IN A GENERAL COURT-MARTIAL OF THE UNITED STATES
U.S. ARMY TRIAL JUDICIARY, THIRD JUDICIAL CIRCUIT

UNITED STATES	)	STIPULATION OF FACT
	)	
v.	)	
	)	
CORSETTI, DAMIEN	)	
PFC, U.S. Army	)	
HHB, USAADACENFB, Fort Bliss, Texas	)	30 May 2006

The Defense and the Government, with the express consent of PFC Damien M. Corsetti, hereby stipulate to the following facts:

1. Ahmed al Darbi was suspected of links to Al Qaeda and involvement in an attack on US personnel. Ahmed al Darbi had knowledge of this attack as well as possible future al Qaeda operations, all of which he originally denied.

2. Ahmed al Darbi gave his occupation as a fisherman and said he owned a ship that transported various types of cargo, including fish. Interrogators later determined that he transported drugs, explosives, people and weapons. Ahmed al Darbi supposedly knew how to fly a plane.

3. Ahmed al Darbi was interrogated on numerous occasions over the course of several months and routinely reported to be in good health.

4. Ahmed al Darbi traveled extensively in the Middle East with forged documents and used counterfeit money in support of terrorist activities.

5. Ahmed al Darbi was initially vague when answering his interrogators. Over the course of several months, he revealed more information about his terrorist activities.

6. Ahmed al Darbi provided the names of several persons who could provide alibis for him, in an effort to show he was not involved in terrorist activities.

7. Ahmed al Darbi appeared to his interrogators to carefully provide false stories about his travels and drug and/or alcohol use.

8. Ahmed al Darbi was told that lying to his interrogators could result in long term incarceration.

9. Ahmed al Darbi was subjected to sleep adjustment to weaken his resolve.

DEFENSE EXHIBIT A

AMERICAN FORCES INFORMATION SERVICE

NEWS ARTICLES

Al Qaeda Manual Drives Detainee Behavior at Guantanamo Bay

By Donna Miles
American Forces Press Service

WASHINGTON, June 29, 2005 – If you're a Muslim extremist captured while fighting your holy war against "infidels," avoid revealing information at all costs, don't give your real name and claim that you were mistreated or tortured during your detention.

This instruction comes straight from the pages of an official al Qaeda training manual, and officials at the detention facility at Naval Station Guantanamo Bay, Cuba, say they see clear evidence that detainees are well-versed in its contents.

Police in Manchester, England, discovered the manual, which has come to be known as the "Manchester document," in 2000 while searching computer files found in the home of a known al Qaeda member. The contents were introduced as evidence into the 2001 trial of terrorists who bombed the U.S. embassies in Tanzania and Kenya in 1998.

The FBI translated the document into English, and it is posted on the Justice Department's Web site.

The 18-chapter manual provides a detailed window into al Qaeda's network and its procedures for waging jihad - from conducting surveillance operations to carrying out assassinations to working with forged documents.

The closing chapter teaches al Qaeda operatives how to operate in a prison or detention center. It directs detainees to "insist on proving that torture was inflicted" and to "complain of mistreatment while in prison."

Chapter 17 instructs them to "be careful not to give the enemy any vital information" during interrogations.

Another section of the manual directs commanders to teach their operatives what to say if they're captured, and to explain it "more than once to ensure that they have assimilated it." To reinforce the message, it tells commanders to have operatives "explain it back to the commander."

And at the Guantanamo Bay detention center, detainees take this instruction to heart. Many of the more than 500 detainees are "uncooperative" in providing intelligence, Army Brig. Gen. Jay Hood, commander of Joint Task Force Guantanamo, told military

analysts who traveled to the facility June 24 and reiterated today during a hearing before the House Armed Services Committee.

Some detainees have never uttered a single word during more than three years of interrogation. Others give false names or refuse to offer their real names.

This can prove challenging for interrogators at the facility, because many detainees "follow the al Qaeda SOP (standard operating procedures) to the T," according to Army Col. John Hadjis, chief of staff for Joint Task Force Guantanamo.

Officials say they see evidence of the al Qaeda-directed misinformation campaign in allegations of detainee abuse and mishandling of the Koran at Guantanamo Bay.

Defense Secretary Donald H. Rumsfeld expressed frustration over this effort during a June 21 interview on the "Tony Snow Show."

"These detainees are trained to lie, they're trained to say they were tortured, and the minute we release them or the minute they get a lawyer, very frequently they'll go out and they will announce that they've been tortured," Rumsfeld said.

The media jumps on these claims, reporting them as "another example of torture," the secretary said, "when in fact, (terrorists have) been trained to do that, and their training manual says so."

During a February 2004 Pentagon news conference, a DoD official said new information provided by detainees during questioning is analyzed to determine its reliability.

"Unfortunately, many detainees are deceptive and prefer to conceal their identifies and their actions," said Paul Butler, principal deputy assistant secretary for special operations and low-intensity conflict.

Butler said the Manchester document includes "a large section which teaches al Qaeda operatives counterinterrogation techniques: how to lie, how to minimize your role."

The document, he said, has surfaced in various locations, including Afghanistan.

The manual's preface offers a chilling reminder of the mentality that drives al Qaeda disciples and the lengths they will go to for their cause.

"The confrontation that we are calling for ... does not know Socratic debates, ... Platonic ideals ... nor Aristotelian diplomacy," its opening pages read. "But it knows the dialogue of bullets, the ideals of assassination, bombing and destruction, and the diplomacy of the cannon and machine gun."

Related Sites:
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The Manchester Document

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CORSETTI, DAMIEN PFC, U.S. Army HHB, USAADACENFB, Fort Bliss, Texas	)	30 May 2006

The Defense and the Government, with the express consent of PFC Damien M. Corsetti, hereby stipulate to the following facts:

1. Omar al-Faruq was a high-level al-Qaeda representative in Southeast Asia.

2. al-Faruq was detained at the BCP until 20 September 2002; al-Faruq never returned to the BCP at any time pertinent to this case.

3. Sleep deprivation and physical training were authorized at the BCP.

4. In September 2002, al-Darbi and al-Faruq were subjected to sleep deprivation and physical training.

5. al-Faruq provided valuable and corroborated information to his interrogators in September 2002.

6. There is no record of al-Faruq having made any allegation of maltreatment while at the BCP.

7. During the period 1 August 2002 to 1 February 2003, representatives of the International Committee for the Red Cross (ICRC) visited the Bagram Collection Point for the purpose of assessing the health and welfare of detainees therein. During such visits, ICRC representatives were afforded access to detainees for private interviews, without US military involvement.

8. After being processed into the facility, Ahmed al-Darbi (a/k/a BT 264) met with ICRC representatives on at least one occasion. Ahmed al-Darbi did not make any claim of maltreatment or abuse to ICRC representatives.

Defense Counsel	DAMIEN M. CORSETTI PFC, USA Accused	Charles E Ellis CPT, JA Trial Counsel

DEFENSE EXHIBIT C FOR ID

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AMERICAN FORCES INFORMATION SERVICE
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Defense Counsel	DAMIEN M. CORSETTI PFC, USA Accused	CPT, JA Trial Counsel

DEFENSE EXHIBIT C FOR ID

DEFENSE EXHIBITS NOT ADMITTED

OFFICE OF THE CLERK OF COURT
US ARMY JUDICIARY
ARLINGTON, VIRGINIA 22203-1837

THE RECORD OF TRIAL HAS BEEN REVIEWED FOR RELEASE UNDER THE PROVISIONS OF THE FREEDOM OF INFORMATION ACT. THE DOCUMENT[S] DESCRIBED AS FOLLOWS HAVE BEEN REMOVED FROM THIS COPY OF THE RECORD BECAUSE THE RELEASE WOULD BE IN VIOLATION OF THE DOD FREEDOM OF INFORMATION ACT PROGRAM, DOD 5400.7-R, EXEMPTION (7)(C), 5 U.S.C. 552(b)(7)(C):

Criminal Investigation Report

Contents cannot be released outside the Department of the Army without the approval of the Commander, United States Army Criminal Investigation Command, Fort Belvoir, VA.

