruling that the two young defendants had already suffered the agonies of the most brutal torture and the threats of those who inflicted the inhuman tortures were still ringing in the defendants' ears.); *Kokenes v. State*, 213 Ind. 476, 13 N.E.2d 524 (1938) (physical torture and punishment with threats of more to follow may so intimidate and influence the will through fear as to compel false testimony to be given out of the presence of the inquisitors; when it is shown that the defendant was tortured and brutally beaten for the purpose of making a confession, the defendant has sustained that burden of showing the incompetency of a confession and, in the absence of a clear showing that the coercive force no longer operated when such confession was made, the confession should be excluded. While there was no evidence that the defendant was beaten or threatened by the police officers who took his two confessions, it was undisputed in the present case that the defendant was cruelly beaten and tortured by police and that the defendant was threatened by a member of the police force at the very portals of the door where he gave his confession.); *Cavazos v. State*, 143 Tex. Crim. 564, 160 S.W.2d 260 (1942)

The real issue confronting this Court is what is meant by the words "obtained by" or "produced by" torture? These phrases must be considered synonymous with the phrase "as a result of" because, as previously noted, M.C.R.E. 304 is simply an implementation of Article 15 of the CAT and cannot be construed more narrowly than this binding treaty obligation. The phrase "as a result of" clearly implies that the Court must determine whether there is a causal connection between the torture and the statement. The Appellant offers a much stricter interpretation. According to the Appellant, the only statements which can be considered to be "obtained by" torture are when "the interrogator to whom it was made used torture to get it." (Appellant's Brief at 21) Under the government's logic, an analysis of whether a statement was obtained by torture cannot consider "actions that happened outside the particular interrogation that produced the statement." (Appellant's Brief at 21) In other words, under Appellant's interpretation, only statements obtained during the actual administration of torture are subject to suppression. Once the torture has stopped, even momentarily, according to Appellant, then any subsequent statement is not "obtained by use of torture." "[L]inking subsequent confessions, temporally or otherwise, to a previous confession made to different interrogators. . .simply does not fall within the meaning of 'obtained by use of torture.'" (Appellant's Brief at 21) If Appellant is to be believed, a statement made to a new interrogator in a different interrogation *by law* cannot be the product of torture in a preceding interrogation. Spatial and temporal proximity

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(reversing the defendant's conviction of murder based on improper admission of the defendant's purported confessions, the first of which allegedly resulted from physical and mental torture by law enforcement officers; the defendant's second confession was not admissible in evidence because the undisputed evidence showed that at the time the second confession was made, the defendant was still suffering from physical punishment previously administered and was laboring under fear that he would receive similar treatment unless he made his second confession in conformity with the first one. While there was no evidence of the defendant's mistreatment before he gave his second confession, the court declared that the manner and means by which the officers obtained the first confession rendered it inadmissible against the defendant and the burden rested on the state to show that the subsequent confession was not made while the defendant was laboring under the same influence which prompted him to make the first confession.) *See generally*, 16 A.L.R. Fed. 2d 257, *Admissibility of Evidence Procured by Torture or Alleged Torture—Global Cases.*

to torture are irrelevant, according to the Appellant, as are the lingering effects of the earlier torture. The government presents no authority for this position[16] and the absurdity and impracticability of such an argument is apparent. Indeed, every court to consider the question has assumed that statements after torture can be the product of torture and applied a causation analysis to determine if the statements in fact resulted from torture.

There is a recent federal case which is directly on point. Just like this case, in *United States v. Karake*, 443 F. Supp. 2d 8 (D.D.C. 2006), it was proven that the foreign defendants were tortured by agents of a foreign government, which produced self-incriminating statements, and then interrogated by U.S. agents in the foreign country shortly thereafter, which produced a second set of self-incriminating statements. In *Karake*, the torture was perpetrated by Rwandan officials in Rwanda on Rwandan citizens, just as the torture here was carried out by Afghan officials in Afghanistan on an Afghan citizen. The *Karake* court suppressed the statements made to U.S. law enforcement officials based on the coercion by Rwandan officials. The court found that the American had an "insurmountable problem" in proving that, between the confessions obtained at the Rwanda military camp and those made to American investigators at another location, there was a "clean break" sufficient to dissipate the previous coercion.

