DEPARTMENT OF THE ARMY
HEADQUARTERS, U. S. ARMY AIR DEFENSE ARTILLERY CENTER
AND FORT BLISS
1733 PLEASONTON ROAD
FORT BLISS, TEXAS 79916-6816

REPLY TO
ATTENTION OF:

ATZC-JAL

15 March 2006

MEMORANDUM THRU Office of the Staff Judge Advocate

FOR BG Robert P. Lennox, Commanding General, General Court-Martial Convening Authority

SUBJECT: Report of Deposition Irregularity

1. I was appointed as the Deposition Officer in the case of *United States v. PFC Damien M. Corsetti*. On March 8, 2006 the deposition of the witness Ahmed Al Darbi was conducted at the Guantanamo Naval Station, Cuba. IAW Rules for Courts Martial 702(f)(9) and the appointment order, I am to report back to the Convening Authority "any substantial irregularity in the proceeding." This memorandum is my report.

2. There were two irregularities that occurred during the deposition:

a. At the time and place scheduled for the deposition the witness was not present. The deposition was scheduled for around 1530 and at that time it was communicated to me by detention facility personnel that the witness did not want to leave his cell to attend the deposition and that personnel from the facility would go and talk with him. Around 1900 the witness arrived and stated on the record that he was there voluntarily.

b. The accused was not present in the room during the deposition. His civilian defense counsel stated on the record that the accused voluntarily chose not to be present and to instead watch the deposition via a video monitor.

3. There were no other noted irregularities. The court reporter is in the process of typing the record and once I authenticate it will forward it to the Office of the Staff Judge Advocate.

4. I can be contacted at the above address or Voice (915) 568-4704 or Fax (915) 568-4821 or craig.drummond@bliss.army.mil. Respectfully submitted.

CRAIG W. DRUMMOND
CPT, JA
Detailed Deposition Officer

DEPARTMENT OF THE ARMY
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AND FORT BLISS
1733 PLEASONTON ROAD
FORT BLISS, TEXAS 79916

ATZC-CG

MEMORANDUM THRU Staff Judge Advocate

FOR Bagram Prosecution Team

SUBJECT: Order for the Deposition of Ahmed al Darbi

1. As general court-martial convening authority in *United States v. PFC Damien M. Corsetti*, I find that there are exceptional circumstances concerning a witness in the case that warrant the preservation of testimony by taking a deposition. Specifically, an accusing witness, Ahmed al Darbi, has been detained for reasons of national security at the Guantanamo Bay Naval Station, Cuba, and may not be available to testify at trial in person.

2. I find that it is in the interest of justice that the material testimony of Ahmed al Darbi be taken and preserved for potential use at court-martial. Pursuant to my authority under Rule for Courts-Martial 702, I hereby order that the deposition of Ahmed al Darbi be taken by the Bagram Prosecution Team and counsel for the accused no later than 10 February 2006.

ROBERT P. LENNOX
Brigadier General, USA
Commanding

DEPARTMENT OF THE ARMY
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AND FORT BLISS
1733 PLEASONTON ROAD
FORT BLISS, TEXAS 79916

ATZC-CG

MEMORANDUM FOR CPT Craig Drummond, Office of the Staff Judge Advocate

SUBJECT: Appointment as Deposition Officer

1. In accordance with Rule for Courts-Martial702(d)(1), you are hereby detailed as deposition officer to depose Ahmed al Darbi, a witness in the case of *United States v. PFC Damien M. Corsetti.*

2. Ahmed al Darbi is currently detained at Guantanamo Naval Station, Cuba. You will execute this mission no later than 10 February 2006 unless I grant an extension of time. You will immediately coordinate travel arrangements and court reporter support with the Bagram Prosecution Team chief, MAJ Christopher D. Carrier (915-569-5544; christopher.carrier1@us.army.mil). You will arrange the time and place of the deposition, administer the oath to the witness, reporter, and interpreter, maintain order during the proceeding, and record objections by parties.

3. You are advised that the trial counsel is CPT Christopher E. Ellis (Fort McPherson; 404- 464-0319; christopher.ellis@forscom.army.mil). Assistant trial counsel is CPT Branson Parker (Fort McPherson; 404-464-0329; branson.parker@forscom.army.mil. Defense counsel is CPT Joseph Owens (TDS, Fort Bragg; 910-396-7307; joseph.owens@us.army.mil).

4. You will insure that an audio recording is made of the entire proceeding so that a verbatim transcript may be prepared. When the verbatim transcript has been prepared by the court reporter, you will authenticate the record of the deposition and forward it to me, noting any substantial irregularity in the proceeding, no later than 17 February 2006.

ROBERT P. LENNOX
Brigadier General, USA
Commanding

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ATZC-CG

19 January 2006

MEMORANDUM FOR Deposition Officer (CPT Craig Drummond), *United States v. Corsetti*

SUBJECT: Extension of Time for the Deposition of Ahmed al Darbi

1. At the request of civilian defense counsel recently retained by the accused, I am extending the deadline for the deposition of Ahmed al Darbi from 10 February 2006 to 10 March 2006. You will authenticate the record of the deposition and forward it to me no later than 17 March 2006.

2. All other directives and requirements in my 6 January 2006 orders remain in effect.

ROBERT P. LENNOX
Brigadier General, USA
Commanding

United States Army Trial Judiciary
Fourth Judicial Circuit, Fort Bliss, Texas

UNITED STATES

v.

PFC Damien M. Corsetti
Company A, 519th MI Battalion
Fort Bragg, NC 28310

Essential Findings of Fact, Conclusions of Law and Ruling Defense Motion to Suppress Eyewitness Identification

April 27, 2006

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1. The defense has moved, pursuant to Military Rule of Evidence (MRE) 321(c)(2) to exclude several "pretrial" identifications of the accused made by an alleged victim. I have considered the briefs submitted by the parties, documents appended thereto, witness testimony, and the arguments of counsel.

Facts.

2. The Court finds the following facts by a preponderance of the evidence:

a. The accused is charged with: one specification of violating a lawful general order; two specifications of willful dereliction of duty, one of which involves a detainee known as Ahmed al Darbi; three specifications of maltreatment, one of which involves detainee al Darbi; one specification of wrongful use of a controlled substance; three specifications of assault, two of which involve detainee al Darbi; one specification of committing indecent acts with detainee al Darbi; one specification of indecent exposure; and one specification of communicating indecent language, also involving detainee al Darbi.

b. The charges were preferred on 29 September 2005. An Article 32 investigation was conducted on 6 December 2005, and the case was referred to a general court-martial by the convening authority on 9 January 2006. The accused was arraigned on 28 March 2006.

c. CID Special Agent (SA) Daniel Carton testified that in March 2004 he was assigned to a CID team that was investigating the deaths of two detainees known as Dilawar and Habibullah at the Bagram Detention Facility in Afghanistan in December of 2002.

d. In June of 2004, SA Carton traveled to the Guantanamo Naval Base in Cuba to interview detainees who were known to have been present

APPELLATE EXHIBIT XXVI

at the Bagram facility in December 2002. SA Carton's stated purpose was to obtain information regarding the detainee deaths.

e. On of the individuals SA Carton interview at Guantanamo was the detainee Ahmad al Darbi, also known as BT 264 or ISN 768. On 28 June 2004 at 0825 hours, SA Carton began his interview of al Darbi. The interview was conducted in an interview trailer which consisted of a standard size room with air conditioning and a monitoring device for use by security forces. Present in the interview room were SA Carton, al Darbi, and a CID interpreter. According to SA Carton, he did not coerce al Darbi in any fashion to obtain his cooperation. SA Carton testified that had al Darbi chosen not to speak to him, he would have terminated the interview.

f. SA Carton testified that he began the interview by informing al Darbi that the purpose of the interview was to obtain information regarding the deaths of the detainees Dilawar and Habibullah at Bagram two years earlier.

g. Appellate Exhibit XXIV is a portion of SA Carton's Agent's Investigative Report (AIR) pertaining to his interview of al Darbi, who is referred to in the document as "ISN 768." During the course of the interview with SA Carton, al Darbi related that he had been held at the Bagram facility for a period of eight months, two weeks of which he spent in a so-called isolation cell. He also made reference to several beatings, "torture," and other maltreatment that he allegedly received at the hands of military police guards and interrogators. Al Darbi informed SA Carton that he had been mistreated before he showed al Darbi any photographic images of military police and military intelligence personnel known to have been at the Bagram facility in late 2002.

h. The AIR further reflects that at 0855 hours, al Darbi was provided a "photographic lineup" from which he identified the accused. "A2 (a reference to the page and specific image contained in the photographic lineup) was described by al Darbi as "in charge of torture. He had a tattoo of the Virgin Mary on the inside of his forearm. He showed me his penis and put it against my face. He hit me between the legs, in the chest and threw me around the room." Al Darbi also stated that "B6" was the same guy as A2 (according to SA Carton's AAR, both images depict the accused).

i. SA Carton testified that he handed al Darbi a photo array (Enclosure 1 to Appellate Exhibit XVII), which was comprised of pages marked A through N, each of which contained six facial images of personnel assigned to Bagram at the time of the offenses then under investigation. The file numbers annotated on each page corresponded to the CID investigations pertaining to Dilawar and Habibullah. Al Darbi

initially indicated that he recognized 12-15 of the persons depicted in the photo array. A total of 84 photographic images was contained in the photo array presented to al Darbi.

j. According to SA Carton, the accused identified the person appearing at position A2 on page A as the accused. Al Darbi also identified the person appearing at position B6 on page B as the accused.

k. SA Carton testified that all of the images depicted in Enclosure 1 to Appellate Exhibit XVII are of individuals who were known to have been at Bagram at the time of the deaths of Dilawar and Habibullah. The first two pages of the enclosure (A and B) are of only men. The next three pages (C, D and E) are of only women. The remaining pages (F through N) contain images of only men. The images were shown to al Darbi in sequential order, starting with the page marked "A."

l. According to SA Carton, the accused told him that during the time he was held at Bagram in the general population cells, he had a clear view of what was happening within the facility. SA Carton further testified that his investigation determined that Al Darbi was able to independently corroborate other events which had occurred within the facility. He was also able to identify 12-15 of the persons depicted in the photo array accurately based upon their duty positions. Several notations appearing in SA Carton's AIR detail the specific individuals al Darbi identified from the initial photo array.

m. At an Article 39(a) session conducted on 28 March 2006, the request of trial counsel, the accused exposed his left and right forearms for the Court's inspection. The accused had what appeared to be a large tattoo of the Virgin Mary on his inside left forearm. He also had another large tattoo on his right inside forearm.

n. As reflected in Appellate Exhibit XXV, detainee al Darbi was deposed at Guantanamo Bay, Cuba at the direction of the convening authority on 8 March 2006. Although the accused and both his civilian and detailed counsel were present, the accused waived his right to be present during the al Darbi deposition. The accused viewed the deposition from an adjacent room through an audio-video link.

o. In the course of his deposition, al Darbi described a soldier who performed acts consistent with the offenses with which the accused has been charged. Before being shown any photographs, al Darbi described the accused as "a big, fat Italian guy with a tattoo of the Virgin Mary" on his left forearm (See Appellate Exhibit XXV, pages 11-17).

p. Al Darbi's deposition testimony reflects that he was in a wooden isolation room with the accused for a "long time;" the accused kicked the deponent in the groin and stomach, poked him in the chest and neck with a finger; pulled on the deponent's chest hair; placed his penis against the deponent's face; performed similar acts in close proximity to the deponent's anal area, performed simulated sex acts and otherwise threatened to rape the deponent; and stepped on the deponent's handcuffed hands and chest (See pages 11-17 of Appellate Exhibit XXV).

q. At the end of the Government's direct examination, al Darbi was shown the two documents that comprise Enclosure 2 of Appellate Exhibit XVII. Al Darbi identified the individual who appears at position 2 on page A, and position 6 on page B as being the person who committed the charged offenses.

r. Pages A and B of the photo arrays used by SA Carton in June of 2004 are the same pages A and B of the photo arrays utilized by trial counsel during the 8 March 2006 deposition. In the photo array marked page A, the accused's image is located in the top-middle portion of the array, and his image is roughly the same size as that of the other five individuals depicted on the page. The photographs depict each of the individuals from the neck up. No rank or other identifying information is visible in any of the images. The individuals depicted all appear to be wearing either a BDU top or similar military apparel.

s. In the photo array marked page B, the accused's image is located in the lower-right portion of the array. The accused's image is the same size as four of the five other images depicted in the array. The image of the individual depicted at position B5 is somewhat smaller than the other five images. The photographs again depict each of the individuals from the neck up, with no observable rank or other identifying information. The individuals depicted are also all wearing either a BDU top or similar military apparel.

t. The following observations are noted with regard to the individuals appearing on page A and page B of the photo arrays: the individual depicted in position 1A appears to be the same individual depicted at position B3; the individual depicted at position 3A appears to be the same individual depicted at position 1B; the individual depicted at position 4A appears to be the same individual depicted at position 2B; and the individual depicted at position 6A appears to be the same individual depicted at position 4B. The individual depicted at position 5A does not appear on page B. The individual depicted at position B5 does not appear on page A. All of the individuals depicted are white males. Two individuals on page A are depicted wearing eye glasses. One individual depicted on page B is wearing eyeglasses. The accused (located at positions A2 and

B6) is not depicted wearing eyeglasses. All of the individuals depicted in the two arrays have military haircuts. The physical build of the individuals depicted in the photo arrays cannot be accurately discerned from the photographs.

