

	)	IN THE COURT OF MILITARY
	)	COMMISSION REVIEW
)	
UNITED STATES,	)	REPLY BRIEF ON BEHALF OF
	)	APPELLANT
Appellant,)	
	)	C.M.C.R. Case No. 08-004
v.)	
	)	Interlocutory Appeal from the
	)	19 November 2008 Ruling of the
MOHAMMED JAWAD	)	Military Judge on the Defense
a/k/a "Amir Khan"	)	Motion to Suppress Out-of-Court
a/k/a "Mir Jan"	)	Statements By the Accused Made
a/k/a "Sakheb Badsha,"	)	While in U.S. Custody, D-021
)	
Appellee.)	
	)	Presiding Military Judge
	)	Colonel Stephen R. Henley

**TO THE HONORABLE CHIEF JUDGE AND JUDGES OF THE COURT OF
MILITARY COMMISSION REVIEW**

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This reply brief is timely filed under Court of Military Commission Review Rules of Practice (C.M.C.R.R.) 7 and 14(c)(1). The appellee's brief was filed on 15 December 2008.

ARGUMENT

The appellee argues both that the Military Judge did not in fact apply a presumption of taint and that he correctly did do so. Neither argument finds support in the record or the law. The Military Judge clearly applied a presumption as shown by the plain language of his ruling, and his doing so was without legal basis. Despite the appellee's arguments to the contrary, a straightforward application of the correct, totality-of-the-circumstances test does not support the legal conclusion that the appellee's confessions at Forward Operating Base (FOB) 195 were obtained by torture. The commission's ruling is therefore in error and should be reversed.

1. Standard of Review

This Court reviews the commission's conclusions of law *de novo*. See *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995) ("In reviewing a military judge's ruling on a motion to suppress, we review fact finding under the clearly-erroneous standard and conclusions of law under the *de novo* standard."). While the *Ayala* decision, cited by the appellee, labeled the overall review standard in motions to suppress as "abuse of discretion," a careful reading of that case reveals that the *de novo* standard of review applies to questions of law. Accord *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) ("[A]ny ruling based on an erroneous view of the law . . . constitutes an abuse of discretion."); *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995) (citing Childress & Davis, 2 Federal Standards of Review § 11.10 at 11-41) ("We will reverse for an abuse of discretion if the military judge's findings of fact are clearly erroneous or if his decision *is influenced by an erroneous view of the law*" (emphasis added)).

In the case *sub judice*, the question of whether the Military Judge correctly applied a “presumption of taint” is a purely legal question that this Court reviews *de novo*. Further, as noted in our opening brief, the question of the voluntariness of a confession is also a legal question reviewed *de novo*. See *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991) (voluntariness of a confession is a question of law requiring independent determination by appellate court); *United States v. Minares-Alvarez*, 264 F.3d 980, 984 (10th Cir. 2001) (citations omitted) (“We review *de novo* the ultimate issue of whether a statement was voluntary, taking into account the totality of the circumstances surrounding the confession.”).

2. Whether the Military Judge Applied a Presumption

Despite the appellee’s contention that the Military Judge did not apply a presumption of taint, the 19 November 2008 Ruling itself explicitly states, “Where a confession is obtained after an earlier interrogation in which a confession was acquired due to actual coercion or duress, the subsequent confession is *presumptively tainted* as a product of the earlier one.” Exhibit A at 3 (emphasis added). The ruling then states that the government must “overcome this presumption” by evidence of intervening circumstances. *Id.* Given that the Military Judge explicitly stated he was employing a presumption, it is fanciful to conclude the Military Judge simply ignored the standard he took pains to set out. Finally, we note that the Military Judge amended his original ruling to expand footnote 5, which initially only cited *Oregon v. Elstad*, 470 U.S. 298 (1985), in support of his use of a presumption. See Exhibit B at 3 n.5. In revising footnote 5 in the amended ruling, the Military Judge did not reject the use of the presumption, but rather explained why he believed it was appropriate to use it. See Exhibit A at 3 n.5.

Thus, there can be no doubt the Military Judge applied a presumption. Because the Military Judge employed this presumption, rather than rely on the rules Congress and the

Secretary of Defense laid out in 10 U.S.C. § 948r and M.C.R.E. 304, one can only conclude that in doing so, he was *adding* to those rules. Because he had no legal basis to do so, he erred as a matter of law.