Just as Judge Henley did in this case, the D.C. District Court applied a totality of the circumstances analysis to the confession to the American agents:

> Thus, the ultimate inquiry into voluntariness is identical to that used for any confession: whether in making his statement, defendant's "will has been overborne and his capacity for self-determination critically impaired." *Schneckloth v. Bustamonte*, 412 U.S. 218 at 225 (1973). This is a totality of the circumstances test. *Id.* at 226; *see also Arizona v. Fulminante*, 499 U.S. 279 at 285-86 (1991); *Oregon v. Elstad*, 470 U.S. 298 at 318 (1985) ("As in any [voluntariness] inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the

[16] In this most critical paragraph of the entire brief, there is literally no authority cited. In a clear violation of their obligation to cite adverse precedent, the Appellant fails to cite the numerous cases which take the contrary view.

suspect" when considering the admissibility of a confession made after a prior inadmissible one.).

Drawing upon numerous Supreme Court and Circuit Court precedents, the court identified a number of facts and circumstances which are relevant to take into consideration, such as the length of time between the confessions: "As to the length of time between a previously coerced statement and a subsequent confession, the critical question was not the length of time between the two statements but the length of time between the removal of the coercive circumstances and the subsequent confession." *Id.* at 89. (citing *Lyons v. Oklahoma*, 322 U.S. 596 (1944)).

The court made clear that the effect of torture can carry over from one interrogation to the next: "Moreover, the court may take into consideration the continuing effect of the prior coercive techniques on the voluntariness of any subsequent confession." *Id.* at 87.

> "[T]he fact that the earlier statement was obtained from the prisoner by coercion is to be considered in appraising the character of the later confession. The effect of the earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary."[17]; *see also Lisenba v. California*, 314 U.S. 219, 240, 62 S. Ct. 280, 86 L. Ed. 166 (1941) ("The question of whether those confessions subsequently given are themselves voluntary depends on the inferences as to the continuing effect of the coercive practices which may fairly be drawn from the surrounding circumstances.") Whether effective *Miranda* warnings preceded the subsequent statements is also a relevant inquiry. *Westover v. United States*, decided together with *Miranda*, 384 U.S. at 496-97; *see also United States v. Daniel*, 932 F.2d 517, 519 (6th Cir. 1991); *Robinson v. Percy*, 738 F.2d 214, 221 (7th Cir. 1984). The purpose of these factors is to ensure that there exists a "break in the stream of events . . . sufficient to insulate the statement from the effect of all that went before." *Clewis v. State of Texas*, 386 U.S. 707, 710, 87 S. Ct. 1338, 18 L. Ed. 2d 423 (1967).

Other relevant factors that courts have considered (and which Judge Henley also considered) include whether the criminal defendant "remained in custody following the first confession and through the second, whether he was denied access to counsel, and whether he

[17] Quoting *Lyons v. Oklahoma*, 322 U.S. 596, at 603 (1944)

initiated contact with authorities before his second confession." *Holland v. McGinnis*, 963 F.2d 1044, 1050 (7th Cir.1992), citing *Robinson v. Percy*, 738 F.2d 214, 221 (7th Cir. 1984); *Holleman v. Duckworth*, 700 F.2d 391, 396 (7th Cir 1983), *cert. denied*, 464 U.S. 834, 78 L. Ed. 2d 116, 104 S. Ct. 116 (1983). *See also*, United States v. Lopez, 437 F.3d 1059 (10th Cir.2006); *United States v. Perdue*, 8 F.3d 1455 (10th Cir.1993); *Leon v. Wainwright*, 734 F.2d 770 (11th Cir.1984).