Law and Analysis.

3. The defense asserts that both of the pretrial identifications of the accused made by detainee al Darbi are so unnecessarily suggestive so as to create a substantial likelihood of mistaken identification, and should thus be suppressed. The Government asserts that each of the pretrial identifications of the accused was not conducive to a substantial likelihood of misidentification of the accused.

4. In *Neil v. Beggars*, 409 U.S. 188 (1972), the Supreme Court established five factors to be considered in determining the reliability of identification testimony: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the similarity between the witness' prior description of the criminal and the actual description of the accused; (4) the witness' level certainty in the correctness of the identification as demonstrated at the confrontation; and (5) the lapse of time between the crime and the confrontation.

5. The Court concludes that the Government has demonstrated by a preponderance of the evidence that the pretrial identification of the accused by detainee al Darbi on 28 June 2004 was reliable under the circumstances. The Court specifically concludes: al Darbi had an ample opportunity to observe the accused at the time of the charged offenses, and was in extremely close proximity at the time of such offenses; the nature of the charged offenses makes it highly likely that al Darbi's attention was focused on the accused; the accuracy of al Darbi's prior identification of the accused was highly accurate in that it contained an element of detail that was previously unknown to CID, namely a distinctive tattoo of the Virgin Mary on his left forearm; there is no evidence that al Darbi was in any way uncertain of his identification of the accused in either instance; and although approximately eighteen months had passed between the alleged offenses and al Darbi's first identification of the accused, there is no evidence before the Court that such passage of time in any was diminished al Darbi's ability to identify the accused, especially given his close proximity to the accused at the time of the alleged offenses and the nature of such offenses. The Court similarly concludes that with regard to al Darbi's identification of the accused on 8 March 2006, each of the five *Beggars* factors has also been satisfied by a preponderance of the evidence for the same reasons noted above. Finally, the Court concludes that the pretrial identification of the accused was not conducive to a substantial likelihood of misidentification.

Ruling.

6. The defense motion to suppress the 28 June 2004 and 8 March 2006 pretrial identifications of the accused is DENIED.

MARK P. SPOSATO
LTC, JA
Military Judge

United States Army Trial Judiciary
Fourth Judicial Circuit, Fort Bliss, Texas

UNITED STATES)
)
v.)
)
PFC Damien M. Corsetti)
Company A, 519th MI Battalion)
Fort Bragg, NC 28310)

Essential Findings of Fact, Conclusions of Law and Ruling Government Motion to Admit Deposition

April 27, 2006

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1. The Government has moved, pursuant to Article 49 of the UCMJ and Military Rule of Evidence (MRE) 804(d)(1), to admit the written deposition of Ahmed al Darbi as former testimony. I have considered the briefs submitted by the parties, documents appended thereto, the authenticated record of the deposition, and the arguments of counsel.

Facts.

2. The Court finds the following facts by a preponderance of the evidence:

a. The accused is charged with: one specification of violating a lawful general order; two specifications of willful dereliction of duty, one of which involves detainee al Darbi; three specifications of maltreatment, one of which involves detainee al Darbi; one specification of wrongful use of a controlled substance; three specifications of assault, two of which involve detainee al Darbi; one specification of committing indecent acts with detainee al Darbi; one specification of indecent exposure; and one specification of communicating indecent language, also involving detainee al Darbi.

b. The charges were preferred on 29 September 2005. An Article 32 investigation was conducted on 6 December 2005, and the case was referred to a general court-martial by the convening authority on 9 January 2006. The accused was arraigned on 28 March 2006.

c. In an undated memorandum, the convening authority determined that "there were exceptional circumstances concerning a witness in the case that warrant the preservation of testimony by taking a deposition. Specifically, an accusing witness, Ahmed al Darbi, has been detained for reasons of national security at the Guantanamo Bay Naval Station, Cuba, and may not be available to testify at trial in person."

APPELLATE EXHIBIT XXVII

d. After a thirty day delay occasioned at the request of defense counsel, on 8 March 2006, counsel for both parties and the accused traveled to the United States Detention Facility at Guantanamo Bay, Cuba for the purpose of deposing Ahmed al Darbi.

e. In support of its motion, the Government has tendered a verbatim written transcript of the deposition, authenticated by the deposition officer, as Appellate Exhibit XXV. In a memorandum that accompanied the deposition transcript, the deposition officer noted two "irregularities" associated with the deposition of detainee al Darbi. The first irregularity noted related to the initial absence of the deponent, al Darbi. According to the deposition officer's memorandum, the deponent did not appear until three and a half hours after the scheduled time for the deposition because the accused initially did not want to leave his detention cell to attend the deposition. The accused voluntarily appeared for the deposition at 1900 hours after he spoke with detention facility personnel.

f. The second irregularity pertained to the accused's absence. The deposition officer related that the accused voluntarily chose not to be present and to instead watch the deposition by video monitor in an adjacent room. The accused absented himself at the behest of his civilian defense counsel in an apparent attempt to avoid identification by detainee al Darbi.

g. The first seven pages of the deposition transcript relate to the qualifications of "Eagle 5," a contract interpreter/translator working at the Guantanamo detention facility. The moniker "Eagle 5" was utilized to protect the individual's identity, which is apparently common practice at the Guantanamo facility. Although "Eagle 5" stated that he had never acted as translator at a court-martial proceeding, he testified that he had performed translation duties on more than one hundred occasions. "Eagle 5" stated that he has been an Arab language speaker for more than forty years, and he has been speaking the English language since 1972.

h. The Government's direct examination of detainee al Darbi begins on page 9, and continues through page 24 of the deposition transcript. In the course of his testimony, al Darbi identifies the accused as the person who committed seven of the charged offenses. The accused also successfully identified the accused in two different photographic arrays. Finally, al Darbi also described in detail a tattoo of the Virgin Mary the accused had on his left forearm.

i. The defense cross-examination of al Darbi begins on page 25 and continues through page 49 of the transcript. The detainee refused to answer several questions posed by the defense that were unrelated to the

charged offenses, including why he was being held by United States authorities.

j. On page 36 of the transcript, the translator indicates that al Darbi disagreed with his translation and the use of the word "interpreter" as opposed to the term "interrogator." This is the only apparent instance of disagreement between "Eagle 5" and al Darbi discernable from the deposition transcript.

k. The enclosure to the Government brief (Appellate Exhibit XIV) is an affidavit executed by Deputy Secretary of Defense England on 28 March 2006. The document, styled "Determination of the Deputy Secretary of Defense," states:

> Ahmed al Darbi (ISN 768) 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 [the accused]. 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.

l. The Government has proffered that detainee al Darbi's trial before a military commission at Guantanamo was not to commence until the resolution of the accused's court-martial proceedings. The Government further proffered that military authorities at Guantanamo prohibited the introduction of videotaping equipment into the confinement facility. There is no evidence before the Court to rebut the Government's contention in either regard.

m. At a 39(a) session conducted on 28 March 2006, upon the request of trial counsel, the accused exposed his right and left forearms, which contained large and elaborate tattoos. The tattoo on the accused's left forearm depicted an image of the Virgin Mary.

n. CID Special Agent Daniel Carton testified that detainee al Darbi's allegations relating to the accused came to light in June 2004 when he traveled to Guantanamo to conduct canvas interviews of former Bagram detainees in relation to the investigation of detainee deaths at the facility. SA Carton testified that he had to travel to Guantanamo to interview al Darbi because al Darbi was being held on suspicion of committing terrorist acts against the United States.

Law and Analysis.

3. The Government asserts that it has adequately established that Ahmed al Darbi is unavailable for trial, and that his deposition is relevant and admissible. The defense asserts that the deposition is not admissible because the translator was not qualified, the deposition was not videotaped, and because the defense was denied requested discovery and an equal opportunity to interview al Darbi before the deposition occurred.

4. In order for a deposition to be admissible at trial, the witness must be "unavailable" both in terms of hearsay prohibition of MRE 804(b)(1) and in terms of the Confrontation Clause of the Sixth Amendment. A witness is not "unavailable" in terms of the Sixth Amendment unless the prosecution has made a good faith effort to obtain the witness' presence for trial. The Government must exhaust every reasonable means to secure the witness' live testimony. Article 49 of the UCMJ permits the use of depositions at courts-martial so long as they are otherwise admissible under the rules of evidence. Article 49 specifically authorizes the use of depositions, *inter alia*, where it can be demonstrated that the witness "resides or is . . . beyond 100 miles from the place of trial or hearing": or the witness "by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, non-amenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing." The Court concludes that the detainee Ahmad al Darbi is unavailable within the meaning of both MRE 804 and Article 49 of the UCMJ. The determinations made by Deputy Secretary of Defense England in his 28 March 2006 affidavit are not impeached or contradicted in any fashion through evidence adduced by the defense. Further, al Darbi is currently located more than 100 miles distant from Fort Bliss, Texas, he is imprisoned, and he is otherwise non-amenable to process, as demonstrated by Undersecretary of Defense England's affidavit. The Court also concludes that based on the evidence of record, al Darbi's status is unlikely to change in the foreseeable future.

5. In determining whether to admit the deposition of Ahmed al Darbi, the Court considered the following circumstances: the importance of the testimony (al Darbi's testimony relates directly to seven of the charged offenses); the amount of delay necessary to obtain in-court testimony (al Darbi has been detained at Guantanamo since at least June of 2004, and it is uncertain when his case will be adjudicated by a military commission); the trustworthiness of the alternative to the testimony (the deposition was taken by direction of the convening authority in substantial compliance with the requirements of RCM 702); the nature and extent of earlier cross-examination (the defense conducted a lengthy cross-examination in preparation for the pending trial, with the accused observing at his own election through a video link); the prompt administration of justice (the offenses involving al Darbi are alleged to have occurred between on or about 1 August 2002 and 1 February 2003, and it is uncertain when and if al

Darbi will ever be available to testify in person, given his present status as a detained enemy combatant in the war against terrorism); and any special circumstances militating against delay (the charges were preferred on 29 September 2005, and the offenses involving al Darbi are alleged to have occurred between on or about 1 August 2002 and 1 February 2003).

