

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

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| <p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI</p> | <p>AE 335A</p> <p>Government Response To Defense Motion To Suppress Custodial Statements Made By Mr. Ahmed Mohammed Ahmed Haze (Al-Darbi) To Federal Law Enforcement Agents Between 24 August-3 September 2002 And Derivative Evidence, As Required By 10 U.S.C. § 948r And The Fifth Amendment</p> <p>27 January 2015</p> |
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1. Timeliness

The government timely files this response pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.d.(1).

2. Relief Sought

The government respectfully requests that the Commission deny the defense motion to suppress Ahmed Mohammed Al-Darbi's ("Al-Darbi") potential live testimony at trial and the accused's 2007 statements to law-enforcement agents.

The defense also seeks to suppress Al-Darbi's August and September 2002 statements to law-enforcement agents. The government has no intention of affirmatively relying on Al-Darbi's 2002 statements and, thus, there is no need for the Commission to consider whether to suppress the 2002 statements. The government reserves the right to use Al-Darbi's 2002 statements for rebuttal to any argument made by the defense as part of the government's case-in-chief or the defense's case-in-chief.

3. Overview

Relying on Military Commission Rule of Evidence (“M.C.R.E.”) 304(a)(5), the defense seeks to suppress Al-Darbi’s potential live testimony at trial and the accused’s voluntary statements made to law-enforcement agents in 2007, arguing that such evidence is derived from improperly induced statements made by Al-Darbi in 2002. But M.C.R.E. 304(a)(5) does not support the defense-requested relief to suppress evidence purportedly derived from a third party who is not an accused in this case. 10 U.S.C. §948r, as implemented at M.C.R.E. 304(a)(1), which contemplates the suppression of illegally obtained statements from a third-party is a closer approximation to the defense’s purported theory. Nevertheless, even under that analysis, the defense’s argument fails as moot given that the government is not relying on the statements the defense contends were the result of alleged mistreatment (Al-Darbi’s 2002 statements to U.S. law-enforcement).

The plain reading of M.C.R.E. 304(a)(5) prohibits the admissibility of evidence derived from an improperly induced statement made by the accused. The rule states: “Evidence derived from a statement that would be excluded under [M.C.R.E. 304(a)(1)] may not be received in evidence *against an accused who made the statement . . .*” M.C.R.E. 304(a)(5) (emphasis added).¹ Accordingly, the accused may challenge the admissibility of evidence derived from *his* improperly induced statements, but the accused may not challenge the admissibility of his own 2007 statements, nor Al-Darbi’s future testimonial evidence at trial under M.C.R.E. 304(a)(5). Because the accused may not challenge the admissibility of evidence derived from a third party,

¹ Rule 304(a)(1) states in relevant part: “No statement, obtained by the use of torture, or by cruel, inhuman, or degrading treatment . . . whether or not under color of law, shall be admissible in a trial by military commission”

the Commission should deny the defense motion to suppress evidence purportedly derived from Al-Darbi.

Rule 304(a)(5) is consistent with federal-court practice. Federal civilian courts consistently hold that evidence derived from an unlawfully obtained third-party statement should not be suppressed as fruit of the poisonous tree. *Gissendanner v. Wainwright*, 482 F.2d 1293, 1296 (5th Cir. 1973); *Jacobs v. Warden, Md. Penitentiary*, 367 F.2d 321, 323 (4th Cir. 1966).² Consistent with the plain language of the rule, and the practice developed in federal civilian courts, the Commission should deny the defense motion to suppress.

4. **Burden of Proof**

As the moving party, the defense must demonstrate by a preponderance of the evidence that it has standing, under M.C.R.E. 304(a)(5), to challenge evidence derived from third party statements. R.M.C. 905(c)(1)-(2).

5. **Facts**

The government charged Abd Al Rahim Hussayn Muhammad Al Nashiri (“the accused”) with multiple offenses under the Military Commissions Act of 2009, 10 U.S.C. § 948a *et seq.*, relating to terrorist attacks against the United States and its coalition partners. The accused is charged with the attempted attack on USS THE SULLIVANS (DDG 68) on 3 January 2000, and the attacks on USS COLE (DDG 67) on 12 October 2000 and the French supertanker MV *Limburg* on 6 October 2002. These attacks resulted in the deaths of 18 people, serious injury to dozens of others, and significant property damage.³

² The defense also seeks to suppress Al-Darbi’s 2002 statement. The Commission should find that issue moot because the government will not affirmatively offer Al-Darbi’s 2002 statements in their case-in-chief but reserves the right to use them as rebuttal evidence.