Another federal court faced with allegations of torture by agents of a foreign government, (in this case, Saudi Arabia) applied a similar totality of the circumstances analysis to that used in *Karake*, but ultimately found the torture allegations to be unsupported. The court found that the United States had met its burden by a preponderance of the evidence to demonstrate that the statements to U.S. agents in Saudi Arabia were free of the taint of torture. However, the court made it clear that:

> The Court has taken notice of the defendant's allegations of torture and, if it could fully credit the defendant's testimony, the Court would find that the defendant was, in fact tortured, and would rule that the resulting statements were involuntary. . .[T]he Court takes very seriously its duty and responsibility to ensure that statements and evidence obtained through torture find no place in the American justice system.

United States v. Abu Ali, 395 F. Supp 2d 338, 387 (E.D.Va 2005).

The commission followed a well-trod path in excluding the statements to the U.S. interrogators on the basis of the torture which preceded the statements, even though not personally inflicted by the U.S. interrogators. The logic of the approach used by Judge Henley is unimpeachable. Torture is an act intended to inflict severe physical or mental pain or suffering. M.C.R.E. 304(b)(3). Severe mental pain or suffering is defined as the "prolonged mental harm." caused by or resulting from, among other things, threats of imminent death or the threat that another person will be imminently subjected to death. M.C.R.E. 304(b)(3)(C) and (D). The law

recognizes that torture causes "prolonged mental harm." M.C.R.E. 304(b)(3). Indeed, the military commission found specifically "that the threat to kill the Accused and his family was intended to inflict severe physical or mental pain or suffering." Ruling D-022 ¶3. Consistent with this finding, it was appropriate for the commission to presume, absent a preponderance of the evidence to the contrary, that a self-incriminating statement made just a few hours later in a subsequent interrogation session was causally related to, or "the product of" this torture.

In analyzing the causal connection, the military commission relied on analogous Supreme Court precedent. The Supreme Court has stated that where there is "no break in the stream of events," statements made subsequent to initially illegal interrogations are not sufficiently "insulate[d]...from the effects of all that went before." *Clewis v. Texas*, 87 S.Ct. 1338, 1340 (1967). As a result, the Court in *Clewis* held that a confession obtained nine days after a coerced confession was also involuntary. Just as the commission did here, the Court engaged in a totality of circumstances analysis, finding of "substantial concern . . . the extent to which petitioner's faculties were impaired by inadequate sleep and food, sickness, and long subjection to police custody with little or no contact with anyone other than police." The Court was referring to an adult defendant, but noted that all these factors took on "additional weight" because the defendant had "only a fifth-grade education" and had "never been in trouble with the law before." *Id* at 1341.

Applying *Clewis*, the Tenth Circuit has held that the "'appropriate inquiry in determining the admissibility' of . . . [a] second confession is whether the coercion surrounding the first [confession] had been sufficiently dissipated so as to make the second statement voluntary." *United States v. Lopez*, 437 F.3d 1059, 1065 (10th Cir. 2006), citing *United States v. Perdue*, 8 F.3d 1455, 1467 (10th Cir. 1993). Although the Court was evaluating the effects of coercion

rather than torture, the analysis of the issue is directly on point. Applying the *Clewis* standard, *Lopez* held that the "coercion producing the first confession had not been dissipated" even though the "second confession came after a night's sleep and a meal, and almost twelve hours elapsed between confessions." *Id.* Another important factor identified by the court was that there was no indication that the interrogator or other police officers made statements to the defendant to "dissipate the coercive effect" of the earlier interrogation tactics used to illicit the first confession. *Id.* *Lopez* and *Clewis* are cases about coercion. Torture is more harmful than mere coercion and more likely to produce unreliable confessions. This fact was clearly recognized by Congress, which authorized statements produced by coercion to be admissible under certain circumstances (M.C.R.E. 304(a)(2), while banning statements derived from torture completely. M.C.R.E. 304(a)(1). Given the severe and long-lasting effects of torture, it was completely appropriate for the military commission to borrow the "presumption of taint" rule from the coercion context and apply the types of factors that the U.S. Supreme Court has deemed relevant to whether the taint has dissipated. "When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession." *Oregon v. Elstad*, 470 U.S. 298, at 310 (1985), citing *Westover v. United States*, 384 U.S. 478 at 494 (1966) and C*lewis v. Texas*, 386 U. S. 707 (1967).