Def Grp D for ID

APPELLATE EXHIBITS

IN A GENERAL COURT-MARTIAL OF THE UNITED STATES
U.S. ARMY TRIAL JUDICIARY, THIRD JUDICIAL CIRCUIT

UNITED STATES V. DAMIEN M. CORSETTI PFC, U.S. Army A CO, 519TH MI BN, FORT BRAGG, NC	)	MOTION FOR ADMISSION OF DEPOSITION OF WITNESS 20 MARCH 2006

I. RELIEF SOUGHT

COMES NOW the Government, and requests that this Honorable Court admit into evidence in the case-in-chief the deposition of a witness in the above-styled case, Ahmed al Darbi.

II. BURDEN

The moving party, in this case the Government, must prove any factual issues by a preponderance of the evidence. See Manual for Courts-Martial, R.C.M. 905(c)(1).

III. FACTS

The accused is charged with, inter alia, several specifications of abuse directed against Ahmed al Darbi, a.k.a. BT 264, who was a detainee at the Bagram Collection Point, Afghanistan, during 2002. At the time of the alleged misconduct, the accused served as an interrogator at that facility, while Ahmed al Darbi was a detainee. Later, Ahmed al Darbi was transferred to the US detention facility at Guantanamo Bay, Cuba, where he has remained.

In 2004 and again in 2005, while detained at Guantanamo, Ahmed al Darbi made the accusations of abuse. Ahmed al Darbi stated that the accused, during interrogations conducted in 2002, had: watched his interrogation partner throw articles of garbage and soiled toilet paper onto Ahmed al Darbi's person, without intervening; himself thrown articles of garbage onto Ahmed al Darbi; sat on top of Ahmed al Darbi; put cigarette ash onto Ahmed al Darbi; walked across the handcuffs of Ahmed al Darbi; forcefully pulled hairs out of Ahmed al Darbi's chest; struck Ahmed al Darbi on the leg, chest and groin; showed Ahmed al Darbi a condom and his penis and stated "I'm going to fuck you," or words to that effect. These allegations formed the basis for charges and specifications under Articles 92, 128, and 134 of the UCMJ. (See Charge Sheet for more information).

APPELLATE EXHIBIT XLV

The Convening Authority, BG Lennox, ordered that Ahmed al Darbi's deposition be taken before 10 March 2006. CPT Craig Drummond, Office of the Staff Judge Advocate, Fort Bliss, TX, was appointed as the Deposition Officer. (See attached orders). Government counsel coordinated court reporter support, vehicular support, theater clearances, translator support, and other necessary matters for all personnel. The deposition was in fact held on 8 March 2006, behind "the wire" at Camp Delta, Guantanamo Bay, Cuba, and was in fact the first military deposition held there. (See deposition transcript for more information).

At all times relevant to the trial of this case, Ahmed al Darbi has remained in custody at the maximum security US facility at Guantanamo Bay, Cuba. He is a foreign civilian and currently awaits a hearing before a Military Commission. An USMC O-5 assigned to the Office of Military Commissions informed government trial counsel that this commission would be delayed until such time as the Army completed its investigation of the accused (which had begun after the deaths at the Bagram Collection Point in December 2002). This officer's name is protected information and can be divulged to the Court in any more secure format than that of a motion.

IV. EVIDENCE

1. The deposition transcript (still being authenticated by CPT Drummond)
2. Appointment memorandum/CPT Drummond
3. Order for Deposition of Ahmed al Darbi signed by the Convening Authority

V. LAW

1. R.C.M. 905(c) (1)
2. R.C.M. 702
3. M.R.E. 804
4. M.C.M. Article 49
5. United States v. Vanderwier, 25 M.J. 263 (1987)
6. United States v. Dieter, 42 M.J. 697 (1995)
7. United States v. Cokely, 22 M.J. 225 (1986)
8. California v. Green, 399 U.S. 149, 158 (1970)
9. United States v. Pollard, 38 M.J. 41, 49 (1993)
10. United States v. Graf, 35 M.J. 450, 465 (CMA 1992)
11. United States v. Wellington, 58 M.J. 420 (2003)
12. M.R.E. 807

VI. ARGUMENT

The deposition of Ahmed al Darbi qualifies for admission into evidence in the case in chief because it satisfies both statutory (MCM) and Constitutional requirements.

A. Article 49

The deposition was taken pursuant to all conditions set forth in Article 49, UCMJ, which provides in part:

> (d) A duly authenticated deposition taken upon reasonable notice to the other parties, so far as otherwise admissible under the rules of evidence, may be read in evidence, or in the case of audiotape, videotape, or other similar material, may be played in evidence before any military court or commission in any case not capital...if it appears
>
> (1) that the witness resides or is beyond the State, Territory, Commonwealth, or District of Columbia in which the court, commission, or board is ordered to sit, or beyond 100 miles from the place of trial or hearing;
>
> (2) that the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing

This deposition was taken in front of a duly appointed deposition officer who is also a JAGC officer. The court reporter was a paralegal NCO (E-7/SFC) who was of course sworn in. (The deposition officer is currently in the process of authenticating the transcript and his proximity to this Court will ensure that an authenticated copy will be provided with the utmost celerity upon his review and completion of the process). The Defense was fully informed about the deposition. Both Defense counsel attended. So did the accused (at which the accused expressly waived his right to personally confront the witness, and instead relied upon his attorneys to cross examine Ahmed al Darbi while the accused observed the proceedings via closed-circuit TV). Thus, the initial procedural concerns were all satisfied.

The unavailability analysis is also satisfied because the witness, Ahmed al Darbi, is unavailable within the meaning of Article 49. He clearly lives outside the 100 mile limit from Fort Bliss and is in fact OCONUS. He is a foreign civilian who is under military custody at Guantanamo Bay, in a state of imprisonment. His confinement cannot change unless and until he is acquitted by a Military Commission; the commission will not hear the matter of Ahmed al Darbi until the case at bar has been fully adjudicated. Further, he is nonamenable to the process of this Court in that he would not be able to come to the United States for reasons of immigration law (he is not American nor eligible for a visa). Finally, it would be unreasonable to require his presence for several very practical reasons, to include massive physical security requirements and complicated media arrangements, all of which would seriously disrupt the trial of this case.

The plain language of Article 49 contemplates that witnesses sometimes become unavailable. Its remedy is to admit a deposition, such as this one that was taken in full compliance with its requirements.

B. MRE 804

This deposition is admissible as former testimony under Military Rule of Evidence 804, which states:

> a. Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness. (1) Former testimony. Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. A record of testimony…is admissible under this subdivision if such a record is a verbatim record.

There is (or shortly will be) a complete verbatim record of this deposition. The deposition is to be used in the present case. Both the government and Defense examined the witness (in fact, the Defense's cross examination is much longer than the government's direct examination).

MRE 804(a)(6) recognizes "unavailability" pursuant to Article 49 (analyzed above). The government submits that this deposition was duly taken from an unavailable witness and is admissible under both Article 49 and MRE 804.

C. RCM 702

This deposition was also properly taken under, and pursuant to, RCM 702, which states:

> b. In general. A deposition may be ordered whenever, after preferral of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at an investigation under Article 32 or a court-martial.

It is self-evident that there are "exceptional circumstances" in this case. The alleged victim is suspected of being a member of a terrorist organization, and is imprisoned in Cuba. The accused supposedly committed indecent acts against him during an interrogation in Afghanistan. The trial is in Texas. The list could easily go on. But the fact remains that a deposition was vital to preserve evidence necessary for the administration of justice, especially when the witness is unavailable to come to court.

RCM 702 has many procedural requirements for taking a deposition. It is not necessary to go through each one in detail, but in short, they were all satisfied. This deposition was taken in a formal setting, pursuant to an order from the Convening Authority (RCM 702(b)). The deposition officer was properly detailed (d) and caused the proceedings to be recorded (e)(6). Defense counsel

had already been assigned (d)(2) and participated, putting objections on the record (e)(7). The witness testified under oath (g)(1)(B).