6. The Court is satisfied that the authenticated transcript of al Darbi's deposition is reliable. There is insufficient evidence to indicate that the translator "Eagle 5" was unqualified or otherwise incapable of properly performing duties as translator. The Court concludes that the defense had adequate and equal access to al Darbi. Al Darbi's refusal to answer certain irrelevant questions did not deprive the accused of due process. Finally, there is no evidence before the Court that the Government failed to provide access to discoverable evidence to the defense before the deposition of al Darbi.

Ruling.

7. The Government motion to admit the deposition of Ahmed al Darbi as prior testimony in accordance with MRE 804(b)(1) is GRANTED. The deposition may be read to the members at the appropriate time. A copy of the deposition transcript will not be provided to the members as an exhibit for their deliberations.

MARK P. SPOSATO
LTC, JA
Military Judge

United States Army Trial Judiciary
Fourth Judicial Circuit, Fort Bliss, Texas

UNITED STATES

v.

PFC Damien M. Corsetti
Company A, 519th MI Battalion
Fort Bragg, NC 28310

Essential Findings of Fact, Conclusions of Law and Ruling Defense Motion to Compel Employment of Expert Consultant

May 1, 2006

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1. The defense has moved, pursuant to Rule for Courts-Martial (RCM) 703 and Military Rule of Evidence (MRE) 706 to compel the production of an expert consultant. I have considered the defense request to the convening authority, the expert's CV, the action of the convening authority, and the arguments of counsel.

Facts.

2. The Court finds the following facts by a preponderance of the evidence:

a. The accused is charged with: one specification of violating a lawful general order; two specifications of willful dereliction of duty, one of which involves a detainee known as Ahmed al Darbi; three specifications of maltreatment, one of which involves detainee al Darbi; one specification of wrongful use of a controlled substance; three specifications of assault, two of which involve detainee al Darbi; one specification of committing indecent acts with detainee al Darbi; one specification of indecent exposure; and one specification of communicating indecent language, also involving detainee al Darbi.

b. The charges were preferred on 29 September 2005. An Article 32 investigation was conducted on 6 December 2005, and the case was referred to a general court-martial by the convening authority on 9 January 2006. The accused was arraigned on 28 March 2006.

c. On 22 March 2006, the accused's Civilian Defense Counsel (CDC) submitted a request to the convening authority for the employment of Dr. Jerrold M. Post as an expert consultant for the defense (Appellate Exhibit XX).

d. The defense proffered that the employment of Dr. Post was relevant and necessary for the following reasons:

APPELLATE EXHIBIT XXVIII

This case involves an allegation of detainee abuse. One of the alleged victims is Ahmed al Darbi, a purported member of the Al Qaeda terror network. Dr. Post has done extensive research into the Al Qaeda network, and can assist the defense in understanding how the network works and, more importantly, their use of false allegations of abuse to obtain their freedom.

Among other things, Dr. Post can educate the defense as to the existence and contents of the "Manchester Document" an Al Qaeda "handbook" outlining the use of false claims of abuse. Dr. Post has also done extensive research on the issue of crimes of obedience, and how Al Qaeda members will not deviate from their "handbook." The existence of the manual is not a matter for debate, as the government acknowledges its existence in a June 29, 2005 press release, in which Secretary of Defense Donald Rumsfeld states "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."

Dr. Post's expertise will assist the defense in preparing for any further cross-examination of Ahmed al Darbi. It will also assist the defense in cross-examining CID/OGA agents who will testify as to their conversations with Mr. al Darbi, and will assist the defense in formulating a theory of the case that centers around the issue of Al Qaeda members fabricating allegations of abuse to further their political causes.

Dr. Post can also assist the defense in understanding how [the accused], a lower enlisted soldier, would react to being told by superiors that his methods of interrogation were not only permissible, but acceptable, and the effect of his lack of training on him.

e. The information attached to the defense request to the convening authority reflects that Dr. Post is Director of the Political Psychology Program at the Elliott School of International Affairs at George Washington University. Dr. Post's faculty profile from the school's web site reflects that Dr. Post holds an M.D. degree from Yale, and worked for 21 years for the CIA where he founded and directed the Center for Analysis of Personality and Political Behavior, "an interdisciplinary behavioral science unit which provided assessments of foreign leadership and decision making for the President and other senior officials to prepare for Summit meetings and other high level negotiations and for use in crisis situations." Dr. Post's profile further states that he has published widely on crisis decision-

making, leadership, and on the psychology of political violence and terrorism, and recently has been addressing weapons of mass destruction terrorism, psychological incentives and constraints, as well as information systems terrorism.

f. Dr. Post's CV reflects that since September 11, 2001, Dr. Post has testified before the House National Security subcommittee hearings on bio-terrorism, before the Senate Armed Services Committee on terrorist psychology and motivation, and before the United Nations International Atomic Energy Agency in Vienna at a special session on nuclear terrorism on the psychology or nuclear terrorism. He is also touted as a frequent commentator on national and international media outlets on such topics as leadership, leader illness, treason, the psychology of terrorism, suicide terrorism, Slobodan Milosevic, Yasir Arafat, Osama bin Laden, Saddam Hussein and Kim Jong Il.

g. The defense proffers that Dr. Post charges $500 per hour for case review and $5,000 per day for trial testimony, plus expenses.

h. On 24 March 2006, the convening authority denied the defense request for employment of Dr. Post (Appellate Exhibit XXI). In articulating his basis for denying the requested assistance, the convening authority stated:

> "I find the defense has failed to make a showing of relevance and necessity sufficient to warrant the appointment of Dr. Post in accordance with the rules announced in *United States v. Garries* and Rule for Court-Martial 703(d). I have considered the fact that it does not appear that the government will be presenting evidence of calling an expert witness such that Dr. Post's expertise would be either relevant or necessary."

i. The Court is not aware of whether or not the Government intends to call any expert witnesses during its case in chief or for sentencing. The Government has conceded that it has not offered the defense an adequate substitute for Dr. Post.

Law and Analysis.

3. The defense asserts that the Al Qaeda training manual encourages detainees such as al Darbi to make false allegations of abuse, and Dr. Post can explain to the fact finder from a psychological basis why al Darbi would feel compelled to make false allegations against the accused. The Government asserts that based upon the defense proffer, Dr. Post would essentially function as a human lie detector if he testified. The Government further asserts that Dr. Post's testimony would be irrelevant, as al Darbi has previously testified that not all United States personnel abused him.

Finally, the Government asserts that Dr. Post's testimony would necessarily rely upon facts not in evidence.

4. The defense has the burden of demonstrating, by a preponderance of the evidence, that an independent Government-funded expert is relevant and necessary. I applied the following analysis in determining whether a CID investigator and/or fingerprint expert is necessary:

a. Why is the expert assistance required?
b. What would expert assistance accomplish for the accused?
c. Why is the defense unable to gather and present evidence that the expert assistant would be able to develop?

The defense must demonstrate something more than a mere possibility of assistance from the requested expert assistant. The defense must show that there exists a reasonable probability both that an expert would be of assistance to the defense and that the denial of expert assistance would result in a fundamentally unfair trial.

5. The Court concludes that while the defense has satisfactorily established Dr. Post's qualifications, and the subject matter of his expected testimony, the defense has failed to establish a proper basis for Dr. Post's testimony in relation to the instant case, and why they would be unable to gather and present evidence that he would be able to develop. It is apparent from the defense's proffer in its request to the convening authority that the defense is well aware of possible grounds to impeach the credibility of the Government's foreign national witnesses. The Court further concludes that it is not clear from the defense's proffer what the logical or legal relevance of Dr. Post's testimony would be, other than to be a human lie detector. Further, the defense has not demonstrated more than the mere possibility that Dr. Post would be able to provide assistance. There is not a scintilla of evidence currently before the Court, other than the defense proffer, that any of the Government's witnesses are or have ever been associated with Al Qaeda or any other terrorist organization. The Court also concludes that the defense has made no showing of what the reliability of Dr. Post's opinion testimony would be. Finally, the Court concludes that the probative value of Dr. Post's proffered testimony would be greatly outweighed by the danger of unfair prejudice.

MARK P. SPOSATO
LTC, JA
Military Judge

United States Army Trial Judiciary
Fourth Judicial Circuit, Fort Bliss, Texas

UNITED STATES

v.

PFC Damien M. Corsetti
Company A, 519th MI Battalion
Fort Bragg, NC 28310

Essential Findings of Fact, Conclusions of Law and Ruling Defense Motion to Abate

May 11, 2006

---

1. The defense has moved, pursuant to Rule for Courts-Martial (RCM) 703 and Article 49 of the UCMJ to abate the proceedings pending the production of the witness Omar al Faruq. I have considered the briefs submitted by the parties, documents appended thereto, a classified report relating to the circumstances surrounding al Faruq's escape from United States custody, and the arguments of counsel.

Facts.

2. The Court finds the following facts by a preponderance of the evidence:

a. The accused is charged with: one specification alleging violation of a lawful general order; two specifications of willful dereliction of duty, one of which involves a detainee known as Ahmed al Darbi; three specifications of maltreatment, one of which involved a detainee known as Omar al Faruq; one specification of wrongful use of a controlled substance; three specifications of assault, two of which involve detainee al Darbi; one specification of committing indecent acts with detainee al Darbi; one specification of indecent exposure; and one specification of communicating indecent language, also involving detainee al Darbi.

b. The charges were preferred on 29 September 2005. An Article 32 investigation was conducted on 6 December 2005, and the case was referred to a general court-martial by the convening authority on 9 January 2006. The accused was arraigned on 28 March 2006.

c. Appended to the defense brief (Appellate Exhibit VIII) is 2-page article from the 14 November 2005 edition of *Newsweek* magazine. The article, entitled "*Qaeda Prison Break*," relates that four Arab captives, including al Faruq, escaped from the Bagram detention center in Afghanistan on 11 July 2005. According to the article, al Faruq is "a well-known Qaeda leader in Southeast Asia who had been handed over to the Americans by Indonesian authorities in 2002."

APPELLATE EXHIBIT XXIX

d. In regard to the circumstances surrounding al Faruq's escape from the Bagram facility, the *Newsweek* article relates: "But few Afghans seem to believe an escape from Bargram is possible, and that has given rise to rumors about the July 11 breakout. According to one fugitive Taliban commander interviewed by a *Newsweek* reporter last week, the four men were actually exchanged in secret for captured U.S. special-operations troops." A Pentagon spokesman was also quoted as stating the above account was "absolutely absurd and completely untrue."

e. The *Newsweek* article further relates: "U.S. officials believe that Faruq and his three companions likely had some inside help, perhaps from local hires at the base." The article does not attribute this statement to any particular person.

f. The accused was assigned to the 519th Military Intelligence Battalion which was deployed to Bagram Airfield, Afghanistan, at the time of the charged conduct in this case.

g. Omar al-Faruq was a Person Under Control (PUC) of the United States military at Bagram Airfield, Afghanistan, at the time of the charged conduct in this case.

h. Neither the defense counsel nor the trial counsel has had access to al-Faruq in preparation for trial.

Law and Analysis:

3. The defense asserts that because the accused is charged with maltreatment of al Faruq in violation of Article 93, UCMJ, al Faruq is a witness of central importance as described in RCM 703(b)(3) because a conviction under Article 93 requires proof that the accused's actions resulted in "pain or suffering" of the alleged victim. Therefore, the defense argues, he must be produced or the proceedings abated. Additionally, the defense argues that they have had no access to this witness but that he was in government custody for 2 ½ years and thus the defense has been denied "equal opportunity" to obtain evidence as required by Article 46, UCMJ. Finally, the defense posits "the *Newsweek* article along with the astonishing circumstances of Faruq's escape from a highly-fortified facility support the inference that the US Government may have caused al Faruq's unavailability."