³ The Commission dismissed the separate charges relating to the accused’s alleged participation in the attack on MV *Limburg* (Charge IV, Specification 2, & Charges VII-IX). AE 168G; AE 241C. The

Ahmed Mohammed Al-Darbi is a member of Al-Qaeda and a named coconspirator in this case. Al-Darbi was captured in June 2002. AE 335, Attachment A at 38. Al-Darbi was held at Bagram Airbase in Afghanistan, where he ultimately provided a series of statements to the Federal Bureau of Investigation (“FBI”) in August 2002 and September 2002. AE 335, Attachment A. The government will not affirmatively offer—during any stage of the accused’s case—the contents of any statements that Al-Darbi made to law-enforcement agents in 2002. The government, however, may call Al-Darbi as a witness in its case-in-chief, to testify before the members and the Commission to what he directly observed and heard, firsthand, while working for Al-Qaeda and the accused.

In December 2013, Al-Darbi voluntarily entered into a pretrial agreement with the United States Government to plead guilty to charges stemming from his role in the 2002 attack on MV *Limburg*. AE 335, Attachment G at 1 (“No person has made any attempt to force or coerce me to make this Offer or to plead guilty.”). Al-Darbi pled guilty before a military commission in February 2014 and described his conduct, including the purchase of boats, Global Positioning System devices, and a hydraulic crane in the United Arab Emirates for use in an illegal operation that violated the law of war.

government moved for reconsideration of the Commission’s Order dismissing those charges. AE 168H; AE 241D. The Commission granted reconsideration and, on reconsideration, denied the government’s requested relief, while modifying the initial Order to state dismissal of the charges was without prejudice. AE 168K; AE 241G. The Order does not affect the Conspiracy charge (Charge V), which includes overt acts comprising the attack on MV *Limburg*. On 29 September 2014, the government filed an interlocutory appeal with the United States Court of Military Commission Review (“U.S.C.M.C.R.”), causing AE 168K/241G to be stayed automatically pending disposition by the U.S.C.M.C.R. On 12 November 2014, the United States Court of Appeals for the District of Columbia Circuit granted the defense request to stay the proceedings before the U.S.C.M.C.R., which then placed those proceedings in abeyance pending the resolution of the mandamus petition before the District of Columbia Circuit.

6. Law and Argument**A. The Defense Motion To Suppress Al-Darbi's 2002 Statements to Law-Enforcement Agents Is Moot**

The Commission need not consider whether Al-Darbi's statements to law-enforcement agents in 2002 should be suppressed. While the accused has standing to challenge the admissibility of third-party statements (see M.C.R.E. 304(a)(1)), the government has no intention of making affirmative use of Al-Darbi's 2002 statements. The Commission's inquiry regarding Al-Darbi's 2002 statements should end with this assertion. The government reserves the right to use Al-Darbi's 2002 statements for rebuttal to any argument made by the defense as part of the government's case-in-chief or the defense's case-in-chief.

B. The Commission Should Deny the Defense Motion To Suppress Possible Live Testimony from Al-Darbi

The defense asks the Commission to suppress Al-Darbi's potential live testimony in this case, relying on M.C.R.E. 304(a)(5) and arguing that such live testimony would be derived from Al-Darbi's 2002 statements made to law-enforcement agents, which the defense alleges to have been improperly induced. But Rule 304(a)(5) does not prohibit the admissibility of future testimonial evidence derived from statements made by third parties.

The defense attempts to recast the rule, stating the rule "specifically prohibits *any* evidence derived from statements obtained by torture or cruel, inhuman, or degrading treatment." AE 335 at 2 (emphasis added). The plain reading of M.C.R.E. 304(a)(5), however, is narrower, in that it only precludes the use of derivative evidence when derived from an improperly induced statement made by the accused. Rule 304(a)(5) states: "Evidence derived from a statement that would be excluded under [Rule 304(a)(1)] may not be received in evidence *against an accused who made the statement . . .*" M.C.R.E. 304(a)(5) (emphasis added). Simply, the accused has

standing to challenge the admissibility of evidence derived from his own statements, but he does not have standing to challenge the admissibility of evidence derived from a third party like Al-Darbi.

The defense provides no legal authority to depart from the plain language of the rule. The defense, for example, relies on *United States v. Ghailani*, where the federal district court suppressed testimony derived from statements of the accused assumed for the purposes of the litigation there to have been improperly obtained. 743 F. Supp. 2d 261, 287-88 (S.D.N.Y. 2010). The *Ghailani* holding is consistent with Rule 304(a)(5). Unlike *Ghailani*, the defense here seeks to suppress evidence purportedly derived from someone other than the accused, *i.e.*, Al-Darbi. The defense offered no rule or case that would support its incorrect interpretation of the rule.

The defense further argues that if Al-Darbi testifies, his willingness to do so is “illusory” because he entered into a pretrial agreement with the United States. AE 335 at 6. When Al-Darbi entered into a pretrial agreement, however, he did so voluntarily and with the assistance of qualified counsel. AE 335, Attachment G at 1. The defense will have the opportunity to explore Al-Darbi’s willingness to testify during cross-examination, should the government call Al-Darbi as a witness. This Commission should not find that pretrial agreements, previously reviewed and executed by a military judge, render future live testimony to be involuntary—a novel position taken by the defense for which it offers no legal authority.