D. Confrontation Clause

This deposition meets the requirements of applicable case law. Two cases on point provide an outline for meeting admissions requirements for depositions in military criminal cases. They provide the following guidance: "The Confrontation Clause of the Sixth Amendment places additional limitations on the use of depositions...In order for a deposition to be used at trial, the witness must be 'unavailable' both in terms of the hearsay prohibition of MRE 804(b)(1) and in terms of the Confrontation Clause." (United States v. Dieter, 42 M.J. 697 at 699, quoting United States v. Vandermier, 25 M.J. 263 at 265).

Under both MRE 804(b)(1) and Article 49, UCMJ, Ahmed al Darbi is unavailable, as analyzed above. It is not a matter of the government not wanting to bring him to Fort Bliss; it is basically impossible to do so. Thus, his former testimony should be allowed into evidence via deposition, pursuant to the former testimony exception to the hearsay rule.

Concerning the Confrontation Clause, the Dieter court continued:

> "...A witness is not 'unavailable' in terms of the Sixth Amendment 'unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial (citing Barber v. Page, 390 U.S. 719, 724-725 (1968). The government must exhaust every reasonable means to secure the witness' live testimony. (United States v. Ortiz, 35 M.J. 391 (C.M.A. 1992). In determining whether to admit a deposition when a witness is temporarily unavailable, the military judge should consider all the circumstances, including: the importance of the testimony, the amount of delay necessary to obtain the in-court testimony, the trustworthiness of the alternative to live testimony, the nature and extent of earlier cross-examination, the prompt administration of justice, and any special circumstances militating for or against delay." (at 699, quoting Vandermier at 266 and United States v. Cokely, 22 M.J. 225 (C.M.A. 1986).

Applying these standards to the case at bar, the government has fully addressed any Sixth Amendment concerns. First, the government has made a "good faith effort" under the meaning of Barber v. Page to obtain Ahmed al Darbi's presence at trial. In Barber, the prosecutors did not make any effort to avail themselves of the presence of out of state witnesses by utilizing either inter-prison cooperation or by a special law that allowed prosecutors to obtain the attendance of ex-prisoners who had since returned to civilian life.

The Barber set of facts is completely distinguished by those in the present case. Trial counsel has twice traveled to Guantanamo Bay, Cuba and verified the following:

That Ahmed al Darbi is in fact imprisoned there, that he is suspected of being a member of a terrorist organization, that he is waiting for a military commission to hear his case, that he is not an American citizen who can travel to the United States without a visa, and that he has in fact made allegations about detainee abuse during interrogations conducted in Afghanistan by the accused (see attached four sets of statements given by al Darbi concerning these allegations). Further, the US base at Guantanamo Bay is a very secure installation. It requires substantial theater, country, and local clearances to be issued in order to actually meet with a detainee. (And there is no existing cooperative protocol nor statute in place to get a detainee out of Guantanamo and into a stateside court). Not only did the government trial counsels overcome all of these obstacles in order to verify the witness's unavailability, the government went several steps further. The government in this case facilitated Defense access to the witness, culminating with the Defense's lengthy cross-examination in a first-of-its-kind deposition.

Hence, consistent with the case law, the government has exhausted every reasonable means to secure Ahmed al Darbi's presence at trial. He simply cannot come to the United States. Technically, this witness is "temporarily" unavailable only in that he will some day (presumably) get out of the Guantanamo Bay prison facility. However, that day will not come until his military commission is heard, and this is presently on hold pending the outcome of the case at bar. This is of course a "catch 22" situation that makes him arguably more than "temporarily" unavailable.

Nonetheless, under the analysis provided by the above courts, it is the job of the military judge to conduct a balancing test considering the totality of the circumstances as to whether to admit this deposition. Under the factors listed by the Vandermier court, the government again has met the burden. First, this testimony is very important. It directly supports six of the thirteen specifications charged against the accused. Second, the amount of delay necessary to obtain the in-court testimony would be substantially, even indefinitely long. There is basically no way for the Office of Military Commissions to move forward until this case is resolved, and thus no end in sight if this deposition were not to come into evidence. Third, the trustworthiness of the alternative (the deposition) is high. The deposition was taken before an active duty JAGC officer, a sworn court reporter, sworn translator (who put his extensive credentials on the record) and a sworn witness, all in an environment very similar to a courtroom. Fourth, after the government direct examination, the Defense conducted a lengthy cross-examination (the "greatest legal engine ever invented for the discovery of truth." California v. Green, 399 U.S. 149, 158 (1970). Fifth, the only way for the administration of justice to be "prompt" in this case would be to admit the deposition into evidence. Sixth, there are special circumstances militating against delay here—such as the fact that this case is being tried three and a half years after the events took place. Further delay would negatively affect the memories and even the availability of other witnesses, many of whom have returned to civilian life or are getting ready to do so. Plus, the Defense has already received two delays; it's time to try this case.

E. Alternative—MRE 807

This Court could also view the deposition as admissible under the Residual Exception of MRE 807, because it is evidence material to the issues in this case, more probative than any other evidence which can be reasonably obtained, and admission would serve the general purpose of the Military Rules of Evidence and be in the interests of justice.

The accused's charges relevant to this deposition essentially rest upon evidence of offensive touching and conduct toward Ahmed al Darbi. The witness's testimony regarding this conduct is obviously material to the accused's guilt or innocence. Similar analysis should be applied to the other factors. Ahmed al Darbi's testimony is more probative than any other evidence which can be reasonably obtained. It is the only known evidence that supports the charges of abuse that allegedly occurred against this witness by the accused. Admission would serve the interests of justice because a jury would be able to consider all relevant, known evidence and ascertain its truth and its weight, thus enabling a fully-informed decision.

"A military judge has considerable discretion in determining whether to admit residual hearsay." United States v. Pollard, 38 M.J. 41, 49 (1993). Further, the Court in United States v. Kelley, 45 M.J. 275 at 281 provided a succinct review of analyzing residual hearsay:

> "The rules of evidence contemplate that a military judge will be "a real judge," exercising discretion rather than slavishly applying mathematical formulae. See United States v. Graf, 35 M.J. 450, 465 (CMA 1992) ("In our view, the Uniform Code of Military Justice contemplates that a military judge be a real judge as commonly understood in the American legal tradition."). Our holding favors neither prosecution nor defense. It favors the proponent of evidence, either prosecution or defense, by broadening the number of factors that may be considered. A holding favoring admissibility is consistent with the purposes of the rules. See Mil.R.Evid. 102, Manual for Courts-Martial, United States (1995 ed.) ("These rules shall be construed . . . to the end that the truth may be ascertained"); Mil.R.Evid. 402 ("All relevant evidence is admissible, except as otherwise provided . . . .").

United States v. Wellington, 58 M.J. 420 (2003) stands for the proposition that residual hearsay is admissible under circumstances that satisfy both a reliability and a necessity test. There, the original declarant died; here he is unavailable under the meaning of MRE 804/Article 49. CAAF satisfied the first (reliability) prong by analyzing the statements to see if they met or approached the inherent reliability standard of enumerated hearsay exceptions. In this case, Ahmed al Darbi's deposition meets the MRE 804(b)(1) Former Testimony exception, as previously stated and explained above. In satisfying the second (necessity) prong, CAAF concluded that "there is no other more probative evidence of the fact." (at 425). Ahmed al Darbi's Guantanamo incarceration makes him unavailable. Further, there is no other *more* probative evidence of the fact (that Ahmed al Darbi was subjected to unlawful, offensive physical contact) than his own

words, spoken under oath and recorded during a deposition. There is only one person who experienced this alleged abuse. Necessity dictates that Ahmed al Darbi's testimony be admitted.

VII. CONCLUSION

This deposition is admissible under all relevant law, both statutory and Constitutional. There are only two ways to hear Ahmed al Darbi's testimony; either by admitting the deposition, or by convening the necessary portion of the court-martial at Guantanamo Bay, Cuba. The government respectfully requests that in light of all the circumstances in this case, that the legally sufficient deposition proceeding taken from an unavailable witness be admitted into evidence.

