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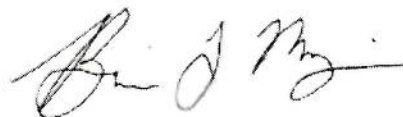


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CERTIFICATE OF FILING AND SERVICE

I certify that on 23 September 2014, I caused copies of the foregoing to be served on the counsel for Appellant via electronic mail.

Respectfully submitted,



BRIAN L. MIZER
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Assistant Detailed Defense Counsel

IN THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES)	MOTION TO DISMISS GOVERNMENT
<i>Appellant,</i>)	APPEAL FOR LACK OF JURISDICTION
)	
v.)	
)	
)	
ABD AL RAHIM HUSSAYN)	
MUHAMMAD AL NASHIRI,)	Before Panel No. 2
)	
)	CMCR Case No. 14-001
<i>Appellee.</i>)	

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF
MILITARY COMMISSION REVIEW**

COMES NOW, Appellee, Abd Al-Rahim Hussein Al-Nashiri (“Al-Nashiri”), pursuant to Rule 20 of this Honorable Court’s Rules of Practice, and moves this Honorable Court to dismiss Appellant’s case for failure to comply with the jurisdictional requirement set forth in 10 U.S.C. § 950d(e) that the government file its notice of appeal within five days.

Statement of the Case

On 27 August 2013, Appellee filed a motion to dismiss all charges related to an alleged October 2002, attack on the French-flagged vessel *MV Limburg* for lack of subject-matter jurisdiction. (A.E. 168.) The Commission below held two pretrial hearings and authorized additional briefing on the Commission’s subject-matter jurisdiction for the alleged bombing of the *MV Limburg*, which occurred off the coast of Yemen. (A.E. 241; Unofficial/Unauthenticated Transcript at 3068-3101 and 3874-3905.) On 11 August 2014, the Commission granted Appellant’s motions, and dismissed the charges related to the *MV Limburg*, Specification 2 of Charge IV, and Charges VII through IX for lack of subject matter jurisdiction.

Seven days later, on 18 August 2014, the government filed a Motion to Reconsider. (A.E. 168H; 241D.) The government also requested the Commission hold a third hearing on the matter. *Id.* Both requests were opposed by Appellee. (A.E. 168I; 241E.) On 16 September 2014, the Commission granted Appellee's request for reconsideration, but declined to reverse its prior ruling dismissing the charges and specifications without prejudice. (A.E. 168K; 241G.)

Three days later, on 19 September 2014, the government filed its Notice of Appeal with this Court.

Argument

A) The Government Failed to File Either a Notice of Appeal or a Timely Motion for Reconsideration Within the Five-Day Period Required by 10 U.S.C. § 950d(e), and This Court Lacks Jurisdiction to Hear this Appeal.

“Prosecution appeals are disfavored and are permitted only upon specific statutory authorization.” *United States v. Bradford*, 68 M.J. 371, 373 (C.A.A.F. 2010). While the opportunity to file a government notice of appeal is permissive, “the time within which to do so is not.” *United States v. Rodriguez*, 67 M.J. 110, 115 (C.A.A.F. 2009) (Noting jurisdictional nature of statutory timelines); *United States v. Flores-Galarza*, 40 M.J. 900 (N-M.C.M.R. 1994) (Time for notice of appeal of ruling at 1227 on a Friday under 72-hour provision of Article 62, UCMJ, expired at 1227 on Monday, Memorial Day, and government notice of appeal at 1122 on Tuesday was untimely and jurisdictional.); *United States v. Mayer*, 21 M.J. 504 (A.F.C.M.R. 1985). Because Appellant did not file either a notice of appeal or a timely motion to reconsider on or before 16 August 2014, this Court lacks jurisdiction to hear this appeal.