3. Whether Application of the Presumption Is Legally Permissible

As to the appellee's argument that such a *sua sponte* addition to the commissions rules is legally permissible, the government rests on its initial brief on the inapplicability of constitutional due process precedents, and offers the following thoughts on the appellee's citation to the common law. The government agrees that U.S. civilian courts have had occasion through the years to determine whether confessions were procured by torture or other forms of coercion. Indeed, in addition to the cases the appellee cites in which statements have been suppressed, courts have also repeatedly admitted statements into evidence, even under allegations of torture, where the statements were determined to have been voluntarily made. *See generally* 16 A.L.R. Fed. 2d 257 (2008). Reference to common law precedents on either side of the issue, however, is not very helpful when those precedents have been formally preempted by statute or other applicable rules. Once legislative enactments and rules promulgated pursuant to those enactments have taken the field, the statutory framework they create, not the common law, controls.

The issue of statutory preemption is particularly relevant where the historical common law precedents are inconsistent with the more recent statutory framework. In the military commissions context, 10 U.S.C. § 948r and M.C.R.E. 304 were created specifically to provide the framework under which to analyze situations involving self-incrimination by alien unlawful enemy combatants. Contrary either to constitutional or common law precedents, this framework explicitly provides that statements made under circumstances where the existence or degree of

coercion is in dispute may be admitted so long as they are reliable and probative, and their admission is warranted by the interests of justice. M.C.R.E. 304(c). To rely on common law precedents that have been specifically preempted by statute and regulation in this manner therefore makes little sense.¹

Secondly, the common law precedents pointed to by the appellee are state court precedents, decided in civilian proceedings against criminal defendants, not in military commission proceedings against alien unlawful enemy combatants. As argued in our original brief, the law has long recognized the differences between alien enemy combatants charged with crimes before military commissions and ordinary civilian criminal defendants charged before civilian courts. *See generally Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Ex Parte Quirin*, 317 U.S. 1 (1942); Brief of Appellant at 13-18. Similarly, to the extent federal courts have addressed issues of torture and coercion, their rulings' precedential value must be placed in the context of Article III criminal proceedings, not military commission prosecutions of alien unlawful enemy combatants.²

The appellee cites the recent federal district court opinion in the case of *United States v. Karake*, 443 F. Supp. 2d 8 (D.D.C. 2006), and describes it as "directly on point." Although the appellee is mistaken in that view, the case is nevertheless instructive for a number of reasons. The *Karake* defendants were Rwandan nationals charged in a U.S. federal court with offenses

¹ It is also specifically prohibited by the M.C.R.E., whose very terms limit applicability of secondary sources such as the rules of evidence at common law to the extent to which they are not inconsistent with the M.C.A., M.C.R.E., or other governing regulations. *See* M.C.R.E. 101(b).

² The appellee is incorrect to suggest that he is not an alien unlawful enemy combatant because a hearing on his jurisdictional challenge has not yet been held. Brief of Appellee at 19 n.18. Pursuant to this Court's decision in *United States v. Khadr*, C.M.C.R. 07-001 (24 Sept. 2007), the military commission below has prima facie jurisdiction over the appellee until personal jurisdiction is successfully challenged. *Id.* at 21. As that jurisdiction has not been successfully challenged, the appellee's status as an alien unlawful enemy combatant, as alleged in the charge sheet, exists for purposes of all commission proceedings, including the instant appeal before this Court.

relating to the killing of American tourists in Rwanda in 1999. F.B.I. agents participated, along with Rwandan authorities, in interrogating the defendants during their long detention at a Rwandan military camp. The court found the defendants were subjected to “countless hours of repetitive questioning over a period of many months, during which time they were subjected to periods of solitary confinements, positional torture, and repeated physical abuse.” *Id.* at 94. In concluding that almost all of the defendants’ confessions to U.S. and Rwandan authorities were coerced, the district court applied Fifth Amendment due process precedents and, as an aspect of that analysis, specifically found the defendants had not knowingly and intelligently waived their *Miranda* rights. *See id.* at 93-94.