I have served the foregoing on Mr. William Cassara and CPT Ryan Dowdy via electronic mail, this 21st day of March, 2006.

//SIGNED// Christopher E. Ellis

CHRISTOPHER E. ELLIS
CPT, JA
Trial Counsel

DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

DETERMINATION OF THE DEPUTY SECRETARY OF DEFENSE

Ahmed al Darbi is an alien who is currently detained by the Department of Defense as an enemy combatant at Guantanamo Bay, Cuba. Due to his status as a detained enemy combatant, I will not authorize Mr. Al-Darbi to travel to Fort Bliss for the court-martial of Private First Class Damien Corsetti. Accordingly, I have determined that he is unavailable under the meaning of Military Rule of Evidence 804 and Article 49 of the Uniform Code of Military Justice.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed: March 28, 2006

Gordon England
Deputy Secretary of Defense

End 1

United States	)	
	)	Response to Government Motion for
	)	Admission of Deposition
v.	)	
	)	
PFC Damien M. Corsetti	)	March 21, 2006
Company A	)	
519th Military Intelligence Battalion	)	
Fort Bragg, North Carolina 28310	)	

1. Nature of Response: The defense moves to prevent the Government from using deposition testimony of one of the alleged victims in lieu of producing him at trial.

2. Summary of Facts:

a. The defense accepts the government's statement of facts in their motion, with the following exceptions:

b. The defense is unaware of whether this the first deposition taken at Guantanamo Bay, Cuba.

c. The defense has no knowledge of whether Mr. al Darbi will stand trial before a commission.

d. Upon the defense and government arriving at the prison at GTMO, the alleged victim refused to come out of his cell, and refused to speak to anyone. It was not until after he spoke with an unnamed person over several hours that the alleged victim agreed to give testimony.

e. When interviewed by the defense, Mr. al Darbi answered a few cursory questions from the defense, and then refused to answer any further questions. Mr. al Darbi stated he would not answer any questions about his background, why he was detained, his activities upon arriving at Bagram, or other relevant matters.

APPELLATE EXHIBIT XLV

f. When deposed, Mr. al Darbi again refused to answer salient questions from the defense.

3. Discussion:

The Deposition Was Taken in Violation of R.C.M. 702

The Court of Military Appeals has held that a deposition may be required under circumstances other than to preserve the testimony of a necessary witness when that witness is likely to be unavailable for trial. R.C.M. 702, Analysis. See United States v. Killebrew, 9 M.J. 154 (C.M.A. 1980); United States v. Cumberledge, 6 M.J. 203, 205, n.3 (C.M.A. 1979) (deposition may be appropriate means to compel interview with the witness when government improperly impedes defense access to a witness); United States v.Chuculate, 5 M.J. 143, 145 (C.M.A. 1978) (deposition may be appropriate means to allow cross-examination of an essential witness who was unavailable at the Article 32 hearing); United States v. Chestnut, 2 M.J. 84 (C.M.A. 1976) (deposition may be an appropriate means to cure error where witness was improperly found unavailable at Article 32 hearing).

R.C.M. 702(g)(1)(A)(ii) provides that an accused has the right to be represented at an oral deposition by counsel "as provided in R.C.M. 506." R.C.M. 506 states an accused has the right to be represented by civilian counsel at no expense to the government, and by detailed military counsel or military counsel of his own selection. The right to civilian counsel is grounded in Article 38(b), UCMJ, and the right to be effectively represented by counsel is, of course, guaranteed by the Sixth Amendment to the U.S. Constitution. United States v. Hamilton, 36 M.J. 927 (1993.)

Article 47, MCM, guarantees all parties to a trial the equal access to witnesses. In the instant case, the defense was not provided equal access to Mr. al Darbi, as he refused to answer salient questions both prior to the deposition, and at the deposition itself. In addition, as noted in the defense's Motion to Abate, the government has failed to provide the defense with discovery of matters that would have been relevant to the taking of Mr. al Darbi's deposition. The defense was unable to interview Mr. al Darbi prior to the date of the deposition, due to logistical and security problems.

As a result of the above, what occurred here was not a deposition but, rather, a question and answer period for the government. The government asked all of their questions, and got answers to all of them. The defense, on the other hand, was estopped from asking those questions necessary to adequately defend their client.

The deposition was not videotaped and, as a result, it appears the government will simply move to admit the written deposition into evidence. This will deny the panel the right to judge Mr. al Darbi's credibility, and to see for themselves his refusal to answer relevant questions.

Finally, the interpreter in this case did not meet the qualifications of MRE 604, which provides that "an interpreter is subject to the provisions of these rules relating qualifications as an expert and the administration of an oath or affirmation that the interpreter will make a true translation." Rule for Courts-Martial 502(e)(1) similarly provides that "the qualifications of interpreters and reporters may be prescribed by the Secretary concerned." Article 28, UCMJ, enunciates the same requirement.

The authors of the MREM explain that MRE 604 "establishes specific procedures for using an interpreter. *First, the interpreter must be qualified in the same manner as any*

expert witness. This includes proof that the interpreter is competent to translate the foreign language into English." (MREM, supra, at 715.)

In the instant case, the interpreter was not qualified as an interpreter. In the colloquy leading up to his being sworn in, it is obvious from the transcript that the interpreter not only was not a certified translator, but did not even understand the defense counsel's questions regarding his qualifications. He had never interpreted in a court proceeding before, and could not provide any documentation as to his abilities. This is akin to picking someone off the street, asking them if they are bilingual, and then having them server as a translator in an important court proceeding.

Neither the accused nor his counsel speaks Arabic. As such, it was impossible for us to know whether the proceedings were being properly translated. However, it became apparent at several times during the proceedings that the interpreter was having difficulty with the process. While his skills may be adequate for detainee interrogations, they are certainly not adequate for the court room. The defense does not oppose the admission of a deposition in this case. The defense objects to the admission of this deposition.

4. Relief Requested: Denial of the government's motion to admit the deposition of Mr. al Darbi.

5. Evidence: Transcript of deposition, Order of the Convening Authority, and related e-mail traffic.

6. Oral Argument: Requested.

William E. Cassara, Esquire
Civilian Defense Counsel

UNITED STATES	)	
	)	
v.	)	Motion to Suppress Eyewitness Identifications
	)	
CORSETTI, DAMIEN PFC, U.S. Army, A Company, 519TH MI Battalion, Fort Bragg, NC	)	March 20, 2006

I. MOTION

COMES NOW the accused, by and through counsel, pursuant to Military Rule of Evidence 321(c)(2), moves the Court to exclude the unlawful pre-trial identifications of PFC Corsetti, and prevent the use of his identification at photographic line up at trial.

II. BURDEN OF PROOF/STANDARD OF PROOF

In accordance with M.R.E. 321(d)(2) the government bears the burden of demonstrating by a preponderance of the evidence that the identification was reliable under the circumstances. If the Court finds the identification unreliable, the government is prohibited from admitting any subsequent identifications, including in-court identifications, unless it can demonstrate by clear and convincing evidence that the later identifications were not derived from the unreliable identification.

III. FACTS

The accused is charged with abusing a detainee, Ahmed Al Darbi, and with sexually assaulting Ahmed al Darbi. When first questioned by authorities about possible abuse, Mr. al Darbi denied being abused. When questioned again, he detailed salacious allegations of abuse against the accused and others. He initially referred to the accused as the "Fat, Italian guy." Later, he was shown a photographic line up of six individuals, the first of whom was the accused. He identified the accused as his primary assailant.

Mr. al Darbi was immediately shown a second set of six pictures. Again, the accused was the first picture in the line up. Again, Mr. al Darbi allegedly identified the accused.

During a deposition in this case at Guantanamo Bay, Cuba, the trial counsel showed Mr. al Darbi, the exact same two sets of pictures, and Mr. al Darbi again identified the accused.

APPELLATE EXHIBIT XVI

The Defense is willing to stipulate to the above facts for the purposes of the motion.