The Appellant argues that the commission applied a "Constitutionally-based" exclusionary rule analysis, which was improper, in their view, because "alien unlawful enemy combatants"[18] do not have Constitutional rights, or at least not Fifth Amendment rights. Contrary to the view expressed by the government, there is precedent for applying Constitutionally-based due process

[18] Mr. Jawad has never been determined to be an "alien unlawful enemy combatant." A jurisdictional hearing scheduled to determine whether the government could prove Mr. Jawad's status as an AUEC was stayed indefinitely as a result of this interlocutory appeal.

rights to non-citizens interrogated by U.S. agents outside the U.S. – when those aliens are brought to the United States to face trial in a U.S. court. See, *United States v. Bin Laden*, 132 F. Supp 2d 168, 173-70 (S.D.N.Y. 2001); *United States v. Abu Ali*, 395 F. Supp 2d 338 (E.D.Va 2005); *United States v. Karake*, 443 F. Supp. 2d 8, 49 (D.D.C. 2006). However, despite the ample authority the commission had to apply a Constitutional analysis, the commission declined to do so. The military commission did not hold that the Constitution generally, or any specific Constitutional rights, applied to the accused, and made it clear that it was not relying on the Fifth Amendment.[19] Indeed, the military commission apparently rejected the defense argument in D-021 that the U.S. interrogators were required to provide a Miranda–style warning to Mr. Jawad (if they wished to use the statements produced in a U.S. court proceeding) and that his confession was *per se* inadmissible because of their failure to do so. Rather than relying on the Constitution itself, the military commission was simply applying the irrefutable logic of the Supreme Court, grounded in hundreds of years of common law, that interrogations do not occur in a vacuum, and courts must consider significant recent events in analyzing what may have caused a person to make a particular incriminating statement. See, *A v. Secretary of State for the Home Department*, 2005 UKHL 71, 19 BHRC 441 (HL 2005) (statements which are the product of torture are inadmissible in British Courts as a matter of centuries of common law and international law.)

Statements which were held to be the result of torture by persons other than the interrogators have been excluded in numerous cases. For example, in *People v. Berve*, 51 Cal. 2d 286, 332 P.2d 97 (1958), the California Supreme Court held that the trial court erred in ruling

[19] See Ruling, FN 5 "The Supreme Court's opinion in *Elstad* was based, in part, on the Fifth Amendment self-incrimination and warning requirements that were put in place in *Miranda v. Arizona*, 451 U.S. 471 (1966) as a practical reinforcement of those rights. While, in the case at bar, the Accused's self-incrimination protections are set forth in M.C.R.E. 301 and M.C.R.E. 304, a reasonably similar *Elstad* analysis is appropriate with regard to the admissibility of confessions allegedly the product of coercion."

that the confession of the defendant, who was convicted of second degree murder, was voluntary and admitting the confession into evidence at the defendant's trial in view of uncontradicted evidence showing that the defendant was subjected to violence and threats of death and violence against himself and his parents just hours before his confession to the police. The Court held that the prosecution must show that coercive conditions that once existed no longer prevailed at the time of the confession. The court concluded that the prosecution failed to show that the obvious coercive circumstances prior to the defendant's confession had ceased to exist in the defendant's mind at the time he uttered the confession. The court opined that the actual physical and psychological effects of the beating absorbed by the defendant were painfully fresh when he confessed, and that the psychological effect of the previous threats continued event though there was no threat of further violence by the police who took the confession.)

Similarly, in *State v. Whiteman*, 67 N.W.2d 599 (N.D. 1954), the North Dakota Supreme Court reversed the trial court's order denying the motion of a defendant who entered a plea of guilty to murder in the first degree to set aside the judgment of conviction and allow him to enter a plea of not guilty, holding that the defendant's confession, obtained shortly after he had been subjected to threats of torture, and coercion could not be accepted as a confession freely and voluntarily given. The defendant was questioned immediately after he was confronted and threatened by an angry mob. The first confession was obtained from the defendant the next day when, the court stated, the hatred, violence, and threats of torture were fresh in his mind. Four days later, the defendant signed a formal document called a confession which was in the exact language as the first degree murder charge filed against him except that the confession recited that it was freely made. The court declared that once having signed a confession (which the court did not believe was freely and voluntarily given since the defendant was still under the control