Even on this very basic description of the case’s facts and holding, the differences between *Karake* and the case at hand are legion. The *Karake* defendants were criminal suspects, not enemy combatants. The *Karake* court applied a Fifth Amendment due process analysis, which, as outlined in our original brief, should not be applied to alien unlawful enemy combatants captured abroad, facing charges before a military commission, with no connection to the United States other than their detention and previous alleged attacks against the United States, its forces, citizens, and interests. Importantly, even employing a constitutional due process analysis, the *Karake* court did not *presume* taint in determining whether the coercion by the Rwandan authorities was sufficiently attenuated to make the defendants’ confessions to U.S. authorities voluntary; rather, the court simply employed a straightforward totality-of-the-circumstances analysis. *See Karake*, 443 F. Supp. 2d at 86-87. Finally, in determining that the defendants’ subsequent confessions to U.S. authorities were not sufficiently attenuated from the coercive conduct of the Rwandan authorities, the district court placed great weight on the following factors: (1) the U.S. interrogations were conducted while the suspects remained in

Rwandan detention at the same Rwandan camp; (2) the U.S. interrogations often occurred in the presence of four or more of the same Rwandan interrogators; and (3) at least some of the defendants continued to be beaten between these interrogations. In sum, the court found that there was no appreciable change in the defendants' conditions or circumstances during which they originally confessed to the Rwandan authorities. *See id.* at 87-89. None of these factors is present here, where the accused was transferred into the custody of U.S. authorities at a U.S. base; interrogated solely by U.S. interrogators; and not beaten, threatened, or mistreated in any way during his interrogations there.

The other federal district court case the appellee relies on, *United States v. Abu Ali*, 395 F. Supp. 2d 338 (E.D. Va. 2005), also supports the government's position. In *Abu Ali* the defendant, a U.S. citizen, had been arrested and held by Saudi Arabian authorities, by whom he was allegedly whipped, slapped, kicked, subjected to sensory deprivation, interrogated excessively, and chained in uncomfortable positions for long periods. *See id.* at 343. Even though the defendant testified extensively under oath about his alleged mistreatment, the district court found the denials of mistreatment by the Saudi detention facility officials to be more credible, and concluded that the weight of the evidence did not support the defendants' claims. *See id.* at 373-75. In this assessment, as was the case in *Karake*, the judge did not apply a "presumption of taint," but rather, simply assessed the confessions at issue under a straightforward totality-of-the-circumstances test. *Id.* at 372-73.

To summarize, the government's position is not that the appellee's previous confession to, and alleged treatment by, the Afghan authorities cannot or should not be considered. Rather, the circumstances of the appellee's earlier confession to the Afghan authorities are merely factors among the universe of factors that should be taken into account in assessing his

subsequent confessions to U.S. authorities under the totality of the circumstances, which is the proper test under M.C.R.E. 304(a).³ Neither the law nor the rules create a *presumption* that the later confessions given at FOB 195 were obtained by torture, and the Military Judge erred as a matter of law in applying such a presumption.

4. Whether the FOB Confessions Were Obtained By Torture

On the ultimate question of whether the appellee's confessions at FOB 195 were "obtained by use of torture," the appellee would have this Court ask "whether there was some causal relationship between the torture and the confession," Appellee Brief at 11, a test the appellee arrives at only by reaching outside of the language both Congress and the Secretary chose to employ under the M.C.A and the M.C.R.E., respectively. The appellee's test has the distinct ring of a derivative evidence rule, which, as outlined in our original brief, is precisely what the simple "obtained by" language was crafted to avoid. Simply put, if Congress or the Secretary had wanted to enact the broader sweep of a derivative evidence rule, they could easily have done so by writing "derived from" (as in M.R.E. 304), rather than simply "obtained by," torture.⁴ That they specifically chose not to adopt M.R.E. 304's broader language in this regard in either the M.C.A. or the M.C.R.E. is significant to understanding legislative and executive intent on this issue.

³ As noted in our opening brief, we believe the military judge's ruling regarding the appellee's confession to Afghan authorities was also erroneous. The appellee's suggestion that the Government's decision to forego an appeal of that ruling somehow transforms its underlying issues into "conclusively settled" and "indisputable" facts is simply incorrect. For purposes of the present appeal, this Court is not bound by the commission's ruling in that initial suppression order. To the contrary, to the extent findings were made regarding earlier confessions and those findings affected the military judge's ruling from which we now appeal, those findings are relevant for consideration here by this Court.

⁴ Indeed, in the appellee's view, M.C.R.E. 304(a) "ban[s] statements *derived from* torture," Appellee Brief at 19 (emphasis added), which is not the language the rule actually uses. The government does not share the appellee's view that the words "obtained by" and "derived from" mean the same thing, and neither should this Court.