IV. LAW

The Defense relies on the following authorities in support of its motion:

a. *Amend V, U.S. Const.*
b. *Mil. R. Evid. 321*
c. *Mason v. Brathwaite, 432 U.S. 98 (1977)*
d. *Stovall v. Denno, 388 U.S. 293 (1967)*
e. *Neil v. Biggers, 409 U.S. 188 (1972)*
f. *United States v. Rhodes, 42 M.J. 287 (1995)*

V. ARGUMENT

The Due Process Clause of the Fifth Amendment mandates the exclusion of any pretrial identification that is so unnecessarily suggestive as to create a substantial likelihood of a mistaken identification. *See Manson v. Brathwaite, 432 U.S. 98 (1977) and Stovall v. Denno, 388 U.S. 293 (1967).* In furtherance of this constitutional directive, Military Rules of Evidence 321(a) and (d)(2), mandate the exclusion of unreliable pre-trial identifications.

The Rule has incorporated a two-prong test based on the Supreme Court case law for determining the admissibility of eyewitness identification:

1) Was the pre-trial identification unnecessarily suggestive? *See Stovall v. Denno, 388 U.S. 293 (1967).*

2) If the pretrial identification was "unnecessarily suggestive", was it conducive to a substantial likelihood of misidentification? *See Manson v. Brathwaite, 432 U.S. 98 (1976).*

In assessing the first prong of the analysis, whether the pretrial identification was unnecessarily suggestive, the Supreme Court laid out five factors in *Neil v. Biggers, 409, U.S. 188 (1972),* to be considered for whether an identification is unnecessarily suggestive:

1. Did the witness have an opportunity to view the criminal at the time of the crime?

2. What was the witness' degree of attention?

3. What was the accuracy of the witness' prior description of the alleged criminal?

4. What was the level of certainty demonstrated by the witness at that confrontation?

5. What was the length of time between the crime and the confrontation?

Id. at .

A. The Photographic Line-Up was Unnecessarily Suggestive

The photographic lineup conducted in this case was unnecessarily suggestive. The accused was the first person in both photographic lineups, both times they were shown to Mr. al Darbi.

Although the primary method of description by the witness was the accused height and weight, the photographs were taken with no reference point for the height of the individual. In addition, all of the photographs were taken of an individual from the shoulders up, so there is no indication as to build in the photographs.

Mr. al Darbi further indicated as the existence of several tattoos his alleged assailant had. None of the photographs depicts tattoos. The photos in question were in the direct and sole possession of the government at all times, yet there is no indication of whether these photos were shown to Mr. al Darbi prior to the line up.

Hair and mustache was another feature that was cited by the witness. He stated that his assailant wore a beard. However, instead of focusing in on individuals with hair and a mustache cited by the witness, the CID agents chose individuals with no facial hair.

Mr. al Darbi admits that the majority of the time he was assaulted he was wearing a hood. He also admits that the accused is the first person he saw at the Bagram prison, and that the accused frightened him greatly.

The length of time between the alleged assault, and the photographic line-up was substantial. There is a significant probability that the alleged victim would not have been able to identify anyone outside of the unduly suggestive line-up.

B. The Pretrial Identification was Conducive to a Substantial Likelihood of Misidentification

The pretrial identification was conducive to a substantial likelihood of misidentification. PFC Corsetti's photograph was the first one in both line-ups, and the alleged victim was only shown two photographic line-ups. At no time has he made a personal identification of the accused. As noted, there is no indication as the circumstances surrounding the photographic line-up, and whether Mr. al Darbi was shown other photos of the accused or anyone else.

C. The Unduly Suggestive Photographic Lineup would Taint any In-Court Identification

The Government intends on using Mr. al Darbi's photographic line-up identification at the deposition in lieu of his live testimony. As such, this Court already has his "in-court" identification. The circumstances surrounding the first photographic line-up to CID, and the second line-up identification at the deposition, create a significant chance of a misidentification.

VI. CONCLUSION

Based upon the foregoing, the Defense respectfully moves the Court to exclude all pre-trial identifications in this case and to preclude them from making an in-court identification of PFC Corsetti.

William E. Cassara, Esquire
Civilian Defense Counsel

I hereby certify that a copy of this document was served on the Trial Counsel and on the Military Judge on March 20, 2006

William E. Cassara, Esquire
Civilian Defense Counsel

IN A GENERAL COURT-MARTIAL OF THE UNITED STATES
US ARMY TRIAL JUDICIARY, THIRD JUDICIAL CIRCUIT, FORT BLISS, TEXAS

UNITED STATES	)	Govt Response to
	)	**Motion to Suppress**
v.	)	**Eyewitness Identifications**
	)	
CORSETTI, DAMIEN	)	
PFC, U.S. Army,	)	**24 March 2006**
A Company,	)	
519TH MI Battalion,	)	
Fort Bragg, NC	)	

COMES NOW the Government, and requests that this court deny the Defense Motion to Suppress Eyewitness identifications, stating as follows:

I. BURDEN OF PROOF/STANDARD OF PROOF

In accordance with M.R.E. 321(d)(2) the Government bears the burden of demonstrating by a preponderance of the evidence that an out of court identification was reliable under the circumstances. If the Court finds the identification unreliable, the government is prohibited from admitting any subsequent identifications, including in-court identifications, unless it can demonstrate by clear and convincing evidence that the later identifications were not derived from the unreliable identification.

II. FACTS

A. Out of Court identification during June 2004 CID interview

On June 28, 2004, CID agents CW4 Angela Birt and CW3 Daniel Carton traveled to Guantanamo Bay, Cuba and questioned Mr. Ahmad Al-Dharbi about the deaths of two detainees at the Bagram Collection Point, Afghanistan in December 2002. As part of that investigation, they showed Mr. Al-Dharbi 66 photographs of male soldiers and 18 photographs of female soldiers and asked him if he recognized any of the soldiers. (Attachment "1") The photographs were shown to Mr. Al-Dharbi in the order of the letters shown on the bottom of the pages (A-N). Mr. Al-Dharbi identified more than fifteen soldiers who were present at the BCP in 2002, PFC Corsetti being only one of those he identified.

Mr. Al-Dharbi spoke to the CID agents about the interaction between detainees and the soldiers he recognized. He was not restricted to talking about PFC Corsetti alone, or about events that had happened to himself. During the CID interview, without being shown any

APPELLATE EXHIBIT XVII

pictures of PFC Corsetti's body, Mr. Al-Dharbi told CID agents that PFC Corsetti had a tattoo of the Virgin Mary on his forearm. He then identified PFC Corsetti as having committed the acts with which he is presently charged. The CID agents did not coerce or suggest to Mr. Al-Dharbi that he choose PFC Corsetti or any of the other approximately 15 soldiers he described.

B. In Court identification during March 2004 deposition

On 8 March 2006, Mr. Al-Dharbi was deposed at Guantanamo Bay, Cuba, in order to use his testimony at trial in this case. PFC Corsetti traveled to Guantanamo Bay, ostensibly to be present during the deposition. A few minutes before the deposition, defense counsel informed trial counsel that PFC Corsetti would not be taking present in the deposition room, a move clearly designed to deprive the Government of the ability to have Mr. Al-Dharbi identify him.

During the deposition, Mr. Al-Dharbi described a soldier who performed various lewd and violent acts with which PFC Corsetti is charged. Before being shown any photographs, Mr. Al-Dharbi stated that his torturer was a big, fat, Italian guy with a tattoo of the Virgin Mary on his forearm. At the end of direct examination, Mr. Al-Dharbi looked at 2 sets of six photographs and identified PFC Corsetti twice. These twelve photographs were 2 out of the 14 sets of photographs that Agents Birt and Carton had shown Mr. Al-Dharbi in June 2004. Contrary to the Defense assertions in its motion, PFC Corsetti's photos were not the first in each set; they were the second and sixth respectively.

III. LAW

Neil v. Biggers, 409 U.S. 188 (1972)

IV. ARGUMENT

The defense correctly cites to Neil v. Biggers, 409, U.S. 188 (1972), as proper authority for the analysis used to determine whether a pretrial identification was unnecessarily suggestive. The Government, through the deposition transcript and the testimony of a CID agent can show that each of the elements has been met. A synopsis of that evidence is set out below.