and influence of the police officers who had allowed him to be subjected to threats and physical violence) it became a question of fact whether the defendant was not still dominated at the time by the same influences that resulted in his first confession. Finding no evidence to the contrary, and stating that the same was true of the defendant's oral plea given in the trial court, the court ruled that the defendant's formal confession and his oral confession by plea of guilty before the trial court were presumptively the products of the same influence that brought the original confession. The court arrived at the conclusion that the improper treatment of the defendant prior to his formal confession, the acts of violence, threats, hostility, and atmosphere of hatred there exhibited and continuing until late in evening, continued to operate on the mind of the defendant to an extent which brought about his confession and constituted facts overreaching the free will and judgment of the defendant.

In sum, the military commission applied exactly the correct legal standard to the statements in question. The Court must decline the government's suggestion to apply a different rule. In Part 2 of their brief, Appellant invites this court to engage in a "totality of the circumstances" "interests of justice" analysis of the relevant statements pursuant to M.C.R.E. 304(c)(1). This test applies to statements allegedly produced by coercion. As the Appellant notes, M.C.R.E. 304 establishes a two-tiered system of analyzing statements. Statements which are the product of torture are *per se* inadmissible. M.C.R.E. 304(a). Statements which are alleged to be the product of coercion are subjected to further evaluation to determine their admissibility. M.C.R.E. 304(c).[20] The Military Commission made it clear that the Commission had not found it necessary to analyze the statements under the coercion test, and the commission therefore did not consider the totality of the circumstances surrounding the statements at issue:

[20] The defense does not concede the lawfulness of this provision of the M.C.R.E., but this issue is not before the Court.

> As the Military Commission finds the Accused's confession to the U.S. interrogator is tainted. . . it need not decide now whether. . . it should still be excluded because the totality of the circumstances does not render the statement reliable and the interests of justice would not be served by admission of the statement into evidence. See M.C.R.E. 304(c)(1).[21]

D-021 ¶ 7. Because the military commission did not make findings of fact and conclusions of law relative to this rule of evidence, there is nothing for this Court to review on appeal. This Court has no authority to make its own factual findings and conclusions of law before the trial court has had the opportunity to do so. If this Court believes that the military commission incorrectly applied M.C.R.E. 304(a)(1) and should have applied M.C.R.E. 304(c)(1) instead, the only recourse available to the Court is to remand to the military commission to apply M.C.R.E. 304(c)(1).

B. There Is More Than Sufficient Evidence in the Record to Support the Conclusion of the Military Commission that the Statements Made to U.S. Interrogators at FOB 195 Were the Product of Torture

Having determined that the military commission applied the correct legal test to the statements, the remaining task of the Court is to determine whether the findings of fact and conclusions of law are supported in the record. As discussed below, there is ample evidence to support the Military Commission's findings of fact and conclusions of law that the confession was the product of torture, particularly considering that the trial court is best able to judge the credibility of witnesses and weight to be given to the evidence. That is why the trial court's findings of fact are reviewed under a highly deferential "clearly erroneous" standard. Based on all the evidence, the Commission found that the fear and anguish caused by the death threats were still affecting the state of mind of Mr. Jawad at the time of his subsequent confession because the interrogation was close in space and time to the torture and there was no break in the chain or stream of events, or superseding cause which would have dissipated or counteracted the effects of the

[21] Ruling D-021 ¶ 7.

torture. The Commission appropriately engaged in a in a totality of the circumstances analysis and cited a variety of facts and factors that it considered. Each factor cited by the commission finds ample support in the record.