4. There is no dispute that al Faruq 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."

5. 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 Faruq 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, 51 M.J. 410 (2002). Thus although al Faruq may be able to testify that he was or was not harmed in some way, such testimony is not of such central importance to the determination of the objective harm as to be essential to a fair trial. Indeed, al Faruq's absence logically works more towards the accused's favor than otherwise.

6. Article 46 provides: "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, . . . non-amenability to process, or other reasonable cause . . ." While the circumstances relating to al Faruq's unavailability do 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, although the United States government had access to al Faruq 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 al Faruq. And, this is the equality contemplated by Article 46.

7. The Court has reviewed *in camera* an official Army investigation into the circumstances surrounding the escape of al Faruq and three accomplices from United States control in July 2005. The report of investigation, which was conducted under the provisions of Army Regulation 15-6, has been marked "Secret." RCM 701(g) and Military Rule of Evidence (MRE) 505(i) provide for *in camera* inspection of sensitive or classified information. After review of the report, the Court concludes that there is no information contained within the report which supports the defense contention that the United States may have caused al Faruq's unavailability. The AR 15-6 report of investigation (less enclosures) will be attached to the record of trial, subject to a sealing order, as Appellate Exhibit XXX.

Ruling:

6. The defense motion to continue or abate the proceedings is DENIED.

MARK P. SPOSATO
LTC, JA
Military Judge

Sposato, Mark, P. LTC

From: Ellis, Christopher CPT USA FORSCOM SJA [Christopher.Ellis@forscom.army.mil]

Sent: Friday, March 31, 2006 12:51 PM

To: Sposato, Mark, P. LTC; 'William Cassara'; 'Dowdy, Ryan CPT'

Cc: Parker, Branson J CPT USA FORSCOM SJA; Trainor, David CPT USA FORSCOM SJA; Carrier, Christopher D. MAJ

Subject: gov't 404 [U]

UNCLASSIFIED

Sir:

The government has re-evaluated its 404 notice. Defense argued at the 39a that much of the conduct that we noticed pursuant to 404 is actually charged conduct. In reviewing Charge I, Specification 2, the government can see how the Defense came to that conclusion. While we believe that there might be a distinction made here between charged and uncharged conduct, it may actually be a little confusing ("a distinction without a difference"). Accordingly, the government respectfully requests that its 404 notice be withdrawn, and instead we plan to offer elements A-F as evidence of the charged misconduct of dereliction of duty. Point H is withdrawn altogether. We apologize for any time wasted regarding this notice and thank the Defense for clarifying the matter.

Also, Sir, the government wishes to inform the parties that CPT Trainor will be in the office next week at McPherson, while MAJ Carrier will be back at Bliss. CPT Parker and I are spending some time with our families next week. CPT Trainor's extension is: 404-464-0347.

Very respectfully

CPT Chris Ellis

UNCLASSIFIED

APPELLATE EXHIBIT XXXI

United States	)	Defense Witness List
v.	)	
Damien M. Corsetti HHS 519th Military Intelligence Battalion Fort Bragg, North Carolina 28310	)	12 May 2006

RELIEF SOUGHT

Pursuant to Article 13 the Defense moves that PFC Damien Corsetti be granted 135 days sentence credit. This request for appropriate relief is related to the period of time that his unit required him to work details with a group known as either the Abu 7 or Baghram 7.

BURDEN OF PROOF

The defense has the burden, by a preponderance of evidence, to establish the facts necessary to warrant relief.

FACTS

1. PFC Corsetti returned with elements of Alpha Company, 519th Military Intelligence BN from Iraq in January 2003. Allegations regarding misconduct of military intelligence personnel, including PFC Corsetti, started to come to light. The personnel under suspicion including the accused were SGT Joshua Claus, SGT Salina Salcedo, SPC Glendale Walls, SPC Marshall Skaggs, SGT Higginbotham, and SFC Jeremy Shoemake. These allegations stemmed from alleged misconduct from both Abu Gharib and Baghram Detention Facilities.

2. His unit placed him with Rear Detachment in October 2003. SGM Andrade was the SGM for the rear detachment, but was deployed at the time. He soon returned from the deployment and put PFC Corsetti in a squad of 6 other individuals pending allegations from either Baghram or Abu Gharib. This squad was commonly referred to as either the Baghram 7 or the Abu 7.

3. PFC Corsetti and the others endured extra duty type details for approximately 9 months. Typical work details included cutting grass, raking dirt, and cleaning bathrooms. Sometimes the unit would release early, but the command would keep the Abu/Baghram 7 in place to continue with these duties. On some occasions, the group would be selected to perform these duties instead of other soldiers actually on extra duty. During these 9 months PFC Corsetti did not work within his MOS. He did have a short respite, however, when he worked for now retired SFC Guerra. However, SFC Guerra had him for approximately 2 months, and PFC Corsetti still had to perform these details have completing his tasks for SFC Guerra.

APPELLATE EXHIBIT XXXII

WITNESSES/EVIDENCE

The defense will provide and/or requests production of the following evidence/witnesses:

1. SFC (Retired) Jamie Guerra
2. PFC Corsetti will testify for purposes of the motion

LAW

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

Article 13, UCMJ
United States v. Latta, 34 M.J. 596, 597 (A.C.M.R. 1992)
United States v. Cruz, 25 M.J. 326 (C.M.A. 1987)
United States v. Carr, 37 M.J. 987 (A.C.M.R. 1993)
United States v. James, 28 M.J. 214 (C.M.A. 1989)
United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983).
Bell v. Wolfish, 441 U.S. 520 (1979)

ARGUMENT

ARTICLE 13 – CREDIT FOR UNLAWFUL PRETRIAL PUNISHMENT

1. Issue. Whether the unit's treatment of PFC Corsetti by keeping in a group called the Abu/Baghram 7 and having him work Article 15 type details constitutes unlawful pretrial punishment.

2. Law.

a. The Court of Military Appeals has adopted a two-prong test to determine whether a violation of Article 13 has occurred. United States v. James, 28 M.J. 214 (C.M.A. 1989)(adopting the standard enunciated in Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)). The Court should first decide whether the particular conditions were imposed with the intent to punish. Bell, 441 U.S. at 539. If the answer is "yes", then the conditions are punishment and the Court should consider a sentence credit. If the answer is "no", the Court should inquire as to whether the purposes purportedly served by the conditions are reasonably related to a legitimate governmental objective. Bell, 441 U.S. at 539.

b. Military appeals courts have routinely and "unequivocally condemned conduct by those in positions of authority which result in needless military degradation, or public denunciation or humiliation of an accused." U.S. v. Latta, 34 M.J. 569, 597 (A.C.M.R. 1992), citing U.S. v. Cruz, 25 M.J. 326 (C.M.A. 1987). Unnecessary public identification of an apprehended person as a criminal suspect is prohibited. Cruz at 331 n. 3.

c. The test for determining whether an accused has been subjected to pretrial punishment is not only whether the government intended to punish or humiliate but also whether the conduct serves legitimate non-punitive governmental objective. U.S. v. Carr, 37 M.J. 987 (A.C.M.R. 1993).

4. Fact analysis. In this case, PFC Corsetti was under allegations stemming from alleged misconduct at both Abu Garrib Prison, Baghdad, Iraq, and the Baghram Detention Facility, Afghanistan. His unit held him out to the rest of the unit as being guilty by associating with a group of 6 other military intelligence soldiers in trouble and calling them the Abu/Baghram 7. It is patently clear that calling them the "Abu/Baghram 7", and having them work Article 15 type details prior to a finding a guilty is for the purpose of punishing them and degrading them in front of other members of their unit. Furthermore, the command certainly cannot articulate a legitimate military purpose for this kind of treatment.

5. Conclusion. There is no set formula for calculating credit for pretrial punishment. If the military judge finds that illegal pretrial punishment occurred, he or she determines the sentence credit to which the accused is entitled. The military judge may order more than day-for-day credit for illegal pretrial punishment. United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983). The defense respectfully requests that this court grant 135 days pretrial credit, which equals approximately one half the time the endured illegal pretrial punishment.

CONCLUSION

For the reasons stated above, the Defense requests that the court grant the requested sentence credit.

/s/
RYAN B. DOWDY
CPT, JA
Defense Counsel

I hereby certify a copy of the forgoing document was served upon the Government and Military Judge.

/s/
RYAN B. DOWDY
CPT, JA
Defense Counsel

United States	)	Defense Motion for Continuance and to re-open deposition or, in the alternative, to order the government to produce the deponent for trial or abate the proceedings.
v.	)	
PFC Damien M. Corsetti Company A 519th Military Intelligence Battalion Fort Bragg, North Carolina 28310	)	24 May 2006

COMES NOW the defense, by and through the undersigned counsel, and hereby moves for a continuance and to re-open the deposition of Ahmed al Darbi or, in the alternative, to order Mr. al Darbi be produced for trial or abate the proceedings. In support of this motion, the defense states as follows:

a. The accused is charged with: one specification of violating a lawful general order; two specifications of willful dereliction of duty, one of which involves detainee al Darbi; three specifications of maltreatment, one of which involves detainee al Darbi; one specification of wrongful use of a controlled substance; three specifications of assault, two of which involve detainee al Darbi; one specification of committing indecent acts with detainee al Darbi; one specification of indecent exposure; and one specification of communicating indecent language, also involving detainee al Darbi.

b. The charges were preferred on 29 September 2005. An Article 32 investigation was conducted on 6 December 2005, and the case was referred to a general court-martial by the convening authority on 9 January 2006. The accused was arraigned on 28 March 2006.

c. In an undated memorandum, the convening authority determined that "there were exceptional circumstances concerning a witness in the case that warrant the preservation of testimony by taking a deposition. Specifically, an accusing witness, Ahmed al Darbi, has been detained for reasons of national security at the Guantanamo Bay Naval Station, Cuba, and may not be available to testify at trial in person."

d. After a thirty day delay occasioned at the request of defense counsel, on 8 March 2006, counsel for both parties and the accused traveled to the United States Detention Facility at Guantanamo Bay, Cuba for the purpose of deposing Ahmed al Darbi.

APPELLATE EXHIBIT XXXIII

e. On 27 April 2006, the court granted the government's motion to admit the deposition into evidence, over defense objection.

f. During the course of normal discovery requests, the defense has requested copies of numerous documents. Several of these documents were the subject of a prior Article 39 (a) session in this case. Those documents pertinent to this motion are a request for certain "detainee logs" or summaries of all interrogations conducted with Mr. al Darbi, and copies of all statements by al Darbi. In the instant case, as Mr. al Darbi does not speak English fluently, all statements were done in the form of Reports of Investigative Activity, compiled by law enforcement personnel. These will be addressed in order:

Intelligence Summaries

1. Trial counsel in this case initially believed that all of the intelligence summaries in this case had been destroyed. Defense counsel later advised the trial counsel that the former platoon leader, CPT Woods, believed the intelligence summaries still existed, and were located wherever the detainee was housed. Defense counsel was unable to interview CPT Woods until she was granted immunity. On or about 12 May 2006, trial counsel advised the undersigned that the intelligence summaries had been located at Guantanamo Bay, Cuba, and were being brought back to the U.S.

2. On May 17, 2006, the undersigned counsel traveled to Fort McPherson, Georgia to review the classified summaries. Contained within these documents were numerous admissions by Mr. al Darbi of illegal activity (including acts of theft and dishonesty,) and numerous instances in which he admitted to lying in prior interrogations. In addition, these intelligence summaries indicated that, contrary to the statements of Mr. al Darbi at the deposition, his contact with the accused was minimal. Finally, Mr. al Darbi indicated on each summary that he was in good health.

Reports of Investigative Activity

1. Defense counsel was originally told that there were three prior statements of Mr. al Darbi, memorialized in Reports of Investigative Activity. At the deposition of Mr. al Darbi, the defense and government agreed that there was at least one other statement of Mr. al Darbi, which was later provided to the defense.

