

**UNITED STATES COURT
OF
MILITARY COMMISSION REVIEW**

Before
D. Francis, J. Feltham, and E. Geiser

UNITED STATES)	RULING ON APPELLEE’S
)	MOTION REQUESTING
Appellant)	EXTENSION OF TIME TO FILE
)	AND ORDER FOR SPECIFIED
v.)	ISSUES
)	
OMAR AHMED KHADR)	CMCR CASE NO. 08-003
)	
Appellee)	DATE: 12 September 2008
)	
)	

Appellee’s Motion for Extension of Time to Respond to Brief on Behalf of Appellant, received on September 11, 2008, is granted. Appellee’s Response Brief, including the Specified Issue below, is due at 5:00 p.m. Eastern Time on September 17, 2008.

Appellant’s Brief at pages 5-8 describes the processing at the military commission of the issues raised in CMCR CASE NO. 08-003. The brief does not indicate the Government requested reconsideration of the Judge’s order, either within five days of the initial judicial order, dated 4 April 2008, or within five days of the subsequent order, dated 9 May 2008. *See* 10 U.S.C. § 950d(b) (stating that notice of a government interlocutory appeal of an adverse order or ruling by a military judge must be filed “within five days after the date of such ruling or order”); *Bowles v. Russell*, 127 S.Ct. 2360 (2007); *United States v. Ibarra*, 502 U.S. 1 (1991); *United States v. Brewer*, 60 F.3d 1442 (5th Cir. 1995); *United States v. Morillo*, 8 F.3d 864, 869 (1st Cir. 1993); *United States v. Santiago*, 56 M.J. 610 (N.M. Ct. Crim. App. 2001); and R.M.C. 905(f) (stating that there is no time limit for requesting the military judge to reconsider any ruling). The Court specifies the following issues:

I.

WHETHER THE REQUEST FOR RECONSIDERATION, AND THE
SUBSEQUENT NOTICE OF APPEAL, WERE TIMELY UNDER 10
U.S.C. § 950d(b).

II.

IF THE REQUEST FOR RECONSIDERATION OR THE NOTICE OF APPEAL WERE NOT TIMELY, WHETHER THE COURT OF MILITARY COMMISSION REVIEW HAS JURISDICTION TO DECIDE THE INSTANT APPEAL, CMCR CASE NO. 08-003.

Appellant's Brief on the Specified Issues and Reply Brief, if any, is due on September 22, 2008, at 1700 Eastern Time.

FOR THE COURT:


MARK HARVEY
Deputy Clerk of Court

Harvey, Mark Mr DoD OGC

From: Goldstein, Jordan A [REDACTED]
Sent: Friday, September 12, 2008 12:02 PM
To: Harvey, Mark Mr DoD OGC
Cc: Kuebler, William, LCDR, DoD OGC [REDACTED]
Snyder, Rebecca, Ms, DoD OGC; Groharing, Jeff, Maj, DoD OGC [REDACTED]
[REDACTED]

Subject: RE: United States v. Khadr, C.M.C.R. Case No. 08-003

Judge Harvey,

The Government continues to object to any further extension of time being granted to Appellee. Appellee previously requested a 20-day extension of time in which to file its reply to the Government's interlocutory appeal (which, had it been granted, would have given Appellee an entire month to respond to an interlocutory appeal materially similar to the Motion for Reconsideration filed over two months ago before the Military Commission in this case).

Notwithstanding the Government's opposition, this Court granted Appellee a seven-day extension of time beyond the 10 days provided under this Court's rules. This Court subsequently denied a request by Appellee for additional time to file his response.

Appellee now, for a third time, requests special treatment under the rules. However, many of his arguments are make-weights. A week ago, detailed counsel for Appellee indicated to the Military Judge that he anticipated not complying with the C.M.C.R.'s deadline for filing a response. See E-mail from Jordan Goldstein to Mark Harvey, Re: United States v. Khadr, C.M.C.R. Case No. 08-003 (9 Sept. 2008), Attachment (E-mail from 5 Sept. 2008). Appellee's asserted reasons for not complying with the C.M.C.R.'s deadlines are the same previously offered to this Court, and which were twice found to be insufficient.