The first factor cited by the commission was Mr. Jawad's age and education. The age and education of the defendant are commonly considered factors in totality of the circumstances analyses. There is no question that the accused was a juvenile, as reflected in a variety of official U.S. government records that have been presented to the commission in conjunction with earlier motions. The interrogator himself noted that Mr. Jawad appeared to be a teenager of approximately 15 or 16 years. (Transcript p. 799, 970) The commission also was able to view nude photographs of Mr. Jawad taken on the day of capture and make its own assessment of Mr. Jawad's age. The commission also appropriately took into account Mr. Jawad's limited education. Facts concerning Mr. Jawad's limited education have been provided to the commission in conjunction with other motions, were recited in the Defense Motion, and were unrebutted by the government. The commission has also had the opportunity to hear Mr. Jawad testify and make a variety of comments, solicited and unsolicited, throughout the proceedings and is thus independently able to judge Mr. Jawad's level of sophistication. Closely related to the factors of age and education, is Mr. Jawad's lack of prior experience with law enforcement. The defense cited this factor in the defense motion. No evidence was adduced by the government to contradict the defense assertion that this was Mr. Jawad's first arrest.

The commission also noted that Mr. Jawad was under the influence of drugs and suffering from a lack of sleep. Mr. Jawad told the interrogator that he had been drugged. The commission was presented with testimony from LTC Darrel Vandeveld, the former lead trial counsel, that there was evidence which supported Mr. Jawad's account that he was drugged at

the time of the grenade attack. (Transcript p. 1040) The defense asserted that Mr. Jawad was under the influence of drugs in the defense motion and this was unrebutted by the government.

The fatigue and exhaustion of the person being interrogated are frequently cited factors in determining the admissibility of a confession. The interrogator testified that Mr. Jawad was obviously very tired (Transcript p. 1002). Ultimately, he had to stop the interrogation because he was too exhausted to continue. (Transcript p.1002) The interrogation did not even start until after 2300 at night and continued well into the early morning hours. (Transcript p. 987)

The commission also referred to the repeated and prolonged nature of the questioning. The evidence supports the commission's finding that Mr. Jawad was interrogated for several hours, shortly after being interrogated for several hours by the Afghan authorities. This interrogation took place late at night and continued until the early morning hours.

The commission noted the temporal proximity between the initial arrest and confession and the confession at the FOB. It is undisputed that the incriminating statements were made within hours of the initial arrest and torture.

Closely related to the previous factor is the fact that Mr. Jawad was in continuous custody and was hooded, handcuffed and blindfolded when the transfer of custody from the Interior Ministry to the FOB occurred. Mr. Jawad's interrogations were interrupted only by a brief trip from the Interior Ministry to the FOB and by a humiliating "medical exam" and nude photography session, after which the cuffs, hood and blindfold were placed back on the accused and the interrogation recommenced.

The commission noted that techniques to maintain the shock and fearful state associated with earlier capture and interrogation were used by the U.S. interrogators. The commission's conclusion that techniques designed to maintain the shock and fearful state associated with the

earlier capture and interrogation are fully supported by the testimony of the interrogator in the open session and by the interrogator and Major Montalvo in the closed session. (e.g. Transcript p. 986, 992) The Appellant emphasizes that the U.S. interrogators did nothing wrong and their interrogation methods were "textbook."[22] While the interrogation may have been consistent with the Army Field Manual, this fact is irrelevant for the purposes of determining whether the taint was dissipated. As *U.S. v. Karake* makes clear, unlawful acts by American interrogators are not a prerequisite for suppressing statements resulting from torture by a foreign government. The issue is not whether the techniques were lawful but rather whether they helped to dissipate the effects of the earlier torture.[23] Clearly they did not. In fact, as the interrogator freely acknowledged, the techniques employed were coercive. Transcript p. 975.

The commission also noted the absence of cleansing statement. Courts have held that a cleansing statement can purge the taint of earlier coercion. No such statement occurred here. Indeed, in dozens of subsequent interrogations, as noted in Defense Motion D-021, the accused has never again confessed to throwing a hand-grenade. This explains why the government stated on the record that they would not offer any statements from the accused made at either Bagram or Guantanamo. (Transcript p. 721) This was an admission by implication that there were no additional corroborating statements or cleansing statements available for the government to offer.