2. Upon review of this last statement and upon discussion with SA "Jones" (real identity known to the government) the defense learned that there were other statements made by Mr. al Darbi. On 23 May 2006, trial counsel provided the defense with three statements previously made by Mr. al Darbi, whose existence was previously unknown to the trial counsel or the defense counsel.

3. The contents of two of these three statements are largely unknown, as they are heavily redacted. Trial counsel has asked the custodian of those documents to provide un-redacted copies to the trial counsel and defense.

LAW

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

Sixth Amendment to the Constitution of the United States of America
RCM 906(b)(13)
MRE 608 (b)
MRE 803(2)
MRE 803(4)
MRE 807

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004)
U.S. v. Donaldson, 58 M.J. 477 (CAAF 2003)
U.S. v. Wellington, 58 M.J. 420 (CAAF 2003)
U.S. v. Cabral, 47 M.J. 268 (CAAF 1997)
U.S. v. Kelley, 45 M.J. 275 (CAAF 1996)
U.S. v. Giambra, 33 M.J. 331 (CMA 1991)
United States v. Arnold, 25 M.J. 129, 132 (C.M.A. 1987), *citing* United States v. Iron Shell, 633 F.2d 77, 86 (8th Cir. 1980), *cert. Denied*, 450 U.S. 1001 (1981).
Idaho v. Wright, 497 U.S. 805 (1990)

ARGUMENT

At the time of Mr. al Darbi's deposition, the defense was completely unaware of any of this evidence. By his own admission, Mr. al Darbi has lied to investigators, and was involved in significant illegal activity. By his own admission, he is a member of a terrorist organization.

Had the defense known of these statements, they would have been able to cross examine Mr. al Darbi pursuant to Military Rule of Evidence (b) and asked him about these specific acts of misconduct. As the defense was unaware of the existence of any of this evidence, they were limited to general cross-examination questions, most of which Mr. al Darbi refused to answer.

As a result of the above sequence of events, the defense has been denied the opportunity to adequately cross-examine the government's main witness. As the acts of Mr. al Darbi were unknown to the defense, and as the military judge has previously denied the defense request to re-open the deposition, the panel is left with a decidedly inaccurate picture of Mr. al Darbi and his background.

As for the Reports of Investigative Activity, the defense is simply unaware of their contents, due to the redacted nature available to the defense as of the date of this motion. However, the basic fact remains that had the defense known of the existence and content of these statements, it may have had a dramatic effect on the defense approach to this case.

Upon learning of this evidence, the defense has been diligent in pursuing it. Within days of learning of the existence of the intelligence summaries, the defense counsel traveled to Fort McPherson, Georgia to review them. The defense has repeatedly asked the trial counsel for both the intelligence summaries and the investigative notes.

Application of Crawford v. Washington

1. Issue. Whether the court should continue this case to give the defense the opportunity to conduct meaningful cross examination of Mr. al Darbi.

2. Law.

a. *Confrontation Clause*. The Sixth Amendment *Confrontation Clause* provides that an accused in criminal prosecution enjoys the right to confrontation. See Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 1357, 158 L.Ed. 2d 177, 184 (2004). Particularly, the clause protects the accused against admission of *ex parte* examinations amounting to testimonial hearsay into evidence. *Id* at 36, 1354, 184. The reliability of this evidence must be tested in the "crucible of cross-examination." *Id.* The Court explains that this protection includes barring the functional equivalent of *ex parte* testimony.

b. Crawford rejected the idea that the *Confrontation Clause* only applies to in-court testimony. *Id* at 1364, 192. Its focus is on the use of statements as "testimony." *Id.* The Court did not provide the defining limits of "testimony," but found that an accuser giving a formal complaint against the accused is certainly testimonial in nature. Crawford explains that the functional equivalent of *ex parte* in-court testimony are "pretrial statements that declarants would reasonably expect to be used prosecutorially." *Id.*

c. The Court also discussed the second purpose of the *Confrontation Clause*. It prohibits admission of testimonial statements if the declarant does not appear as a witness at trial, and if ruled unavailable, the defendant did not have a prior opportunity to cross exam that witness. *Id* at 1366, 194. The government must first establish that the witness is unavailable, and that the accused had a prior opportunity to cross examine the witness before the out of court testimonial statements are admissible. *Id* at 1369, 197.

3. Factual Analysis.

a. First, The defense has not had a meaningful opportunity to cross examine the most crucial government witness in this case. Based on the tardy receipt of crucial evidence which could be used to cross-examine Mr. al Darbi, the deposition was incomplete. The defense could not cross-examine him about matters they did not know.

b. Second, Mr. al Darbi's credibility is perhaps the most crucial issue in this case. The defense position is simple: Mr. al Darbi is fabricating the allegations of abuse against the accused, as part of his well indoctrinated desires to discredit America. His

statements should be considered impermissible testimonial hearsay as envisioned in Crawford, because they are out of court statements, given under oath, without the accused's counsel being given a meaningful opportunity to cross examine him about his prior lies and inconsistent statements.

c. Third, the deposition should be deemed inadmissible if government does not adequately establish that the witness unavailable under MRE 804.

d. Finally, if the government refuses to produce Mr. al Darbi for either additional questioning at a deposition or for in-court testimony, the military judge should abate the proceedings.

RELIEF REQUESTED

The only reasonable relief available to the defense is to delay these proceedings, and allow the defense counsel to again cross examine the alleged victim in this case, either at a deposition or at trial. As the government has previously indicated that they will not produce Mr. al Darbi at trial, the defense requests that this court either order them to do so, order that the deposition be re-opened, or abate the proceedings. In the alternative, the defense requests that the intelligence summaries be admitted into evidence in their entirety.

Other Matters to Consider

As of the date of this motion, the defense does not have a copy of the government's witness list, which is due on 26 May by order of the court.

26-29 May is, at most military installations, a four-day weekend, which will make it nearly impossible to interview all the government's witnesses, while at the same time reviewing the un-redacted statements of the alleged victim, assuming they are provided.

Civilian defense counsel is in trial at Fort Benning, Georgia on 25 May 2006.

Civilian defense counsel does not have access to SIPRNET, as the person in charge of the computer the civilian defense counsel has been using is currently TDY to Kuwait.

CONCLUSION

The Defense requests that the above mentioned relief be granted.

Respectfully Submitted,

William E. Cassara, Esquire
Civilian Defense Counsel

Served on the court and the trial counsel via e-mail on May 24, 2006

William E. Cassara, Esquire
Civilian Defense Counsel

William Cassara

From: bill@williamcassara.com [WCASSARA1@comcast.net]

Sent: Wednesday, May 24, 2006 09:55 PM

To: Ellis, Christopher CPT USA FORSCOM SJA; mark.sposato@us.army.mil; wcassara1@comcast.net; ryan.dowdy@us.army.mil; Parker, Branson J CPT USA FORSCOM SJA

Cc: Sposato, Mark, P. LTC; Carrier, Christopher D. MAJ

Subject: Re: gov't response to defense motion

Judge: I am on the road at Fort Benning, so am unable to do a more formal response. However, the defense notes the following:

Regarding the Reports of Investigative Activity, assuming the government is correct that the redacted portions do not relate to the instant case, the defense notes that this was a small portion of the defense motion. The gravaman of the defense motion is the recently released Intelligence Summaries. These summaries, turned over to the defense last week, contain a detailed accounting of the alleged victim's criminal activities. Contrary to the government's assertion, the defense had no way of knowing the contents of these Summaries. The government asserts that we could simply have asked our client about the contents of these summaries. However, according to the summaries themselves, the accused name only appears on one Intelligence Summary. The defense position has been that the accused did not interrogate the alleged victim as many times as the alleged victim claims, a fact the Intelligence Summaries confirm. As such, we co! uld not ask our client, as he did not know. His contact with the alleged victim was minimal.

The government further asserts that we knew who conducted these interrogations, and could have asked them about the contents of the Intelligence Summaries. This is simply untrue. We have never known the names of these interrogators, and still don't. The Intelligence Summaries merely provide a number for the interrogator, not their names, which are classified. As such, there was no way for us to know their identities prior to the deposition, as we did not have the Intelligence Summaries.

Furthermore, Crawford v. Washington and the Sixth Amendment are not satisfied by the confronting of those who took the witness' statements. Rather, the Sixth Amendment requires the confrontation of the witness. As the Intelligence Summaries had not been provided to the defense prior to the deposition, we were unable to do so.

Again, I apologize for the nature of this response. I am in trial tomorrow, but will be available by cell phone afterwards. If all goes as planned, tomorrow is a short day.

Respectfully Submitted,

—

William E. Cassara
Attorney at Law
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William Cassara

From: William Cassara [wcassara1@comcast.net]
Sent: Friday, May 26, 2006 11:19 AM
To: 'Ellis, Christopher CPT USA FORSCOM SJA'; 'William Cassara'; 'Carrier, Christopher D. MAJ'; 'Trainor, David CPT USA FORSCOM SJA'; 'Parker, Branson J CPT USA FORSCOM SJA'; 'Dowdy, Ryan CPT'; 'Sposato, Mark, P. LTC'; mark.sposato@us.army.mil
Cc: 'Carrier, Christopher D. MAJ'
Subject: RE: gov't additional response to defense motion

Sir: The defense simply disagrees. The material we had before the deposition was skeletal compared to the information we received last week. I can't comment on the Agent Investigative Summaries, as I have not seen them.
However, the intelligence reports go into great detail about specific acts of misconduct and dishonesty by the alleged victim, and the list is extensive. Prior to the deposition, I knew that he was probably a bad guy, but I did not have the quantity nor quality of acts outlined in the intelligence summaries. In these summaries, Mr. al Darbi makes specific admissions which we were completely unaware of. I point the court's attention to United States v. Stewart, an Air Force Case, at ACM 35471, 31 January 2006, which is close to being on point. In that case, the Air Force Court found error when the defense knew that an alleged victim had some medical problems which might have accounted for her symptoms on the night of an alleged rape. In the middle of trial the defense uncovered medical evidence which went into much greater detail than they previously knew.
Finding error, the AFCCA reversed, saying the late notice amounted to a Brady violation as they were unable to cross examine the alleged victim in detail, as opposed to simply generic questions.
This case is exactly the same. Yes, we had some generic information that al Darbi was a bad guy, but we knew little about the specifics of his misconduct, and could not adequately cross examine him under MRE 508 (b).

V/R

-----Original Message-----
From: Ellis, Christopher CPT USA FORSCOM SJA [mailto:Christopher.Ellis@forscom.army.mil]
Sent: Friday, May 26, 2006 10:59
To: William Cassara; Carrier, Christopher D. MAJ; Trainor, David CPT USA FORSCOM SJA; Parker, Branson J CPT USA FORSCOM SJA; 'Dowdy, Ryan CPT'; Sposato, Mark, P. LTC; mark.sposato@us.army.mil
Cc: Carrier, Christopher D. MAJ
Subject: gov't additional response to defense motion

ALCON:

Before the deposition, the defense had plenty of material to use in cross-examination, and in fact the defense cross examined the deponent extensively (twenty-four pages). The additional notes more recently provided simply provide a few more discrete details on the same subjects.
Having them before the deposition would not have materially changed or improved the cross examination, which covered these subjects.

The government proposes that the correct analysis here is qualitative (would the omitted material have changed or enlarged the cross examination) rather than absolute (the defense must have every single document on earth before the deposition or it's per se an invalid confrontation). The government analogizes to cases in which there were omissions in discovery right through trial and only discovered later. Even when there is a specific request, the result of nondisclosure is not per se error, but rather the high standard of harmless beyond a reasonable doubt. When the request is merely general, the result of nondisclosure is that the defense/appellant must show that the material would have likely changed the result. US v. Hart, 29 MJ 407, 410 (CMA 1990). Applying either standard to the material not available before the deposition, the fact that the defense did not have all the notes should not be construed as rendering the confrontation invalid. The defense had so much information of the same nature on the same subject that the new notes are

substantially redundant. Given the details already known to the defense, possessing a few more details on the same topic would not have changed the tenor or scope of the cross examination. The omission was harmless beyond any reasonable doubt.