C. The Commission Should Deny the Defense Motion To Suppress the Accused’s 2007 Statement to Law-Enforcement Agents

The defense asks the Commission to suppress the accused’s 2007 statements to law-enforcement agents, relying on M.C.R.E. 304(a)(5) and arguing that the statements are derived from Al-Darbi’s 2002 statements, which the defense alleges to have been improperly induced.

Even if the accused's 2007 statements are somehow derived from improperly induced statements made by Al-Darbi, the rules do not allow for the suppression of evidence derived from third parties. Here, the defense alleges the accused's statements are somehow derived from Al-Darbi's statements. Rule 304(a)(5), therefore, does not support the defense motion to suppress, and in light of the operational factors that Congress considered in enacting the Military Commissions Act of 2009, this approach to getting the best evidence bearing upon serious law of war charges before the trier of fact is in the interests of justice.

The defense reliance on *Ghailani* is inapposite. The district court suppressed the challenged evidence because the court found the evidence to be derived from the accused's unlawfully obtained statements. Indeed, in *Ghailani*, the district court found the government "would not have identified or located [the witness] absent Ghailani's coerced statements." *Ghailani*, 743 F. Supp. 2d at 278. The court's ruling is entirely consistent with M.C.R.E. 304(a)(5), which supports the suppression of evidence derived from unlawfully obtained statements made by the accused. Conversely, the defense in this case seeks to suppress evidence derived from a third party's statements—not the accused. The defense argument is inconsistent with the clear language of the Rule and, as such, should be denied.

Additionally, federal civilian courts generally limit an accused's right to suppress evidence derived from a third party. *Jacobs*, 367 F.2d at 323 (holding the illegal arrest of a coconspirator and the subsequent incriminating information he provided about the defendant should not extend "to cloak strangers . . . with absolute or conditional immunities"); *Gissendanner*, 482 F.2d at 1296 (concluding that petitioner's identification in a lineup was not fruit of the poisonous tree from the illegally taken confession of a coconspirator who implicated them). In *Gissendanner*, the Fifth Circuit found it particularly persuasive that the

coconspirators' illegal confession was never introduced against the accused. *Gissendanner*, 482 F.2d at 1296. As the government will not affirmatively offer Al-Darbi's 2002 statements against the accused, the accused can make no colorable argument that his rights were violated by the government's alleged mistreatment of Al-Darbi.

To be clear and without giving credence to the defense argument, the defense argument fails to establish a substantive, causal, or "but-for" link between the contents of Al-Darbi's 2002 statements and the statements made by the accused in 2007. It is submitted to the Commission that this is not an accident. To attempt to argue a substantive or causal link would actually corroborate the allegations made by Al-Darbi against the accused and provide reliability, credibility, and probative weight to the very statements the defense seeks to suppress.

7. Conclusion

The defense motion rests entirely on an incorrect application of M.C.R.E. 304(a)(5). That rule does not provide for the suppression of evidence derived from the statements of persons other than accused. Thus, even if the facts demonstrated that Al-Darbi's potential live testimony and the accused's 2007 statement were derived from Al-Darbi's 2002 statements—they were not—the defense motion must be denied under the plain language of the rule. Only statements derived from statements of the accused properly can be the subject of a motion under Rule 304(a)(5).

8. Oral Argument

The defense requests oral argument. The Commission can decide this matter without oral argument. *See* Military Commissions Trial Judiciary Rule of Court 3.9.(a). If the Commission grants the defense an opportunity to present oral argument, however, the government requests an opportunity to do the same.

9. Witnesses and Evidence

The government does not intend to rely on any witnesses in support of this response. The government relies on the evidence identified *supra* in this response.

10. Additional Information

The government has no additional information.

11. Attachments

A. Certificate of Service, dated 27 January 2015.

Respectfully submitted,

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Justin T. Sher
Maj Winston G. McMillan, USMC
LT Bryan M. Davis, JAGC, USN
LT Paul B. Morris, JAGC, USN
Trial Counsel

Robert C. Moscati
Deputy Chief Prosecutor

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

Filed with TJ
27 January 2015

Appellate Exhibit 335A (Al-Nashiri)
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CERTIFICATE OF SERVICE

I certify that on the 27th day of January 2015, I filed AE335A, **Government Response To Defense Motion To Suppress Custodial Statements Made By Mr. Ahmed Mohammed Ahmed Haze (Al-Darbi) To Federal Law Enforcement Agents Between 24 August-3 September 2002 And Derivative Evidence, As Required By 10 U.S.C. § 948r And The Fifth Amendment**, with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

//s//

Justin T. Sher
Trial Counsel
Office of the Chief Prosecutor
Military Commissions