The appellee maintains that the government cites no authority for employing a narrower test, when in reality the government points to the best authority available: the text, history, and intent of the rules themselves. Given that the test for “torture” is a much higher threshold than the test for coercion, does it not make sense to construe the “obtained by” language in M.C.R.E. 304(a) more narrowly than the broader coercion provisions of M.C.R.E. 304(c), and treat any “gray areas” of causation under the M.C.R.E. 304(c) coercion analysis? Given that the text of 10 U.S.C. § 948r and M.C.R.E. 304 both take pains to set out this dual structure for the analysis, such an interpretation would seem eminently more suited to effecting the intent behind the rules Congress and the Secretary crafted.

For this reason, if there is any question about the lingering effects of conduct engaged in during a previous interrogation, whether torture or not, that question is best and most appropriately analyzed under M.C.R.E. 304(c), not M.C.R.E. 304(a). Hence, not only did the Military Judge err by using an invalid legal presumption, but he compounded that error by using it to analyze the admissibility of the U.S. statements under M.C.R.E. 304(a) rather than M.C.R.E. 304(c). Application of a straightforward totality-of-the-circumstances test would, by contrast, as outlined in our original brief, yield a completely different result under M.C.R.E. 304(a). That result would, at the very least, push the analysis over to M.C.R.E. 304(c) to determine whether the subsequent confessions were nevertheless inadmissible under the disputed coercion analysis (e.g., because they were not reliable or probative).

The importance of the dual framework for the analysis is clearly demonstrated on the facts of this case. It was due in no small part to this basic understanding of the rules, in addition to the late notice of the accused’s unsworn statement, that the government (as well as the appellee) did not vigorously brief or argue M.C.R.E. 304(a) with respect to the FOB statements,

until the Military Judge raised the issue *sua sponte* during oral argument and requested follow-up briefing on the issue. *See generally* Exhibits H, I; Transcript at 1006-33. Even then, the government could not have predicted that the commission would employ a legal presumption, culled from somewhere beyond the commissions rules, to the M.C.R.E. 304(a) analysis and simply bypass M.C.R.E. 304(c) entirely.

The consequences of applying the presumption are not insignificant, particularly when the FOB interrogation is assessed under the straightforward, totality-of-the-circumstances test contained in the rule. To reply to the appellee's arguments that the FOB confessions should nevertheless be suppressed under this test, a number of observations are in order. First, the appellee makes several factual assertions that are not supported in the record. The appellee argues repeatedly that the photos taken at the time of the accused's physical examination should be construed as humiliating and degrading treatment, when the unrebutted testimony from the physician's assistant who conducted the exam was that they were taken specifically for medical examination purposes, "to document any physical findings we found or did not find." Transcript at 859. The photos themselves do not indicate otherwise. *See* A.E. 103.⁵

Nor does the record support that the accused was under the influence of drugs during his interrogation at FOB 195. While an Afghan official did note that the accused initially appeared to be under the influence of something during the Afghan interrogation, the same official also stated that the effects gradually appeared to wear off, prior to the accused's transfer to U.S. custody. *See* Transcript at 870-71. The FOB interrogator, Gunnery Sergeant (GySgt) M, stated that the possibility of the accused being under the influence of drugs had indeed come up during the planning process for the FOB interrogations. *See* Transcript at 813. However, when asked

⁵ The appellee's attempt to transform the standard procedure of photographing captured enemy combatants into some form of mistreatment that can be calculated into a torture inquiry should be soundly rejected.

specifically whether he was able to identify any signs that the accused was under the influence of anything during the actual interrogations at the FOB, GySgt M stated that, while he felt unqualified to say for sure, “[n]othing stood out in my mind.” Transcript at 820. The most likely place one would expect to find specific information about drug influence or impairment during the FOB interrogations is in the accused’s own unsworn declaration. A.E. 106. Had the accused actually testified at the motions hearing, and been subject to cross-examination regarding the circumstances of the FOB interrogations, this topic would certainly have been covered very thoroughly by both sides. The declaration, however, contains no information on this issue. *See id.*

The declaration also contains very little information to support the appellee’s broad speculations about the accused’s inner thoughts and perspective regarding being turned over to the U.S. authorities at FOB 195. *See* Appellee Brief at 27-28. One can easily imagine that, having been caught participating in a grenade attack against U.S. forces earlier that day, the accused might well have been apprehensive about being turned over to U.S. custody. But whether the anxiety inherent in a captured enemy combatant translated into the appellee’s assertions that he “reasonably believed” he was going to be killed by the U.S. authorities at FOB 195 is quite another matter, finds scant support in the record, and is wholly contradicted by his actual treatment at the FOB.⁶