Very respectfully,

CPT Chris Ellis

-----Original Message-----
From: Ellis, Christopher CPT USA FORSCOM SJA
[mailto:Christopher.Ellis@forscom.army.mil]
Sent: Wednesday, May 24, 2006 4:30 PM
To: mark.sposato@us.army.mil; wcassara1@comcast.net; ryan.dowdy@us.army.mil; Parker, Branson J CPT USA FORSCOM SJA
Cc: Sposato, Mark, P. LTC; Carrier, Christopher D. MAJ
Subject: gov't response to defense motion

Sir:

Here is a point by point response to the defense motion for continuance, beginning with paragraph "f." We have no dispute with paragraphs a-e.

v/r
CPT Chris Ellis

f. During the course of normal discovery requests, the defense has requested copies of numerous documents. Several of these documents were the subject of a prior Article 39 (a) session in this case. Those documents pertinent to this motion are a request for certain "detainee logs" or summaries of all interrogations conducted with Mr. al Darbi, and copies of all statements by al Darbi. In the instant case, as Mr. al Darbi does not speak English fluently, all statements were done in the form of Reports of Investigative Activity, compiled by law enforcement personnel. These will be addressed in order:

Government response: "Detainee logs" are not the same thing as interrogation summaries or intelligence reports. The government has never represented that interrogation summaries or intelligence reports were destroyed. The government did state, as a result of direct trial counsel investigation on a previous case, that the internal logs kept at the Bagram Collection Point were destroyed, misplaced, or otherwise impossible to obtain; but these "logs" contained facility-specific internal security type information.

Intelligence Summaries

1. Trial counsel in this case initially believed that all of the intelligence summaries in this case had been destroyed. Defense counsel later advised the trial counsel that the former platoon leader, CPT Woods, believed the intelligence summaries still existed, and were located wherever the detainee was housed. Defense counsel was unable to interview CPT Woods until she was granted immunity. On or about 12 May 2006, trial counsel advised the undersigned that the intelligence summaries had been located at Guantanamo Bay, Cuba, and were being brought back to the U.S.

Government response: Again, the government never believed or stated that "all of the intelligence summaries in this case had been destroyed." To the contrary, the government tried on repeated occasions to have the defense counsel(s) review the intelligence summaries and interrogation reports that are classified and kept at both Fort McPherson and Fort Bliss. In fact, this whole process was under way long before defense ever spoke with CPT Wood.

2. On May 17, 2006, the undersigned counsel traveled to Fort McPherson, Georgia to review the classified summaries. Contained within these documents were numerous admissions by Mr. al Darbi of illegal activity (including acts of theft and dishonesty,) and numerous instances in which he admitted to lying in prior interrogations. In addition, these intelligence summaries indicated that, contrary to the statements of Mr. al Darbi at the deposition, his contact with the accused was minimal. Finally, Mr. al Darbi indicated on each summary that he was in good health.

Government response: While the government disagrees with this characterization of the classified materials, nothing in this paragraph necessitates trial delay. The newly provided documents are notes of a witness known to the defense: (a) the defense had access to substantially similar information before the deposition and asked the accuser about his alleged terrorist activities and (b) the defense can ask the witness who drafted these notes (SA Jones) about any item relevant to the declarant's (al Darbi's) credibility, because the declarant (al Darbi) will be testifying by deposition, thus putting at issue his credibility.

Reports of Investigative Activity

1. Defense counsel was originally told that there were three prior statements of Mr. al Darbi, memorialized in Reports of Investigative Activity. At the deposition of Mr. al Darbi, the defense and government agreed that there was at least one other statement of Mr. al Darbi, which was later provided to the defense.

Government response: These "prior statements" were actually Reports of Investigative Activity made by SA Jones pursuant to her law enforcement duties. They are similar to police reports, not statements directly made by a declarant/witness.

2. Upon review of this last statement and upon discussion with SA "Jones" (real identity known to the government) the defense learned that there were other statements made by Mr. al Darbi. On 23 May 2006, trial counsel provided the defense with three statements previously made by Mr. al Darbi, whose existence was previously unknown to the trial counsel or the defense counsel.

Government response: Two, not three, previously unknown Reports of Investigative Activity made by SA Jones (not witness statements made by al Darbi) were given to defense on 23 May 2006. The defense has already interviewed SA Jones regarding her investigation of al Darbi; she has cooperated fully with defense prior to 23 May 2006. The "new" material are notes of a witness long known to the defense, and the substance is substantially similar to notes already provided.

3. The contents of two of these three statements are largely unknown, as they are heavily redacted. Trial counsel has asked the custodian of those documents to provide un-redacted copies to the trial counsel and defense.

Government response: Since defense filed this motion, the government has had the opportunity to speak with MAJ Redmon, a CITF attorney who clarified the reason for the redaction. The redacted sections contain sensitive information about other cases that are unrelated to the one at bar. The unredacted versions will be sent to trial counsel's AKO-S account for verification of the lack of relevance. The government was also concerned about the redactions at first, but now we understand the basis for them.

LAW

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

Sixth Amendment to the Constitution of the United States of America
RCM 906(b)(13)
MRE 608 (b)
MRE 803(2)
MRE 803(4)
MRE 807
Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004)
U.S. v. Donaldson, 58 M.J. 477 (CAAF 2003)
U.S. v. Wellington, 58 M.J. 420 (CAAF 2003)
U.S. v. Cabral, 47 M.J. 268 (CAAF 1997)
U.S. v. Kelley, 45 M.J. 275 (CAAF 1996)
U.S. v. Giambra, 33 M.J. 331 (CMA 1991)
United States v. Arnold, 25 M.J. 129, 132 (C.M.A. 1987), citing United States v. Iron Shell, 633 F.2d 77, 86 (8th Cir. 1980), cert. Denied, 450 U.S. 1001 (1981).
Idaho v. Wright, 497 U.S. 805 (1990)

ARGUMENT

At the time of Mr. al Darbi's deposition, the defense was completely unaware of any of this evidence. By his own admission, Mr. al Darbi has lied to investigators, and

was involved in significant illegal activity. By his own admission, he is a member of a terrorist organization.

Government response: The accused personally interrogated the witness. As such, he was in an unique position to make the defense very aware of al Darbi's alleged activities from a point in time prior to the deposition. Further, as the defense points out in this motion, the accused traveled to Guantanamo to participate in his own defense. While he absented himself from the actual proceedings so as not to be identified by the witness, he nonetheless had extensive access to his attorneys during the deposition and could easily provide input regarding the cross examination.

Had the defense known of these statements, they would have been able to cross examine Mr. al Darbi pursuant to Military Rule of Evidence (b) and asked him about these specific acts of misconduct. As the defense was unaware of the existence of any of this evidence, they were limited to general cross-examination questions, most of which Mr. al Darbi refused to answer.

Government response: The government assumes that defense is referring here to MRE 608(b). While the defense may not have been aware of SA Jones notes (two of which were seen in May for the first time by the government and defense) the defense had plenty of information to cross examine al Darbi at the deposition. For instance, the defense admits that they had at least three of these notes at the counsel table. Further, the defense cross is something like 50% longer than the government's direct examination. Simply because the defense now wishes that they had asked even more questions at that deposition does not necessitate trial delay.

As a result of the above sequence of events, the defense has been denied the opportunity to adequately cross-examine the government's main witness. As the acts of Mr. al Darbi were unknown to the defense, and as the military judge has previously denied the defense request to re-open the deposition, the panel is left with a decidedly inaccurate picture of Mr. al Darbi and his background.

Government response: The defense had great "opportunity" to cross examine al Darbi, especially as they had inside information as to his alleged acts from their client, and also possession of the most relevant of SA Jones reports. It is doubtful that the panel will perceive an inaccurate image of al Darbi, a Guantanamo detainee.

As for the Reports of Investigative Activity, the defense is simply unaware of their contents, due to the redacted nature available to the defense as of the date of this motion. However, the basic fact remains that had the defense known of the existence and content of these statements, it may have had a dramatic effect on the defense approach to this case.

Government response: The redacted portions, as described above, are not relevant to this case.

Upon learning of this evidence, the defense has been diligent in pursuing it. Within days of learning of the existence of the intelligence summaries, the defense counsel traveled to Fort McPherson, Georgia to review them. The defense has repeatedly asked the trial counsel for both the intelligence summaries and the investigative notes.

Government response: On this particular occasion, defense counsel stopped at Fort McPherson while traveling back from Fort Benning. On prior occasions, there has been difficulty in getting the defense to review classified or sensitive materials. However, none of this supports a delay. This case has been set for trial for some time -- following a defense delay.

Application of Crawford v. Washington

1. Issue. Whether the court should continue this case to give the defense the opportunity to conduct meaningful cross examination of Mr. al Darbi.

2. Law.

a. Confrontation Clause. The Sixth Amendment Confrontation Clause provides that an accused in criminal prosecution enjoys the right to confrontation. See Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 1357, 158 L.Ed. 2d 177, 184 (2004). Particularly, the clause protects the accused against admission of ex parte examinations amounting to testimonial hearsay into evidence. Id at 36, 1354, 184. The reliability of this evidence must be tested in the "crucible of cross-examination." Id. The Court explains that this protection includes barring the functional equivalent of ex parte testimony.

Government Response: Crawford v. Washington is in no way implicated in determining whether to allow the panel to see the deposition of Al-Darbi. As defense counsel correctly points out, Crawford addresses (1) an out of court statement (2) that has never been subject to cross examination. The Al-Darbi deposition was taken for purposes of use in this court martial. (1) It is an in court statement. (2) Unlike the police reports envisioned in Crawford, the Accused was able to see his accuser (and declined) and enjoyed the benefit of his attorney's cross examination of that Accuser. The Accused was afforded all the protections of the Confrontation Clause.

b. Crawford rejected the idea that the Confrontation Clause only applies to in-court testimony. Id at 1364, 192. Its focus is on the use of statements as "testimony." Id. The Court did not provide the defining limits of "testimony," but found that an accuser giving a formal complaint against the accused is certainly testimonial in nature. Crawford explains that the functional equivalent of ex parte in-court testimony are

"pretrial statements that declarants would reasonably expect to be used prosecutorially." Id.

Government's Response: Al-Darbi's deposition was an "in" court presentation. The defense analysis in this paragraph is correct but inapposite.

c. The Court also discussed the second purpose of the Confrontation Clause. It prohibits admission of testimonial statements if the declarant does not appear as a witness at trial, and if ruled unavailable, the defendant did not have a prior opportunity to cross exam that witness. Id at 1366, 194. The government must first establish that the witness is unavailable, and that the accused had a prior opportunity to cross examine the witness before the out of court testimonial statements are admissible. Id at 1369, 197.

Government's Response: Defense counsel cross examined Al-Darbi's at his deposition. The defense analysis in this paragraph is again correct but inapposite.

3. Factual Analysis.

a. First, The defense has not had a meaningful opportunity to cross examine the most crucial government witness in this case. Based on the tardy receipt of crucial evidence which could be used to cross-examine Mr. al Darbi, the deposition was incomplete. The defense could not cross-examine him about matters they did not know.

b. Second, Mr. al Darbi's credibility is perhaps the most crucial issue in this case. The defense position is simple: Mr. al Darbi is fabricating the allegations of abuse against the accused, as part of his well indoctrinated desires to discredit America. His statements should be considered impermissible testimonial hearsay as envisioned in Crawford, because they are out of court statements, given under oath, without the accused's counsel being given a meaningful opportunity to cross examine him about his prior lies and inconsistent statements.

c. Third, the deposition should be deemed inadmissible if government does not adequately establish that the witness unavailable under MRE 804.

d. Finally, if the government refuses to produce Mr. al Darbi for either additional questioning at a deposition or for in-court testimony, the military judge should abate the proceedings.