The commission commented on the U.S. interrogators general awareness of the earlier confession to the Afghan authorities. The military commission's conclusion that the U.S. authorities were generally aware that Mr. Jawad had made a confession to the Afghan authorities

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[22] The defense does not concede this point. In the defense's view, the nude photography session is clear example of humiliating and degrading treatment, in blatant contravention of the Geneva Conventions. While this mistreatment was not perpetrated directly by the interrogators, it is impossible to separate the acts of the American agents who conducted the photo shoot from the interrogation, which commenced immediately after the photos were taken.

[23] Absolutely nothing in the commission's ruling could reasonably be construed as a finding that the U.S. interrogators tortured Mr. Jawad. The government's assertion to the contrary is highly irresponsible and misleading. See, Appellant Brief FN 5 at p. 21.

is significant because it helps to explain why the U.S. interrogators did not accept Mr. Jawad's initial denial of involvement in the attack and why the interrogators were forced to use coercive techniques to extract the confession. The interrogators' belief that Mr. Jawad had perpetrated the attack affected the attitude of those involved in the interrogation of Mr. Jawad, including the Chaplain that the Commander determined needed to be assigned to help protect Mr. Jawad.

The commission also cited as a factor in the totality of the circumstances analysis "Change in locations and identities of interrogators." While in some cases, a change in location and change in interrogator may help to dissipate the taint of torture or coercion, in this case, the commission reasonably concluded that the change in location and change of interrogator did not do so. In fact, one could reasonably conclude that the change in location and change of interrogators actually increased the fear experienced by Mr. Jawad and ensured that the taint of torture was not dissipated. Mr. Jawad was threatened by the Afghans that he or his family would be killed. He was then turned over as a prisoner to members of a foreign armed military force, taken away in handcuffs with a hood over his head, and then accused by soldiers of attempting to murder two of their fellow comrades in arms, while surrounded by several other armed soldiers. It would be hard to imagine a more intimidating environment. From Mr. Jawad's perspective at the time, U.S. soldiers were invading foreign infidels. He was an uneducated Afghan tribal youth who grew up in the era of the Taliban, steeped in the local Islamic culture of anti-Western, anti-American propaganda. He had no idea what American soldiers were capable of, and feared the worst. He quite reasonably believed that the Afghan authorities had simply carried out their threat to kill him by turning him over to the enemy. Because he had been transported wearing a

hood and blindfold, he had no idea where he had been taken or if he would ever see his family again.[24] This is not the kind of change of scene that would dissipate the taint of torture.

Two other facts cited by the military judge are also significant. The commission noted that "He was not provided Afghan or American legal counsel or told that his statements to the Afghan police could not be used against him." In fact, Mr. Jawad was given no warning or rights advisement of any kind. While the commission did not hold that the accused was entitled to counsel or a rights advisement, the absence of a warning or an opportunity to consult with counsel is certainly a reasonable factor to be considered in determining whether there was a break in the chain of events that would have dissipated the taint of the earlier torture and previous confession. The absence of a rights advisement and lack of opportunity to consult with counsel has been repeatedly cited as an appropriate factor for consideration on the admissibility of a statement.

In conclusion, the commission properly concluded that the government failed to prove by a preponderance of the evidence that the taint of the earlier torture had dissipated at the time Mr. Jawad made further self-incriminating statements at the FOB. There is no question that Mr. Jawad was still in great fear during his interrogation at the FOB. The military judge made it clear that he was relying on the accused's own words, which he found to be credible (Appellant's Exhibit B, footnote 2), for example:

> When I got to the place the Americans took me, I was very scared. During the interrogation, I was trembling and very cold. At one point, while the hood was covering my face, they put a bottle of water in my hand and told me to hold on tight to it with both hands. I did not know that it was a water bottle at the time. In my mind, I thought that it was a bomb and might explode. . . .

[24] In fact, six years have now passed without seeing his family.