As for the appellee’s assertion of a lack of corroboration for the accused’s confessions at the FOB, it is difficult to imagine an assertion with less support in the record. First, the record is clear that the accused was apprehended at the scene of the attack, mere moments after the

⁶ Again, had the accused actually provided limited-purpose testimony regarding these issues, as specifically provided for under the rules, the parties might have been able to develop a more detailed, factual basis for assessing such claims than what the accused’s two-page, unsworn declaration allows.

grenade exploded into the victims, and that he was captured in possession of hand grenades. *See* A.E. 91 at 4-7; Transcript at 866-68. More importantly, two Afghan Military Force soldiers who assisted in apprehending the accused at the scene specifically told the U.S. Criminal Investigative Task Force investigator that *they saw the accused throw the grenade into the vehicle*. *See* Transcript at 866-68. That the accused may have subsequently backtracked from his original confessions, at least to the extent of claiming someone else threw the grenade, in no way undermines the corroboration in the record for his earlier statements.

Finally, perhaps the most significant factor that the appellee overstates is the extent to which the accused's confessions at the FOB were produced by actual coercive treatment during his interrogations there. The unrebutted testimony of the trained military interrogator, GySgt M, is crucial on this point. *See generally* Transcript at 792-824, 989-1003. While GySgt M is forthright in describing the initial phase of the interrogation as being designed to reproduce the shock of capture, it is clear from his testimony that he did not seek, and the accused did not make, any incriminating statements during this brief period, during which time essentially all that was determined was that the accused did not speak English. *See* Transcript at 992-93. To the contrary, GySgt M testified that it was only much later, after several breaks had been taken, after the tone of the interrogation had become calm and conversational, after the accused had become more relaxed and no longer appeared fearful, and a rapport had been established, that the accused admitted throwing the grenade. *See* Transcript at 992-96.⁷

Under trying circumstances, in a combat zone in a foreign country, after U.S. forces had been attacked and severely injured, the FOB 195 personnel, and GySgt M, in particular,

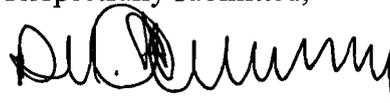
⁷ As to the appellee's contention that this was not a legitimate, "textbook" military interrogation, compare GySgt M's description of the methods and techniques he employed with the operative Department of the Army Field Manual (FM 34-52) on Intelligence Interrogation (1992), Chapter 3.

maintained their professionalism and sought to protect our forces from further attacks by developing actionable military intelligence in the proper manner. With all the attention that has been focused on instances in which U.S. forces may not have conducted themselves appropriately in their treatment of detained personnel, this certainly is not one of them. Hence, of all things, to apply the moniker of “torture” to the confessions the accused made during his interrogations at FOB 195, considering the totality of the circumstances under which he actually gave them, is wholly undeserved and unfounded. It also constitutes error as a matter of law.

Conclusion

Congress and the Secretary of Defense took great pains to develop and implement a constitutionally permissible framework for analyzing the statements of alien unlawful enemy combatants made under precisely the sort of circumstances presented here. The framework that Congress and the Secretary set out under the M.C.A. and M.C.R.E. does not apply a presumption of taint to all subsequent confessions where an earlier statement is determined to have been obtained by torture. Rather, the rules require a straightforward analysis of the totality of the circumstances under which the subsequent confessions were made. Given the record in this case, it is clear that the Military Judge found a basis to exclude the accused’s confessions at the FOB only by applying an invalid presumption in his analysis. This Court should therefore reverse the commission’s decision, render clear guidance on this issue for this and other commissions, and take such further action as it deems appropriate under the circumstances of this case.

Respectfully submitted,



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A handwritten signature in black ink, appearing to read "A. L. Gaston III", with a stylized flourish at the end.

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MOTION FOR LEAVE TO FILE REPLY BRIEF

Due to the complex nature of this appeal, and the issues raised by the appellee which merit a reply, pursuant to C.M.C.R.R. 14(c) and (k), the Government respectfully moves this Court for leave to file the foregoing Reply Brief.

Respectfully submitted,



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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 4,123 words.

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

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Dated: 22 December 2008

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was e-mailed to David A. Frakt, Maj, USAF, Detailed Defense Counsel, on this 22nd day of December, 2008.

A handwritten signature in black ink, appearing to read "D.M. Stevenson", with a circular flourish at the end.

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