1. **Did the witness have an opportunity to view the criminal at the time of the crime?** Mr. Al-Dharbi was in a wooden isolation room at the Bagram Collection point with PFC Corsetti for a "long time". (Depo. P. 11) PFC Corsetti kicked Mr. Al-Dharbi in the groin and stomach, and poked him in the chest and neck with a finger - presumably being less than an arm and a leg length away. (Depo. P. 12) PFC Corsetti pulled Mr. Al-Dharbi's chest hairs – presumably being an arms length away. (Depo. P. 14) PFC Corsetti placed his penis against Mr. Al-Dharbi's face, an exercise that would normally requires close proximity to the victim. (Depo. P. 14) PFC Corsetti performed simulated sexual acts in Mr. Al-Dharbi's anal area and threatened to rape him (Depo. P. 14-16). (It should be noted that Mr. Al-Dharbi testified that he was hooded during the simulated sex) Finally, PFC Corsetti stepped on Mr. Al-Dharbi's handcuffed hands and sat on Mr. Al-Dharbi's chest. (Depo. P. 17) Clearly Mr. Al-Dharbi had an intimate opportunity to see and hear PFC Corsetti on various occasions.

2. **What was the witness' degree of attention?** Being kicked, beaten, stepped on, and having genitalia placed in one's face are attention-focusing periods in the life of a detainee. It is highly probable that Mr. Al-Dharbi was keenly aware of the identities of those who were inflicting these acts on his body.

3. **What was the accuracy of the witness's prior description of the alleged criminal?** The description was highly accurate as it contained an element of detail that was theretofore unknown to the CID agents. In the June 2004 CID interview Mr. Al-Dharbi identified PFC Corsetti as having a tattoo of the Virgin Mary on his forearm. PFC Corsetti, in fact, had such a tattoo while stationed in Afghanistan.

4. **What was the level of certainty demonstrated by the witness at the June 2004 CID interview?** Mr. Al-Dharbi did not seem uncertain at all about his identification of PFC Corsetti or his tattoo.

5. **What was the length of time between the crime and the confrontation?** Approximately 1 ½ to 2 years had elapsed between the time of the abuse and the June 2004 CID interview. The length of time is not a significant factor in this case because the lineup contained 80+ photographs and Mr. Al-Dharbi's identification of PFC Corsetti was certain. Furthermore, identification of the Virgin Mary tattoo could not have been the result of a suggestive lineup or failed memory.

The Neil v. Biggers factors have been met, and the June 2004 identification was not unnecessarily suggestive.

B. The Pretrial Identification was not Conducive to a Substantial Likelihood of Misidentification

The defense argues that: "[t]he pretrial identification was conducive to a substantial likelihood of misidentification. PFC Corsetti's photograph was the first one in both line-ups, and the alleged victim was only shown two photographic line-ups. At no time has he made a personal identification of the accused." These assertions are untrue.

The one *pretrial* identification of PFC Corsetti was done during CID questioning of MR. Al-Dharbi in June 2004. In the June 2004 lineup, Mr. Al-Dharbi was shown 14 panels of photographs, each with six pictures (total 84 photographs). PFC Corsetti was not the first photo in any of these panels. His was the 2nd and 6th photograph in the first two panels. Eleven of the panels had male soldiers (66 photos) and 3 panels had female soldiers (18 photos).

The purpose of the 2004 showing was to determine if Mr. Al-Dharbi recognized any soldiers *who had mistreated the two detainees who had died at Bagram*. Mr. Al-Dharbi recognized, for various reasons, more than fifteen of the soldiers in the lineup and described his contact with them, some good and some bad. Contrary to the defense assertions, the identification of soldiers who had abused Mr. Al-Dharbi was not something the CID agents were seeking. The purpose of the lineup was to determine who had assaulted the two dead detainees.

The March 2006 deposition was not a "pre-trial identification". As defense counsel acknowledges in the last portion of his *Motion to Suppress Eyewitness Identifications*, the deposition was an in-court identification, at which the defense had an opportunity to cross-examine the witness as to his ability to observe PFC Corsetti and the surety of his memory.

An in-court identification is usually composed of a verbal identification of the Accused sitting at the defense table. Because the defense counsel chose not to have PFC Corsetti physically present in the deposition room, he made it impossible to conduct this type of personal in-court identification. However, the defense's tactical move made Mr. Al-Dharbi's deposition identification all the more strong. Rather than looking at PFC Corsetti alone at the counsel table, Mr. Al-Dharbi was able to identify him twice out of two sets of 6 photographs (Exhibit "2"), a feat statistically more difficult than physically pointing a finger at the lone Accused. Again, contrary to the defense assertion, PFC Corsetti was not the first photo in any of these panels.

V. CONCLUSION

The June 2004 lineup was not unreasonably suggestive. It did not the taint in-court identification at the March 2006 deposition. Both identifications should be submitted to the panel. For the foregoing reasons, the Government requests that the Court admit the identifications of PFC Corsetti by Ahmad Al-Dharbi done at Guantanamo Bay in June 2004 and March 2006.

/signed/

DAVID R. TRAINOR
CPT, JA
Trial Counsel

This is to certify that I have served the foregoing on defense counsel and the military judge this 24th day of March 2006.

/signed/

DAVID R. TRAINOR
CPT, JA
Trial Counsel

16. The name, detainee sequence number, capture number, capture date and crime charged with or suspected of for the all detainees at Bagram Confinement Facility..

17. Request copies of any SIGACTS, FRAGOs, OPORDERs, or other similar documents related to the ICRC visits to Bagram Air Base from 1 August to 1 December 2003.

18. Request copies of all statements, electronic mails (e-mails), memorandums, and other documentation sent or received by anyone in the chain of command, up to and including the Commander-In-Chief (President George W. Bush), regarding Bagram prisoner/detainee abuse.

19. Request copies of all memorandums, point papers, electronic mail (email), statements, documentation, and audio/videotapes regarding the applicability of the Geneva Convention to detainees in all of Iraq, Afghanistan and Guantanamo Bay Prisons.

20. Request copies of all portions of the classified and unclassified Justice Department Memorandum from government attorneys to the White House from on or about August 2002 through May 2004 regarding the torturing of captured Al-Qaeda members abroad and why that torture may be justified in the war on terrorism.

21. Copies of any administrative or other non-criminal investigations related, directly or indirectly, to this case; for example, AR 15-6 investigations, reports of survey, line of duty investigations, commander's inquiries, collateral, Article 139, EO, or IG investigations, and any other like or similar investigation(s) which have not been previously provided

William E. Cassara, Esquire
Civilian Defense Counsel

UNITED STATES	)	**FORT BLISS, TEXAS**
	)	
v.	)	
	)	**RESPONSE TO**
	)	**MOTION TO COMPEL DISCOVERY**
CORSETTI, Damien M.	)	
	)	
PFC, U.S. Army	)	
519th Military Intelligence Battalion	)	
Fort Bragg, North Carolina 28310	)	**24 March 2006**

COMES NOW THE GOVERNMENT, by and through its appointed representative, and files this, its Response to the accused's Motion to Compel Discovery, showing the Court as follows:

1.

The accused, PFC Damien M. Corsetti, is charged with two specifications of dereliction of duty, in violation of Article 92, UCMJ; one specification of failure to obey a general order, in violation of Article 92, UCMJ; three specifications of maltreatment of a subordinate, in violation of Article 93, UCMJ; one specification of wrongful use of hashish, in violation of Article 112a; three specifications of assault consummated by battery, in violation of Article 128, UCMJ; and three specifications involving indecent acts or language, in violation of Article 134, UCMJ.

2.

