UNITED STATES OF AMERICA, Appellant	))))))))))))))))))	IN THE COURT OF MILITARY COMMISSION REVIEW APPELLEE'S MOTION TO DISMISS APPELLANT'S INTERLOCUTORY APPEAL CASE No. 08-003
v.		
		Hearing held at Guantanamo Bay, Cuba on 13 August 2008 before a Military Commission
OMAR AHMED KHADR, Appellee		Convened by MCCO # 07-02 Presiding Military Judge Colonel Patrick A. Parrish DATE: 17 September 2008

TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

Relief Sought

Appellee, Omar Ahmed Khadr, respectfully requests that this Honorable Court dismiss the Appellant's appeal in the above-captioned case for lack of jurisdiction.

Facts

The facts necessary to resolve this motion are set forth in the parties' briefs in connection with Appellant's appeal.

Argument

I. The Appeal is not properly before this Court because the disputed ruling below did not terminate the proceedings with respect to a charge or specification.

The ruling on review did not terminate proceedings of the military commission with respect to a charge or specification. Accordingly, there is no jurisdictional basis for the

government's interlocutory appeal. *See* 10 U.S.C. § 950d(a)(1). The Specification of Charge III, as originally preferred, read in pertinent, part as follows:

> In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from at least June 1, 2002, to on or about July 27, 2002, conspire and agree with Usama bin Laden, Ayman al Sawahiri, Sheikh Sayeed al Masri, Saif Al Adel, Ahmed Sa'id Khadr (a/k/a Abu Al-Rahrnan Al-Kanadi), and various other members and associates of the al Qaeda organization, known and unknown; *and willfully join an enterprise of persons, to wit: al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the USS COLE in October 2000, the attacks on the United States;* said agreement *and enterprise sharing a common criminal* purpose known to the accused to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; and terrorism .

(Charge Sheet, Appellant's Appx., Ex. J (emphasis added).) The italicized "enterprise" language was stricken as a result of the Military Judge's 4 April 2008 order granting the defense motion to strike. The government subsequently moved to reconsider, requesting not only reconsideration of the Military Judge's ruling on the "enterprise theory," but requesting restoration of language alleging that Mr. Khadr knew of the unlawful purpose of the agreement, and therefore sufficient to restore the viability of the charge and specification on what the Appellant calls the "agreement theory" of conspiracy (i.e., the actual offense of conspiracy). (Gov't Mot. for Reconsideration, Appellant's Appx., Ex. B.)

While denying the request to reconsider the enterprise issue, the Military Judge granted the government's motion to add language relating to knowledge. (Ruling on Gov't Mot. for Reconsideration, Appellant's Appx., Ex. A.) As a result, after Judge Parrish's 14 August 2008 ruling on Appellant's Motion for Reconsideration, the same specification reads as follows:

> In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from at least June 1, 2002, to on or about July 27, 2002, conspire and agree with Usama bin Laden, Ayman al Sawahiri, Sheikh Sayeed al Masri, Saif Al Adel, Ahmed Sa'id Khadr (a/k/a Abu Al-Rahrnan Al-Kanadi), and various other members and associates of the al Qaeda organization, known and unknown; said agreement <u>concerning an unlawful</u> purpose known to the accused to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; and terrorism.

(*See* Gov't Mot. for Reconsideration, Appellant's Appx., Ex. B, n.6, and Ruling on Gov't Mot. for Reconsideration, Appellant's Appx., Ex. A.) Pursuant to the Military Judge's ruling, the enterprise language (italicized text above) remained stricken from the Specification while the erroneously stricken knowledge language pertaining to the agreement theory of liability (underlined text above) was reinserted. Charge III therefore remains a viable charge and proceedings have terminated neither with respect to the charge nor its sole specification.