> I was so scared by the experience at the Afghan police station and by my experience with the Americans at the place they took me after the police station, that I had nightmares for several days after I got to Bagram prison.[25]

This passage reflects that Mr. Jawad was still experiencing the mental suffering of his earlier torture while he was undergoing interrogation at the FOB and that this suffering was exacerbated by his experience at the FOB. He was in extreme fear and believed that he might be killed. Mr. Jawad's testimony is completely credible and consistent with what might be expected from a teenage boy in his position. Indeed, Mr. Jawad's fearful state was corroborated by the interrogator himself (Transcript p. 806, cross-examination of GYSGT M – Q: Did he appear scared? A: Yes, Sir.) (See also, Transcript p.977, 990) The Physician's Assistant who examined Mr. Jawad just prior to his interrogation at the FOB also noted Mr. Jawad to be "nervous" (Transcript p. 862, line 7).

Conclusion

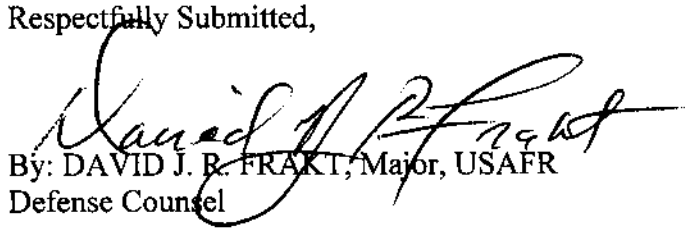
In conclusion, the military judge properly applied considered the totality of the circumstances and concluded that the statements to U.S. interrogators were the product of the earlier torture within the meaning of M.C.R.E. 304(a) because the effect of the torture had not dissipated. The burden was properly placed on the government and the government failed to meet their burden. The overwhelming weight of the evidence supports the commission's conclusion. The findings of fact are not clearly erroneous and the commission did not abuse its discretion in suppressing the statements in question.

[25] Declaration of Mohammed Jawad, dated 26 September 2008. AE 106.

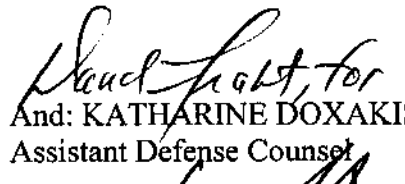
Prayer For Relief

Appellee respectfully requests that this Court affirm the 19 November 2008 Ruling of the military commission below.

Respectfully Submitted,



By: DAVID J. R. FRAKT, Major, USAFR
Defense Counsel



And: KATHARINE DOXAKIS, LCDR, JAGC, USN
Assistant Defense Counsel

And: ERIC MONTALVO, MAJ, JAGC, USMC
Assistant Defense Counsel

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MOTION FOR ORAL ARGUMENT

Pursuant to CMCRR Rule 17, Appellee respectfully moves for oral argument on the following issues presented:

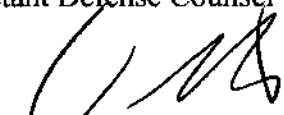
1. DID THE MILITARY COMMISSION APPLY THE CORRECT LEGAL STANDARD IN SUPPRESSING STATEMENTS MADE TO U.S. AUTHORITIES AT FOB 195 AS THE PRODUCT OF TORTURE PURSUANT TO M.C.R.E. 304(a)(1)?

2. ARE THE MILITARY COMMISSIONS' FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTED BY THE RECORD?

Respectfully Submitted,

By: DAVID J. R. FRAKT, Major, USAFR
Defense Counsel

And: KATHARINE DOXAKIS, LCDR, JAGC, USN
Assistant Defense Counsel



And: ERIC MONTALVO, MAJ, JAGC, USMC

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CERTIFICATE OF COMPLIANCE WITH RULE 14(i)

1. This brief complies with the type-volume limitation of Rule 14(i) because:

   This brief contains 11177 words

2. This brief complies with the typeface and type style requirements of Rule 14(e) because:

   This brief has been prepared in a monospaced typeface using Microsoft Office Word 2003 with 12 characters per inch in Times New Roman font.

DAVID J. R. FRAKT
Major, USAFR
Defense Counsel
Dated: 15 December 2008

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was e-mailed to this Court and Lt Col Douglas M. Stevenson, Trial Counsel, on 15 December 2008.

DAVID J. R. FRAKT
Major, USAFR
Defense Counsel
Dated: 15 December 2008