Appellee anticipates Appellant will argue that a timely motion for reconsideration tolls the running of the statutory appeal period. But this Court has held, “for a motion for reconsideration to be considered timely, so as to render the underlying order or ruling ‘nonfinal’

for purposes of a later appeal, the motion for reconsideration must itself be filed within the applicable time period for appeal.” *United States v. Khadr*, 753 F. Supp. 2d 1178, *9 (C.M.C.R. 2009) In *Khadr*, this Court adopted the Navy-Marine Corps Court of Military Appeals decision in *United States v. Santiago*, 56 M.J. 610, 616 (N-M. Ct. Crim. App. 2001), which dealt with tolling under Article 62, Uniform Code of Military Justice. *Id.* at *9-10. “[T]imely notice of an appeal within 72 hours of the order or ruling is ‘mandatory,’ and ‘the military judge is *without authority* to extend the period of time for that notice.” *Santiago*, at 615 (citing *Flores-Galarza*, 40 M.J. at 905)(emphasis in original). The prosecution waited seven days—not five—to file its motion to reconsider, and the Commission’s order is “final” for purposes of 10 U.S.C. § 950d(e). *Id.*

B) Even if the Military Judge had the Authority to Extend the Statutory Time to File a Government Appeal, the Time in Which to File the Government’s Appeal Expired on 16 September 2014, When the Military Judge Declined to Reverse his Prior Ruling.

As discussed above, the timeliness of the government appeal in this case has already been decided by this Court:

[W]e hold that for a motion for reconsideration to be ‘timely,’ such that it renders the underlying order or ruling non-final until a decision is rendered, the motion for reconsideration must itself be filed within the five-day appeal period mandated by 10 U.S.C. § 950d. Once a decision on a timely motion for reconsideration is issued, the Government then has five days to file a notice of appeal of that decision, if desired.

Khadr, at *10. However, Appellee respectfully takes issue with the Court’s *dicta* in *Khadr* that suggests that a decision on a timely motion for reconsideration affords the government another five days in which to notice its appeal.

“The Supreme Court has explained that ‘principles of equitable tolling usually dictate that when a time bar has been suspended and then begins to run again upon a later event, the time

remaining on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped.” *United States v. Saro*, 252 F. 3d 449, 454 (D.C. Cir. 2001) (citing *United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991)). “For example, a motion to reconsider filed after 20 days, if it tolled the 30-day period to appeal, would leave at most only 10 days to appeal once the reconsideration motion was decided.” *Id.* at 454 n. 6; *Socop-Gonzalez v. INS*, 272 F. 3d 1176 (9th Cir. 2001) (*en banc*) (“[C]ourts have typically assumed that the event that ‘tolls’ the statute simply *stops the clock* until the occurrence of a later event that permits the statute to resume running.”) (emphasis in original).

While the doctrine of equitable tolling has been all but extinguished by the Supreme Court’s later ruling in *Bowles v. Russell*, 551 U.S. 205 (2007), this Court should not disregard the Court’s holding in *Ibarra* that the tolling event stops, rather than resets, the clock. *United States v. Buchanan*, 638 F. 3d 448, 458 (4th Cir. 2011) (“When applicable, tolling operates to ‘stop the clock.’”) (citation omitted); *Marandola v. United States*, 518 F. 3d 913 (Fed. Cir. 2008) (“In *Bowles*, the Supreme Court emphasized the jurisdictional nature of notices of appeal and held that the jurisdictional rules lack equitable exceptions.”); *Shaheed v. Filene’s Basement Store*, 2010 U.S. App. LEXIS 25766 (D.C. Cir. 2010). “The tolling provision does not, however, ‘revive’ the limitations period (i.e., restart the clock at zero); it can only serve to pause a clock that has not yet fully run.” *Vroman v. Brigano*, 346 F. 3d 598, 602 (6th Cir. 2003); *See generally, Napoles v. Holder*, 395 Fed. Appx. 338, 339 (9th Cir. 2010) (Discussing tolling of immigration statute: “In other words, tolling will *stop* the clock, but it does not add days *to* the clock; the number of days remaining on the departure clock remain the same after the tolling period ends.”) (emphasis in original).

Conclusion

The government burned seven of its allotted five days before filing its Notice of Appeal, and this Court is without jurisdiction to hear its appeal. Even if the military judge had the authority to extend the statutory period to file either a notice of appeal or timely motion for reconsideration by two days, the government waited an additional three days following his ruling to file its Notice of Appeal, bringing the total time used up by the government for 10 U.S.C. § 950d(e) purposes to ten days. Congress did not give the government ten days to file its notice of appeal for matters not involving classified information, and this appeal must be dismissed. *Khadr*, at *10.

Respectfully submitted,



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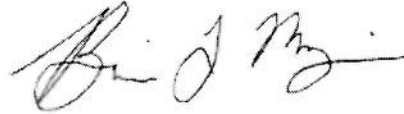


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Respectfully submitted,

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