Accordingly, there is no jurisdiction over this appeal. The interlocutory appeal provisions of the MCA do not authorize an appeal in circumstances such as those presented here, where the ruling of which review is sought terminates only a "part" of the charge or specification. MCA § 950d(a)(1), the provision upon which Appellant premises its appeal, states:

> (a) INTERLOCUTORY APPEAL. – (1) Except as provided in paragraph (2)[1], in a trial by military commission under this chapter, the United States may take an interlocutory appeal to the Court of Military Commission Review of any order or ruling of the military judge that – (A) terminates the proceedings of the military commission with respect to a charge or specification;

[1] MCA § 950d(a)(2), which precludes the United States from appealing a ruling that amounts to a finding of not guilty, is not implicated here.

MCA § 950d(a)(1) (footnote added).

The striking of the enterprise language did not have the effect of terminating the proceedings of the military commission with respect to a charge or specification – a necessary condition in order to trigger the jurisdiction of this Court over the Appellant's interlocutory appeal. The conspiracy offense may still be proven via what the Appellant refers to as the "agreement theory" of liability. The fact that Appellant can no longer use its preferred "enterprise theory" is not a sufficient jurisdictional basis for interlocutory appeal under MCA § 950d(a)(1)[2] because the disputed rulings have plainly *not* terminated the proceedings with respect to a charge or specification.

Military commission proceedings, including proceedings relating to Charge III, are ongoing, and the government has at no time claimed that the effect of the Military Judge's order striking the enterprise language from Charge III precludes it from going forward on this charge. Indeed, by seeking to restore language properly alleging the elements of conspiracy, i.e., that Mr. Khadr knew of the unlawful purpose of the agreement, the government appears to have gone out of its way to maintain the viability of Charge III notwithstanding the Military Judge's ruling on enterprise liability. Thus, there is simply no basis on which to invoke the Court's jurisdiction under § 950d(a).

This conclusion is strengthened by ample precedent holding that "statutes that authorize Government appeals, as well as regulations and appellate court rules implementing them, are strictly construed and enforced." *United States v. Santiago*, 56 M.J. 610, 612-13 (N-M. Ct. Crim. App. 2001). As the same court previously observed in the course of dismissing another

[2] Though Appellant does not invoke them, the other two jurisdictional bases for interlocutory appeal, MCA § 950d(a)(2) and (3), would be equally inapposite here because the rulings below neither exclude evidence that is substantial proof of a fact material in the proceeding nor relate to closure of proceedings, exclusion of the accused from proceedings, or the protection of classified information.

government appeal due to an untimely filing of the record, statutes authorizing prosecution interlocutory appeals "are construed strictly against the right of the prosecution to appeal." *United States v. Pearson*, 33 M.J. 777, 779 (N.M.C.M.R. 1991); *accord United States v. Combs*, 38 M.J. 741, 743 (A.F.C.M.R. 1993). The court explained, "Because these statutes compete with speedy trial and double jeopardy protection as well as judicial impartiality and piecemeal appeal policies, prosecution appeals are not particularly favored in the courts." *Pearson*, 33 M.J. at 779. The Supreme Court has similarly observed that "in the federal jurisprudence, at least, appeals by the Government in criminal cases are something unusual, exceptional, not favored." *Will v. United States*, 389 U.S. 90, 96 (1967) (quoting *Carroll v. United States*, 354 U.S. 394, 400 (1957)). While it is difficult to see how § 950d(a)(1) could conceivably be construed so as to permit jurisdiction over the Appellant's appeal, these authorities make clear that this Court should refrain from engaging in any attempt to do so.

Conclusion

Appellee respectfully submits this Honorable Court should dismiss Appellant's appeal because it does not fall within the jurisdictional requirements for an interlocutory appeal.

Respectfully submitted,

/s/
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Certificate of Service

I certify that a copy of the foregoing was e-mailed to this Court, Major Jeffrey D. Groharing, USMC; Captain Keith A. Petty, JA, USA; Jordan A. Goldstein, and John Murphy, on 17 September 2008.

/s/
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