Moreover, other than a change in a flight, which we concede was an inconvenience (but which actually left Defense counsel with one additional day to work in his D.C. area office), none of the supposed difficulties chronicled in counsel's e-mail was unforeseeable to him when this Court set its briefing schedule. It is important to note that the only reason this week's events interfered with counsel's work on this appeal is because he asked for additional time to file. His answer brief would have been due last Friday (5 Sept. 2008)---and only because counsel was granted a seven-day extension of time did this week's generally foreseeable logistical difficulties come into play with regard to his answer brief.

Appellee has previously researched the underlying legal issue and filed a brief on it. Appellee was alerted by the Government on 22 August 2008 that the Government's instant appeal would be materially similar to the Government's Motion for Reconsideration to the Military Commission---a brief that was filed on 11 July 2008. See United States v. Khadr, Appellant's Motion to Attach (28 Aug. 2008), Ex. A (E-mail from 22 Aug. 2008). Accordingly, Appellee has in effect had at least 21 days to respond to the Government's brief. Appellee's third request for an extension of time should be denied. Should Appellee not submit a responsive brief by 17:00 today in accordance with this Court's prior rulings, Appellant has no objection to Appellee relying on his previously filed brief to the Military Commission (included as Exhibit H to the Appendix to Appellant's Opening Brief), and this case should be immediately calendared for oral argument. If the Court is inclined to grant any additional time, it should set the answer brief due date for tomorrow (13 Sept. 2008) at 17:00.

V/r

Jordan A. Goldstein
U.S. Department of Justice
Trial Counsel

[REDACTED]

To: Harvey, Mark Mr DoD OGC
Cc: Kuebl

[REDACTED]

Subject: United States v. Khadr, C.M.C.R. Case No. 08-003

Mr. Harvey,

Please pass to the Court:

1. Appellee's counsel respectfully request an extension of Appellee's deadline to file an answer to the government's appeal until 1700, Wednesday, 17 September 2008. Appellee's counsel, who act as Appellee's trial defense counsel in military commission proceedings, are unable to file an answer (and dispositive motions) in accordance with the current deadline for the following reasons:

2. Appellee's counsel are currently at Guantanamo Bay. Appellee's counsel appeared at a session of the military commission held 10-11 September 2008. The session involved litigation of 10 discovery and expert motions, and included the taking of testimony from four expert witnesses on complex issues relating to psychological and psychiatric expert assistance. The hearing required extensive preparation. Also, since Appellant's brief was filed with this Court, Appellee has filed seven substantive pleadings with the Commission in connection with the hearing this week. And as explained previously, the amount of time counsel had to prepare for the hearing (as well as respond to the Appellant's brief) was compressed due to Ms. Snyder's reserve duty with the Navy from 18-31 August.

3. In addition to counsels' preoccupation with essential trial proceedings, counsels' schedules were complicated by unforeseen logistical issues. Hurricane Ike caused the OMC flight initially scheduled to depart for Guantanamo on 8 September to be cancelled. Although the flight was cancelled on Sunday afternoon, the government did not inform counsel of the cancellation at all. As a result, counsel were required to get up at 0230 in the morning on the 8th to travel to Baltimore for a 0400 show time. The flight was rescheduled for the next day and counsel were forced to get up at 0230 on 9th as well to depart for Guantanamo. As a result of this and preparations for this week's military commission hearing, counsel have had to function with limited sleep. (Ms. Snyder has had 18 hours of sleep in the last 112 hours and LCDR Kuebler has not had much more.) Moreover, as a result of a change in the flight schedule, a return flight scheduled for Thursday was cancelled, making it impossible for counsel to return to Washington today (assuming the session of the commission could have been concluded in time).

4. Notwithstanding the aforementioned issues, Appellee's counsel have completed some of the work in connection with Appellee's answer and possible motions. However, logistical complications arising from the presence of counsel in Guantanamo make it impossible to complete the brief and file it in accordance with the current deadline. It is worth noting that government trial counsel noted on two occasions during today's session of the military commission that trial counsel were unable to perform work necessary to respond to a defense motion because they are in Guantanamo, where it is difficult to get work done, rather than Washington, D.C.

5. The urgency of the government's interlocutory appeal appears to have relaxed somewhat due to events in the military commission. In light of outstanding expert and discovery issues, the military judge indicated today, in the course of an RMC 802 session, his intent to vacate the current trial date of 8 October and issue an order next week with new dates. Based on comments in the RMC 802 session, it does not appear that the new trial date will be anytime before 1 November.