Immediately following the preferral of charges against PFC Corsetti, the Government shipped to Defense Counsel complete copies of "CID REPORT OF INVESTIGATION – FINAL(C) – 0134-02-CID369-23533" and "CID REPORT OF INVESTIGATION – FINAL(C) – 0137-02-CID369-23534," both dated 8 October 2004, with all associated, unclassified exhibits and attachments. Electronic mail correspondence between PFC Corsetti's detailed military counsel, CPT Joseph Owens, and the Investigating Officer, COL Jay Hogan, reflects the defense's receipt of those files on 14 October 2006. The unclassified files produced total more than 4,000 pages.

3.

A substantially smaller portion of the investigative documents material to this case are classified, none higher than SECRET. Copies of all relevant, classified materials are maintained by the prosecution at Fort Bliss, Texas and at Fort McPherson, Georgia; some are available in electronic format. The Government's position regarding access to these documents has remained unchanged since preferral of charges (indeed, since preferral of charges in the first Bagram-related prosecution): defense counsel will be provided access to all documents, at either location, at any time. Defense counsel have, in fact, reviewed the classified documents in this case, at both Fort Bliss and Fort McPherson; at no time has any request for access been refused

APPELLATE EXHIBIT VII

or even questioned. The Government has declined to provide civilian defense counsel with a "take-home" copy of the materials, his Reserve status notwithstanding. Likewise, the Government has declined to forward a copy of the classified materials to Fort Gordon: no unit or element assigned to Fort Gordon has any responsibility for, or role in, this case, and sound document accountability practices simply do not yield in favor of defense counsel's convenience argument. As for those documents and materials maintained in electronic formats, the Government has repeatedly – to the point of distraction – requested that detailed assistant defense counsel acquire an account on the "AKO-S" classified portal, so that all such materials might be provided in a secure manner. The Government has repeatedly explained that production of those materials can, and will, be accomplished instantaneously upon receipt of secure account information.

4.

The Government responds to the enumerated paragraphs of the Defense Motion to Compel, as follows:

1. Copies of all inspections or evaluations done of Bagram Air Base since the beginning of Operation Iraqi Freedom.

No documents or materials produced during the referenced time frame are relevant to the case at bar.

2. Copies of any logs or journals kept on OGA/ODA personnel's presence at Bagram Air Base.

The Government is unaware of the existence of any documents or materials responsive to the defense's request. Moreover, even assuming, *arguendo*, that such materials could be identified, the presence or absence of personnel not in PFC Corsetti's chain of command would not be relevant to the issues in this case.

3. Medical records, records, and copies of all investigations into the activities of Ahmed al Darbi and Omar al Faroq.

All materials in the Government's possession which are potentially responsive to the defense's request have previously been made available to the defense, as noted above. The Government maintains communications with offices in theater, and has requested that additional record reviews be conducted, to ensure that no potentially-responsive document is omitted; any results, positive or negative, will be provided to the defense immediately upon receipt.

4. The name, detainee number and other information regarding other detainees.

All materials in the Government's possession which are potentially responsive to the defense's request have previously been made available to the defense, as noted above.

5. Statements/e-mails relating to detainee operations at Bagram.

The Government reiterates its objection to the defense's original request, as seeking materials beyond the scope of permissible discovery. The request, as drafted, is entirely too broad to allow for reasonable response: essentially, all documents of any nature, generated or received by anyone (up to and including the President of the United States), which touch, however tangentially, on the topic of detainee operations at Bagram, without limitation to any particular issue or timeframe.

Subject to the foregoing objection, and without waiving same, the Government shows that all documents or materials which would be potentially responsive to a narrowly-tailored request for documents relevant to this case, have been previously provided to the defense, as noted above.

6. Defense request number 20.

The Government remains unaware of any documents or materials responsive to this request. The defense suggests that the existence of the document "has been acknowledged by the administration, and widely reported in the press"; if so, the defense would seem to have access to any such document at a level equal to the prosecution. In any event, even if such a legal opinion exists, it would have no relevance whatsoever to the facts at issue here.

5.

The defense requests that the Court compel production of "all prior statements of the alleged victim, Ahmed al Darbi." The Government shows that all documents and materials in its possession, related in any way to the subject victim, have either been provided or, if classified, are available for review by defense counsel. As noted above, the prosecution has requested that additional record reviews be conducted, to ensure that no potentially-responsive document is omitted; any results, positive or negative, will be provided to the defense immediately upon receipt.

WHEREFORE, the Government, having provided appropriate responses to each and every proper request for discovery made by the defense, prays that the Defense Motion to Compel Discovery be denied.

JOHN B. PARKER
CPT, JA
Assistant Trial Counsel

I hereby certify that the above document was served on counsel for the accused via email on 24 March 2006.

JOHN B. PARKER
CPT, JA
Assistant Trial Counsel

OFFICE OF THE CLERK OF COURT
US ARMY JUDICIARY
ARLINGTON, VIRGINIA 22203-1837

THE RECORD OF TRIAL HAS BEEN REVIEWED FOR RELEASE UNDER THE PROVISIONS OF THE FREEDOM OF INFORMATION ACT. THE DOCUMENT[S] DESCRIBED AS FOLLOWS HAVE BEEN REMOVED FROM THIS COPY OF THE RECORD BECAUSE THE RELEASE WOULD BE IN VIOLATION OF THE DOD FREEDOM OF INFORMATION ACT PROGRAM, DOD 5400.7-R, EXEMPTION (b)(6) 5 U.S.C. 552(b)6):

Photographs

Photographic Line-Up
Pros-Exh. 4 for ID

UNITED STATES v. CORSETTI, DAMIEN. PFC, U.S. Army, A Co., 519th MI Battalion Fort Bragg, NC 28310	MOTION FOR APPROPRIATE RELIEF (Abatement) 28 March 2006

I. Motion

AND NOW comes PFC Damien Corsetti, by and through his defense counsels, William E. Cassara, Esquire and CPT Ryan Dowdy, and submits the following Motion to Abate based on unequal access to a witness of central importance under R.C.M. 703 and Article 46 of the U.C.M.J.

II. Legal Standard and Burden of Proof

1. The burden of proof for this motion rests on the moving party, the Defense. The standard of proof is preponderance of the evidence.

III. Statement of Facts

For purposes of this motion, the defense submits the following:

2. PFC Corsetti is charged with a violation of Article 93 of the U.C.M.J. by throwing Omar al-Farouq (BT 179) removing Omar Al Faroq's pants, grabbing him above the head and shoulders, and by bending him over a table and waving a water bottle in close proximity to his buttocks.

3. PFC Corsetti was assigned to the 519th MI Battalion at Bagram Airfield, Afghanistan, at the time of the charged conduct in this case.

4. Omar al-Farouq was a Person Under Control (PUC) at Bagram Airfield, Afghanistan, at the time of the charged conduct in this case. Al-Farouq was in U.S. Custody from on or about August 2002 through on or about July 2005

6During the course of the Article 32 hearing, the Government disclosed that al-Farouq had somehow escaped from the high-security Bagram Airfield Detention Facility in the summer of 2005, and that his whereabouts were unknown. Omar al-Farouq was in US custody until approximately July 2005. The Defense did not have access to al-Farouq prior to his escape.

7. The *Newsweek* magazine dated 14 November 2005 contained an article entitled "Al Qaeda Prison Break" (pages 34-35) (see Addendum) describing the escape of Omar al-Farouq. The article contained a statement from a confidential informant in the Afghani government, who

APPELLATE EXHIBIT VIII

revealed that Omar al-Farouq did not escape, but was exchanged for captured U.S. Special Operations soldiers.

IV. Law

9. The Defense relies on the following authority in support of its motion:

R.C.M. 703
Article 46, U.C.M.J.
Article 93
Article 128, U.C.M.J.

V Argument – Government Failed To Meet Burden

10. RCM 703(b)(3) provides:

> "if the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party."

11. Omar al-Farouq is unquestionably a witness of "central importance". Article 93 requires a showing that the accused's actions resulted in "pain or sufferening". DA PAM 27-9, para 3-17-1(d). Without Farouq's testimony, the Government can only present the testimony of a soldier who witnessed the alleged incident from a distance, but claims to know whether Farouq suffered. This is not an adequate substitute to Farouq's testimony. Farouq received no medical attention, and made no statements regarding the alleged incident. His statements would provide critical and vital information concerning this alleged incident.