RELIEF REQUESTED

The only reasonable relief available to the defense is to delay these proceedings, and allow the defense counsel to again cross examine the alleged victim in this case, either at a deposition or at trial. As the government has previously indicated that they will not produce Mr. al Darbi at trial, the defense requests that this court either order them to do so, order that the deposition be re-opened, or abate the proceedings. In the alternative,

the defense requests that the intelligence summaries be admitted into evidence in their entirety.

Government response: Presumably, the defense here refers to the interrogation reports. Admitting these interrogation reports in their entirety would be excessive and cumbersome. As previously discussed with the defense, the government would be amenable to admitting an unclassified summary of relevant classified documents.

Final point by the government (nothing follows): The defense's greatest cause for concern is in fact a misunderstanding on their part, which has now been clarified. Although CITF did not initally explain, the redactions on the recently provided notes were not redacted on the basis of any claim of privilege or classification, but rather because the document contained material not relevant to this case, as we will confirm to be on the safe side. The balance of the case for delay -- the fact that the defense did not have certain notes before the deposition -- is rendered harmless by (a) the fact that the defense had access to the witness who wrote these notes, (b) the fact that the defense had substantially similar notes and information about the deponent's alleged terrorist activities, (c) the fact that the defense had substantially similar information about the deponent from the accused, and (d) the fact that the witness who took the notes will testify, and the defense can examine him to the extent they can show relevance. Moreover, this trial date has been set for a long time, though admittedly not as long as the date for Memorial Day 2006 has been set.

I certify that this response was served on the Military Judge (LTC Sposato) and defense counsels Mr. William Cassara & CPT Ryan Dowdy via electronic mail on this the 24th of May, 2006.

Original Signed
CPT Christopher E. Ellis
Trial Counsel

Other Matters to Consider

As of the date of this motion, the defense does not have a copy of the government's witness list, which is due on 26 May by order of the court.

26-29 May is, at most military installations, a four-day weekend, which will make it nearly impossible to interview all the government's witnesses, while at the same time reviewing the un-redacted statements of the alleged victim, assuming they are provided.

Civilian defense counsel is in trial at Fort Benning, Georgia on 25 May 2006.

Civilian defense counsel does not have access to SIPRNET, as the person in charge of the computer the civilian defense counsel has been using

is currently TDY to Kuwait.

CONCLUSION

The Defense requests that the above mentioned relief be granted.

Respectfully Submitted,

William E. Cassara, Esquire
Civilian Defense Counsel

Served on the court and the trial counsel via e-mail on May 24, 2006

William E. Cassara, Esquire
Civilian Defense Counsel

Before the deposition, the defense had plenty of material to use in cross-examination, and in fact the defense cross examined the deponent extensively (twenty-four pages). The additional notes more recently provided simply provide a few more discrete details on the same subjects. Having them before the deposition would not have materially changed or improved the cross examination, which covered these subjects.

The government proposes that the correct analysis here is qualitative (would the omitted material have changed or enlarged the cross examination) rather than absolute (the defense must have every single document on earth before the deposition or it's per se an invalid confrontation). The government analogizes to cases in which there were omissions in discovery right through trial and only discovered later. Even when there is a specific request, the result of nondisclosure is not per se error, but rather the high standard of harmless beyond a reasonable doubt. When the request is merely general, the result of nondisclosure is that the defense/appellant must show that the material would have likely changed the result. US v. Hart, 29 MJ 407, 410 (CMA 1990). Applying either standard to the material not available before the deposition, the fact that the defense did not have all the notes should not be construed as rendering the confrontation invalid. The defense had so much information of the same nature on the same subject that the new notes are substantially redundant. Given the details already known to the defense, possessing a few more details on the same topic would not have changed the tenor or scope of the cross examination. The omission was harmless beyond any reasonable doubt.

Carrier, Christopher D. MAJ

From: WCASSARA1@comcast.net
Sent: Wednesday, May 24, 2006 7:55 PM
To: Ellis, Christopher CPT USA FORSCOM SJA; mark.sposato@us.army.mil; wcassara1@comcast.net; ryan.dowdy@us.army.mil; Parker, Branson J CPT USA FORSCOM SJA
Cc: Sposato, Mark, P. LTC; Carrier, Christopher D. MAJ
Subject: Re: gov't response to defense motion

Judge: I am on the road at Fort Benning, so am unable to do a more formal response. However, the defense notes the following:

Regarding the Reports of Investigative Activity, assuming the government is correct that the redacted portions do not relate to the instant case, the defense notes that this was a small portion of the defense motion. The gravaman of the defense motion is the recently released Intelligence Summaries. These summaries, turned over to the defense last week, contain a detailed accounting of the alleged victim's criminal activities. Contrary to the government's assertion, the defense had no way of knowing the contents of these Summaries. The government asserts that we could simply have asked our client about the contents of these summaries. However, according to the summaries themselves, the accused name only appears on one Intelligence Summary. The defense position has been that the accused did not interrogate the alleged victim as many times as the alleged victim claims, a fact the Intelligence Summaries confirm. As such, we could not ask our client, as he did not know. His contact with the alleged victim was minimal.

The government further asserts that we knew who conducted these interrogations, and could have asked them about the contents of the Intelligence Summaries. This is simply untrue. We have never known the names of these interrogators, and still don't. The Intelligence Summaries merely provide a number for the interrogator, not their names, which are classified. As such, there was no way for us to know their identities prior to the deposition, as we did not have the Intelligence Summaries.

Furthermore, Crawford v. Washington and the Sixth Amendment are not satisfied by the confronting of those who took the witness' statements. Rather, the Sixth Amendment requires the confrontation of the witness. As the Intelligence Summaries had not been provided to the defense prior to the deposition, we were unable to do so.

Again, I apologize for the nature of this response. I am in trial tomorrow, but will be available by cell phone afterwards. If all goes as planned, tomorrow is a short day.

Respectfully Submitted,

--

William E. Cassara
Attorney at Law
1-706-860-5769
1-888-288-3347
1-706-868-5022 (fax)
http://www.williamcassara.com

APPELLATE EXHIBIT XXXV

Sposato, Mark, P. LTC

From: William Cassara [wcassara1@comcast.net]
Sent: Thursday, May 25, 2006 7:09 PM
To: 'Carrier, Christopher D. MAJ'; 'William Cassara'; 'williamcassara'
Cc: 'Ellis, Christopher CPT - SJA'; 'Parker, Branson J. CPT - SJA'; 'Sposato, Mark, P. LTC'
Subject: RE: Redactions in interrogator notes
Follow Up Flag: Follow up
Flag Status: Red

Chris: I appreciate your candor. Thanks.
SIPRNET to Ryan and I is probably the best bet. However, give the holidays, I doubt seriously either of us will be able to review until we arrive on Monday.

From: Carrier, Christopher D. MAJ [mailto:christopher.carrier1@us.army.mil]
Sent: Thursday, May 25, 2006 19:04
To: 'William Cassara'; wcassara1@comcast.net; 'williamcassara'
Cc: Ellis, Christopher CPT - SJA; Parker, Branson J. CPT - SJA; Sposato, Mark, P. LTC
Subject: Redactions in interrogator notes

Gentlemen:

Having reviewed the redacted portions of the interrogator notes, we have to disagree with CITF: the redacted portions are about al Darbi. They are, to generalize, more of the same, but they are distinctly about al Darbi. (What the deal is with CITF is a matter for another day.) That said, the entire documents are discoverable but need to be protected because they contain information about US operations etc. We can SIPRNET them to CPT Dowdy or otherwise provide them within the appropriate protections.

V/r,
CC

Sposato, Mark, P. LTC

From: William Cassara [wcassara1@comcast.net]
Sent: Friday, May 26, 2006 9:19 AM
To: 'Ellis, Christopher CPT USA FORSCOM SJA'; 'William Cassara'; 'Carrier, Christopher D. MAJ'; 'Trainor, David CPT USA FORSCOM SJA'; 'Parker, Branson J CPT USA FORSCOM SJA'; 'Dowdy, Ryan CPT'; 'Sposato, Mark, P. LTC'; mark.sposato@us.army.mil
Cc: 'Carrier, Christopher D. MAJ'
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However, the intelligence reports go into great detail about specific acts of misconduct and dishonesty by the alleged victim, and the list is extensive. Prior to the deposition, I knew that he was probably a bad guy, but I did not have the quantity nor quality of acts outlined in the intelligence summaries. In these summaries, Mr. al Darbi makes specific admissions which we were completely unaware of. I point the court's attention to United States v. Stewart, an Air Force Case, at ACM 35471, 31 January 2006, which is close to being on point. In that case, the Air Force Court found error when the defense knew that an alleged victim had some medical problems which might have accounted for her symptoms on the night of an alleged rape. In the middle of trial the defense uncovered medical evidence which went into much greater detail than they previously knew.
Finding error, the AFCCA reversed, saying the late notice amounted to a Brady violation as they were unable to cross examine the alleged victim in detail, as opposed to simply generic questions.
This case is exactly the same. Yes, we had some generic information that al Darbi was a bad guy, but we knew little about the specifics of his misconduct, and could not adequately cross examine him under MRE 508 (b).

V/R

-----Original Message-----
From: Ellis, Christopher CPT USA FORSCOM SJA [mailto:Christopher.Ellis@forscom.army.mil]
Sent: Friday, May 26, 2006 10:59
To: William Cassara; Carrier, Christopher D. MAJ; Trainor, David CPT USA FORSCOM SJA; Parker, Branson J CPT USA FORSCOM SJA; 'Dowdy, Ryan CPT'; Sposato, Mark, P. LTC; mark.sposato@us.army.mil
Cc: Carrier, Christopher D. MAJ
Subject: gov't additional response to defense motion

ALCON:

Before the deposition, the defense had plenty of material to use in cross-examination, and in fact the defense cross examined the deponent extensively (twenty-four pages). The additional notes more recently provided simply provide a few more discrete details on the same subjects.
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examination. The omission was harmless beyond any reasonable doubt.

Very respectfully,

CPT Chris Ellis

United States v. Damien M. Corsetti HHS 519th Military Intelligence Battalion Fort Bragg, North Carolina 28310	)	Motion for Appropriate Relief 12 May 2006

RELIEF SOUGHT

Pursuant to Article 13 the Defense moves that PFC Damien Corsetti be granted 135 days sentence credit. This request for appropriate relief is related to the period of time that his unit required him to work details with a group known as either the Abu 7 or Baghram 7.

BURDEN OF PROOF

The defense has the burden, by a preponderance of evidence, to establish the facts necessary to warrant relief.

FACTS

1. PFC Corsetti returned with elements of Alpha Company, 519th Military Intelligence BN from Iraq in January 2003. Allegations regarding misconduct of military intelligence personnel, including PFC Corsetti, started to come to light. The personnel under suspicion including the accused were SGT Joshua Claus, SGT Salina Salcedo, SPC Glendale Walls, SPC Marshall Skaggs, SGT Higginbotham, and SFC Jeremy Shoemake. These allegations stemmed from alleged misconduct from both Abu Gharib and Baghram Detention Facilities.

2. His unit placed him with Rear Detachment in October 2003. SGM Andrade was the SGM for the rear detachment, but was deployed at the time. He soon returned from the deployment and put PFC Corsetti in a squad of 6 other individuals pending allegations from either Baghram or Abu Gharib. This squad was commonly referred to as either the Baghram 7 or the Abu 7.

3. PFC Corsetti and the others endured extra duty type details for approximately 9 months. Typical work details included cutting grass, raking dirt, and cleaning bathrooms. Sometimes the unit would release early, but the command would keep the Abu/Baghram 7 in place to continue with these duties. On some occasions, the group would be selected to perform these duties instead of other soldiers actually on extra duty. During these 9 months PFC Corsetti did not work within his MOS. He did have a short respite, however, when he worked for now retired SFC Guerra. However, SFC Guerra had him for approximately 2 months, and PFC Corsetti still had to perform these details have completing his tasks for SFC Guerra.