6. Lastly, bearing in mind the established principle whereby prosecution and defense should enjoy equality of arms, it is worth noting that the prosecution has no fewer than five, and perhaps as many as seven attorneys detailed to this case. The defense (for purposes of trial and appellate proceedings) has two. In reference to Mr. Goldstein's e-mail to the Court of 9 September 2008, please bear in mind that the e-mail was sent from a Washington, D.C. e-mail account. That is because the prosecution had the luxury of leaving Mr. Goldstein behind to mind the appellate process, prepare for anticipated oral argument, etc., and reach into its seemingly endless supply of Department of Justice attorneys to send a different DOJ attorney to act as the THIRD lawyer at the table for the government in connection with this week's session of the military commission.

7. In the event the Court declines to grant the requested relief, Appellee's counsel will be unable to file a brief on behalf of Appellee, will have been ineffective in their representation, and must therefore seek to withdraw from the representation of Mr. Khadr in connection with this appeal.

V/r

LCDR Kuebler

Harvey, Mark Mr DoD OGC

From: Goldstein, Jordan A [REDACTED]
Sent: Tuesday, September 09, 2008 6:51 PM
To: Harvey, Mark Mr DoD OGC; Foreman, Leroy Mr DoD OGC; [REDACTED]
Cc: Kuebler, William, LCDR, DoD OGC; Snyder, Rebecca, Ms, DoD OGC; Groharing, Jeff, Maj, DoD OGC; [REDACTED]

Subject: RE: United States v. Khadr, C.M.C.R. Case No. 08-003

Thank you.

-----Original Message-----

From: Harvey, Mark Mr DoD OGC [REDACTED]
Sent: Tuesday, September 09, 2008
To: Goldstein, Jordan A; Foreman, Leroy Mr DoD OGC; [REDACTED]
Cc: Kuebler, William, LCDR, DoD OGC; [REDACTED]

[REDACTED]
M.C.R. Case No. 08-003

Mr. Goldstein:

I have received your communication as well as the attached email. I will pass your request on to the judges.

Please file your objection(s), if any, as quickly as you can without waiting for the Court's invitation to submit an objection.

Mark Harvey
Deputy Clerk, USCMCR

-----Original Message-----

[REDACTED]
R. Case No. 08-003

Mr. Harvey:

Attached, please find an email from LCDR Kuebler dated 5 September in which he advises the Military Commission judge that "there is a strong possibility [he] will have to seek an

additional extension of time to file [his answer brief] with the CMCr late next week, or simply file late, asking for leave of court to accept the brief and any motions." Attached E-mail from William Kuebler, LCDR, to Jeffrey Groharing, Major, et al., Re: U.S. v. Khadr -- 10 Sep session (5 Sept. 2008).

In the event that counsel for Mr. Khadr pursues either of those options with the C.M.C.R., the United States respectfully requests the opportunity to be heard prior to the Court's favorable consideration of any such request.

V/r,

Jordan A. Goldstein
U.S. Department of Justice
Trial Counsel

Harvey, Mark Mr DoD OGC

From: Kuebler, William, LCDR, DoD OGC
Sent: Friday, September 05, 2008 1:37 PM
To: [REDACTED] Snyder, Rebecca, Ms, DoD OGC; [REDACTED]
Cc: Goldstein, Jordan A; Groharing, Jeff, Maj, DoD OGC [REDACTED]
[REDACTED]
Subject: U.S. v. Khadr -- 10 Sep session

Sir,

To the extent it would matter to the Military Judge as he considers whether to postpone next week's session, the following is provided for his information:

1. Pursuant to order of the Court of Military Commission Review, the Appellee's answer to the government's appeal of the Military Judge's ruling on P-007 (and, presumably, any dispositive motions) is due on Friday, 12 September. That reflects a move from an initial date of 5 September. Ms. Snyder and I act as Mr. Khadr's appellate counsel. As things stand, i.e., with a session of the commission scheduled for next week that could last one or two days, depending on our progress on the appeal, there is a strong possibility we will have to seek an additional extension of time to file with the CMCR late next week, or simply file late, asking for leave of court to accept the brief and any motions. If the Military Judge were to postpone next week's session, we would certainly be in a position to respond to the government's appeal in a timely fashion.

2. The defense plans on filing a motion to reconsider the Military Judge's ruling on [REDACTED] vice [REDACTED] requests (and the case generally). We submitted the recusal request last night and understand that BGEN Hartmann will likely not take any action in connection with the re [REDACTED]

[REDACTED] if these defense need for reconsideration by the military commission.

V/r
LCDR Kuebler