12. Article 46 requires that both the Government and the Defense have "equal opportunity" to obtain evidence. Omar al-Farouq was in the Government's custody for approximately 2 ½ years after the alleged incident of the instant case. The Defense was never given an opportunity to question Farouq. The Defense does not claim that the Trial Counsel had anything to do with al-Farouq's unavailability. However, the *Newsweek* article along with the astonishing circumstances of Farouq's escape from a highly-fortified facility support the inference that the US Government may have caused Farouq's unavailability.

VIII. PROPOSED RELIEF

13. In light of the extremely unequal access to a witness of central importance, the Defense requests a continuance until Omar al-Farouq is produced. Alternatively, the

Defense requests the Military Judge to abate the charges associated with Omar al-Farouq.

IX. EVIDENCE

14. Oral argument is requested only in rebuttal.

/original signed/

WILLIAM E. CASSARA
Civilian Defense Counsel

CERTIFICATE OF SERVICE

I certify that on 28 March 2006, I forwarded this request by e-mail to CPT Christopher Ellis, Trial Counsel.

/original signed/

WILLIAM E. CASSARA
Civilian Defense Counsel

UNITED STATES	)	**FORT BLISS, TEXAS**
	)	
v.	)	**RESPONSE TO MOTION FOR APPROPRIATE RELIEF (Abatement)**
	)	
CORSETTI. Damien M.	)	
	)	
PFC, U.S. Army **519th Military Intelligence Battalion** **Fort Bragg, North Carolina 28310**	)	**23 March 2006**

COMES NOW THE GOVERNMENT, by and through its appointed representative, and files this, its Response to the accused's Motion for Appropriate Relief (Abatement), showing the Court as follows:

I. RELIEF SOUGHT

The Government requests that the Court deny the pending Motion.

II. BURDEN

The burden of proof rests with the accused, as the moving party. The appropriate standard is preponderance of the evidence.

III. FACTS

The accused, PFC Damien M. Corsetti, is charged with two specifications of dereliction of duty, in violation of Article 92, UCMJ; one specification of failure to obey a general order, in violation of Article 92, UCMJ; three specifications of maltreatment of a subordinate, in violation of Article 93, UCMJ; one specification of wrongful use of hashish, in violation of Article 112a; three specifications of assault consummated by battery, in violation of Article 128, UCMJ; and three specifications involving indecent acts or language, in violation of Article 134, UCMJ.

In its Motion, the accused asserts that PFC Corsetti is charged with maltreatment "by throwing Omar al-Farouq (BT-179"…. (See, Motion, para. 2.) Presumably in connection with that charge, the defense contends:

> Omar al-Farouq is unquestionably a witness of "central importance". Article 93 requires a showing that the accused's actions resulted in "pain or sufferening" [sic]. DA PAM 27-9, para 3-17-1(d). Without Farouq's testimony, the Government can only present the testimony of a soldier who witnessed the alleged incident from a distance, but claims to know whether Farouq suffered. This is not an adequate substitute to Farouq's testimony. Farouq received no medical

APPELLATE EXHIBIT IX

attention, and made no statements regarding the alleged incident. His statements would provide critical and vital information concerning this alleged incident.

(Motion, para. 11.)

In point of fact, PFC Corsetti is not charged with any such offense: the charges related to BT-179 stem from the accused's having made the detainee remove his pants in the presence of a female interrogator; having assaulted BT-179 by threatening to sodomize him with a water bottle; and having grabbed BT-179 by the head and shoulders. Likewise, the charges in this case are not supported solely by "the testimony of a soldier who witnessed the alleged incident from a distance, but claims to know whether Farouq suffered": the subject actions of PFC Corsetti were witnessed by interpreters or fellow interrogators, who were present in the small interrogation room at the time.

IV. LAW

The following authorities are applicable to the Court's analysis:

Articles 46 and 49 of the Uniform Code of military Justice (UCMJ);
Rule for Court- Martial (RCM) 703(b)3;
Military Rule of Evidence (MRE) 804(a); and
U.S. v. Carson, 57 M.J. 410 (2002).

V. WITNESSES AND EVIDENCE

The Government does not request an evidentiary hearing on the pending motion.

VI. ARGUMENT AND CITATION OF AUTHORITY

Both the accused's misstatement of the facts of this case, and the text of his argument, seem to have been taken, *verbatim*, from an identical motion filed in the matter of U.S. v. Driver. In that case, the accused was charged with assaulting and maltreating the same victim, BT-179, by throwing him against a wall; an isolation cell guard, standing outside the cell, was the lone witness.

In considering that motion, related to the same unavailable witness, the Driver trial court found that neither defense counsel nor trial counsel had access to BT-179 prior to his escape, and held:

> There is no dispute that Mr. al-Farouq is unavailable to testify at the accused's trial or to appear at any other proceeding over which the United States exercises control. RCM 703(b)(3) provides:
>
> > "Notwithstanding subsections (b)(1) and (2) of this rule, a party is not entitled to the presence of a witness who is unavailable within the meaning of Mil. R. Evid. 804(a). However, if the testimony of a witness

> who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party."

Article 93, UCMJ proscribes cruelty toward or oppression or maltreatment of any person subject to ones orders. Maltreatment is further defined as assault, improper punishment and sexual harassment. The defense asserts that the government must prove the pain and suffering of al-Farouq by his personal testimony that he actually was harmed physically, mentally or emotionally in some way. However, The Court of Appeals for the Armed Forces has held that "in a prosecution for maltreatment under Article 93, UCMJ, it is not necessary to prove physical or mental harm or suffering on the part of the victim . . . It is only necessary to show, as measured from an objective viewpoint . . . that the accused's actions reasonably could have caused physical or mental harm or suffering." U.S. v. Carson, 57 M.J. 410 (2002). Thus, Mr. al-Farouq, though he may be able to testify that he was or was not harmed in some way, is not of such central importance to the determination of the objective harm as to be essential to a fair trial. In deed, Mr. Farouq's absence logically works more towards the accused's favor than otherwise.

....Article 46 declares that "The trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." The President has prescribed such regulations in the RCM 701-703. While a party is normally entitled to the production of witnesses whose testimony is "relevant and necessary." RCM 703(b)(1). However, a party is not entitled to the presence of a witness who is unavailable within the meaning of Military Rule of Evidence (MRE) 804(a). That rule states that a witness is unavailable as a witness when he is unavailable within the meaning of Article 49(d)(2) UCMJ, which states that a witness is unavailable when "by reason of death, age, sickness, bodily infirmity, imprisonment, . . . nonamenability to process, or other reasonable cause . . ." While Mr. al-Farouq's situation does not fit squarely into the examples set forth in Article 49, it would strain common sense to hold that a witness that no party to these proceedings has any knowledge of the whereabouts of is somehow more available than someone who is sick or in prison. Simply put, if he cannot be found the only witness that would be more unavailable than him would be one who is dead. Finally, though the United States government, in some form, had access to Mr. al-Farouq for two and one-half years, more or less, the trial counsel in this case has had no access to him and has no "opportunity to obtain" him for trial. In these ways they are completely equal to the defense counsel with respect to Mr. al-Farouq. And, this is the equality contemplated by Article 46....The defense motion to continue or abate the proceedings is DENIED.

Essential Findings of Fact, Conclusions of Law and Ruling, Defense Motion for Appropriate Relief – Abatement, U.S. v. Driver, 6 February 2006 (copy of full order attached).

VII. CONCLUSION

The Government submits that the trial court's analysis in U.S. v. Driver, *supra*, should also be applied to the facts in the case at bar. The victim/witness, BT-179, is utterly unavailable, and neither side has had any benefit of unequal access. The accused has not met his burden of proving grounds for abatement of the proceedings, and the pending Motion should be denied.

JOHN B. PARKER
CPT, JA
Assistant Trial Counsel

I hereby certify that the above document was served on counsel for the accused via email to bill@williamcassara.com on 23 March 2006.

JOHN B. PARKER
CPT, JA
Assistant Trial Counsel