WITNESSES/EVIDENCE

The defense will provide and/or requests production of the following evidence/witnesses:

1. SFC (Retired) Jamie Guerra
2. PFC Corsetti will testify for purposes of the motion

LAW

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

Article 13, UCMJ
United States v. Latta, 34 M.J. 596, 597 (A.C.M.R. 1992)
United States v. Cruz, 25 M.J. 326 (C.M.A. 1987)
United States v. Carr, 37 M.J. 987 (A.C.M.R. 1993)
United States v. James, 28 M.J. 214 (C.M.A. 1989)
United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983).
Bell v. Wolfish, 441 U.S. 520 (1979)

ARGUMENT

ARTICLE 13 – CREDIT FOR UNLAWFUL PRETRIAL PUNISHMENT

1. Issue. Whether the unit's treatment of PFC Corsetti by keeping in a group called the Abu/Baghram 7 and having him work Article 15 type details constitutes unlawful pretrial punishment.

2. Law.

a. The Court of Military Appeals has adopted a two-prong test to determine whether a violation of Article 13 has occurred. United States v. James, 28 M.J. 214 (C.M.A. 1989)(adopting the standard enunciated in Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)). The Court should first decide whether the particular conditions were imposed with the intent to punish. Bell, 441 U.S. at 539. If the answer is "yes", then the conditions are punishment and the Court should consider a sentence credit. If the answer is "no", the Court should inquire as to whether the purposes purportedly served by the conditions are reasonably related to a legitimate governmental objective. Bell, 441 U.S. at 539.

b. Military appeals courts have routinely and "unequivocally condemned conduct by those in positions of authority which result in needless military degradation, or public denunciation or humiliation of an accused." U.S. v. Latta, 34 M.J. 569, 597 (A.C.M.R. 1992), citing U.S. v. Cruz, 25 M.J. 326 (C.M.A. 1987). Unnecessary public identification of an apprehended person as a criminal suspect is prohibited. Cruz at 331 n. 3.

c. The test for determining whether an accused has been subjected to pretrial punishment is not only whether the government intended to punish or humiliate but also whether the conduct serves legitimate non-punitive governmental objective. U.S. v. Carr, 37 M.J. 987 (A.C.M.R. 1993).

4. Fact analysis. In this case, PFC Corsetti was under allegations stemming from alleged misconduct at both Abu Garrib Prison, Baghdad, Iraq, and the Baghram Detention Facility, Afghanistan. His unit held him out to the rest of the unit as being guilty by associating with a group of 6 other military intelligence soldiers in trouble and calling them the Abu/Baghram 7. It is patently clear that calling them the "Abu/Baghram 7", and having them work Article 15 type details prior to a finding a guilty is for the purpose of punishing them and degrading them in front of other members of their unit. Furthermore, the command certainly cannot articulate a legitimate military purpose for this kind of treatment.

5. Conclusion. There is no set formula for calculating credit for pretrial punishment. If the military judge finds that illegal pretrial punishment occurred, he or she determines the sentence credit to which the accused is entitled. The military judge may order more than day-for-day credit for illegal pretrial punishment. United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983). The defense respectfully requests that this court grant 135 days pretrial credit, which equals approximately one half the time the endured illegal pretrial punishment.

CONCLUSION

For the reasons stated above, the Defense requests that the court grant the requested sentence credit.

RYAN B. DOWDY
CPT, JA
Defense Counsel

I hereby certify a copy of the forgoing document was served upon the Government and Military Judge.

RYAN B. DOWDY
CPT, JA
Defense Counsel

United States Army Trial Judiciary
Fourth Judicial Circuit, Fort Bliss, Texas

UNITED STATES	)	
	)	
v.	)	
	)	ORDER
PFC Damien M. Corsetti	)	
Company A, 519th MI Battalion	)	
Fort Bragg, NC 28310	)	May 11, 2006

1. IDENTIFICATION OF DOCUMENTS: Contained herein is Appellate Exhibit XXX, a report of investigation (less enclosures) relating to the circumstances surrounding the escape of Omar al Faruq from United States Control at Bagram Airbase, Afghanistan in July of 2005. This document has been classified "Secret."

2. ORDER. This exhibit is hereby ordered SEALED. The document that is the subject of this order will be placed only in the original record of trial.

3. DURATION OF PROTECTIVE ORDER. The document that is the subject of this order will remain sealed until ordered unsealed by a court of competent jurisdiction. Access to this document is limited to appellate counsel; court personnel in the performance of their duties; and any appellate or clemency agency, including but not limited to the Army Board for Correction of Military Records and the Army Discharge Review Board.

MARK P. SPOSATO
LTC, JA
Military Judge

Note:
Obtain sealed envelope w/ this order from CW2 Forman from classified safe @ Bagram Prosecution Team office when assembling record.

APPELLATE EXHIBIT XXX

LTC Sposato

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

UNITED STATES	)	GOVERNMENT RESPONSE TO MOTION FOR ARTICLE 13 CREDIT
v.	)	
CORSETTI, DAMINE PFC, U.S. Army HHB, USAADACENFB, Fort Bliss, Texas	)	26 May 2006

I. RELIEF SOUGHT

The Government requests that the Defense Request be denied.

II. BURDEN

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

III. FACTS

In October 2004, PFC Corsetti, along with six other soldiers in the 519th MI BN were titled in an investigation concerning detainee abuse at Bagram Airfield. Having been titled, their personnel files were flagged. Each of the soldiers had previously requested attorneys and were granted same. In October 2004, the 519th MI BN was getting ready to deploy to Iraq. The battalion command decided not to deploy these seven soldiers so as to allow them to remain close to their counsel.

These soldiers were assigned to the rear detachment of the 525th MI Brigade. During 2005 and 2006, the rear detachment consisted of roughly 70 to 220 soldiers, depending on the number of units deploying at any given time. PFC Corsetti and the other six soldiers described above were placed in a squad.

PFC Corsetti states in his motion that his squad was given work details that included cutting grass, raking dirt, and cleaning bathrooms. He neglected to state that he was given a mission to train deploying soldiers on land navigation and other soldier's tasks, that he was placed in charge of maintaining and fixing various vehicles, and that he created an SOP for the motor pool.

APPELLATE EXHIBIT XXXVII

IV. WITNESSES

1. SGM Elizabeth Champagne, HHC, 24th ID, Fort Riley, KS 66442, SGM Champagne is available to testify telephonically at 785-239-3987

V. LAW

1. Article 13, UCMJ, 10 U.S.C. § 813 (1988).
2. Washington v. Greenwald, 20 M.J. 699 (C.M.R. 1985)
3. United States v. Starr, 53 M.J. 380 (C.A.A.F. 2000)

VI. ARGUMENT

The Accused equates his placement in a squad with other titled members of his unit to pretrial confinement. At no time was he given any restriction greater than that of any rear detachment soldier. PFC Corsetti's squad met at formations in the same manner that all other rear detachment soldiers met. PFC Corsetti was not restricted to barracks, was not required to leave his family, was not required to have a chaperone to leave base or move around on base, was not prohibited from engaging in activities that other soldiers enjoyed, and was not required to check in at odd times or on a schedule more frequent than his fellow soldiers. The fact that PFC Corsetti was placed in a particular squad, absent evidence of further restriction is not tantamount to pretrial confinement. Washington v. Greenwald, 20 M.J. 699 (C.M.R. 1985).

PFC Corsetti also complains that he was given menial jobs. That was a function of where PFC Corsetti was assigned (rear detachment) and his rank (PFC) not his status as an Accused. A rear detachment is an administrative unit. Administrative units get their fair share of menial jobs. The Accused is a Private First Class. It goes without saying that Privates First Class are assigned to no small number of menial jobs.

PFC Corsetti was not allowed to perform duties as a counter intelligence soldier. At issue is whether there was a legitimate, nonpunitive basis for not allowing him to perform counter intelligence duties. This issue is resolved by the holding in United States v. Starr, 53 M.J. 380 (2000). In Starr, the Accused was a bomb dog trainer. After coming under suspicion for larceny, he was moved to a special "X-flight" unit composed of soldiers who were under investigation, subject to disciplinary action, or on extra duty. Starr was not allowed to perform security duties and gave up his special beret. Additionally, he performed menial duties on post.

PFC Corsetti's case is on all fours with Starr. The deprivation of Starr's ability to perform security functions was legitimated by the fact that he was no longer a fully functioning security officer (couldn't carry a weapon) and that he needed to be effectively utilized in some manner ("performing necessary work in support of the base mission"). When PFC Corsetti was titled in October 2004, he was flagged and, as a result, was not entitled to a security clearance. Without a security clearance, he couldn't function as a counter intelligence soldier. Placing him in the rear detachment was a way to have him perform useful duties for the 519th MI BN. Cutting grass, training soldiers, writing SOPs, and raking dirt are all jobs that keep a base like

Fort Bragg running. The 519th MI BN command did not intend to punish PFC Corsetti by placing him in the rear detachment. There are legitimate reasons to keep PFC Corsetti in the rear detachment and have him perform some menial tasks. He is not due sentence credit.

VII. CONCLUSION

The Accused has not stated a basis for relief under Art 13. His motion should be denied.

\signed\

CHRISTOPHER ELLIS
CPT, JA
Trial Counsel

I have served the foregoing on defense counsel, this 26th day of May 2006.

\signed\

CHRISTOPHER ELLIS
CPT, JA
Trial Counsel

United States	)	
	)	Defense Notice to Disclose or Intent
v.	)	To Disclose Classified Information
	)	
PFC Damien M. Corsetti	)	26 May 2006
Company A	)	
519th Military Intelligence Battalion	)	
Fort Bragg, North Carolina 28310	)	

AND NOW comes Spec. Damian Corsetti, by and through his defense counsels, Mr. William Cassara and CPT Ryan Dowdy, and submits the following Notice to Disclose or Cause the Disclosure of Classified Information pursuant to the provisions of M.R.E. 505(h). The Defense reasonably believes that the following potentially classified information will be revealed by the Defense in the U.S. v. Corsetti court-martial.

1. Mohammad al Faroq and Mohammad al Darbi were both involved in terrorist activities.

2. Both individuals played significant roles in the planning and carrying out of terrorist activities

3. Certain classified documents detail the extent of both of these individuals. Specifically, certain documents recently turned over to the defense provide explicit details of Mr. Al Darbi's activities. The defense intends on introducing these documents in their case in chief.

4. Guidance received from higher headquarters implicitly authorized certain interrogation techniques used by the accused.

5. Both individuals admitted their involvement in al Qaeda.

6. Information concerning the dates of al-Faruq's custody at Bagram, and al Darbi's detainment at Bagram and Guantanamo Bay.

7. Evidence that al-Faruq and al Darbi began to provide valuable and corroborated information to their interrogators after the sleep deprivation and psychological interrogation techniques used in September 2002, and after being "broken" by the accused.

8. Four International Red Cross memoranda concerning their lack of access to al-Faruq and al Darbi in 2002.

APPELLATE EXHIBIT XXXVIII

9. Evidence concerning al-Faruq's escape from Bagram in 2005.

10. The fact that al-Faruq and al Darbi never complained of being abused by the accused, despite numerous opportunities to do so.

11. al-Faruq was well trained at terrorist training camps in the arts of self-defense, resistance techniques, manipulation techniques, and fighting.

//Original Signed//

WILLIAM E. CASSARA
Civilian Defense Counsel

CERTIFICATE OF SERVICE

I certify that on 26 May 2006, I forwarded this request by e-mail to CPT BRANSON J. PARKER, Trial Counsel.

//Original Signed//

WILLIAM E. CASSARA
Civilian Defense Counsel