

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY**

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED
ABDU AL-NASHIRI

AE 335

**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**

16 January 2015

1. Timeliness: This request is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and is timely pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.)3.7.c. (1).

2. Relief Requested: The Defense respectfully requests the Commission suppress custodial statements made by Mr. Al-Darbi to federal agents between 24 August and 3 September 2002, and all derivative evidence obtained as a result of these statements. This includes any future testimony Mr. Al-Darbi might provide as well as all statements made by Mr. Al-Nashiri that were the product of Mr. Al-Darbi's torture.

3. Overview:

"A coerced confession is offensive to basic standards of justice, not because the victim has a legal grievance against the police, but because declarations procured by torture are not premises from which a civilized forum will infer guilt." *United States v. Karake*, 443 F. Supp. 2d 8, 50 (D.D.C. 2006). Accordingly, the Military Commissions Act (M.C.A.) and Military Commissions Rules of Evidence (M.C.R.E.) prohibit the use of any statement obtained by torture or cruel, inhuman, or degrading treatment. 10 U.S.C. § 948r; M.C.R.E. 304(a)(1). The M.C.R.E. goes further and specifically prohibits any evidence *derived* from statements obtained by torture

or cruel, inhuman, or degrading treatment. M.C.R.E. 304(a)(5). And, unlike its counterpart in the Military Rules of Evidence, M.C.R.E. 304(a)(3) expressly provides an accused standing to suppress statements of others “allegedly produced by coercion.”

These protections prohibiting derivative evidence are much like the protections guaranteed by the 4th and 5th Amendments. “‘When an incriminating statement has been obtained through coercion, the Fifth Amendment prohibits use of the statement or its fruits’ that is to say, evidence derived from any statement coerced from the defendant—unless the evidence ‘has been come at...instead by means sufficiently distinguishable to be purged of the primary taint.’” *United States v. Ghailani*, 743 F. Supp. 2d 261, 264-65 (S.D.N.Y. 2010)(citing *Pillsbury Co. v. Conboy*, 459 U.S. 248, 278 (1983) and *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)). The burden of proving attenuation is on the government. *Ghailani*, at 265 (citing *Brown v. Illinois*, 422 U.S. 590, 604 (1975)).

In this case, Mr. Al-Darbi’s 24 August- 3 September 2002, statements were obtained through torture or cruel, inhuman, or degrading treatment. Therefore his statements and all derivative evidence obtained from these coerced statements should be suppressed. This includes any statements made by Mr. Al-Nashiri, who was apprehended as a direct result of Mr. Al-Darbi’s statements obtained by the use of torture, or at a minimum, cruel, inhuman, and degrading treatment. The prosecution cannot prove attenuation *per se* where Mr. Al-Darbi’s 2002, statements and the derivative evidence from these statements are the product of torture.

4. Burden of Proof and Persuasion: The prosecution bears the burden of persuasion by a preponderance of the evidence. R.M.C. 905(c)(2)(A). Specifically, the prosecution must prove the evidence they seek to admit was not “come at by the exploitation of that illegality,” in this case the torture of Mr. Al-Darbi. *Wong Sun v. United States*, at 488; *United States v. Karake*, 443 F. Supp. 2d 8, 89 (D.D.C. 2006).

5. Statement of Facts:

a. In August- September 2002, federal law enforcement agents conducted custodial interrogations of Mr. Al-Darbi in Bagram Airbase, Afghanistan.

b. During this time in custody, agents of the United States, while at times acting under the color of law, intended to inflict severe physical or mental pain or suffering upon Mr. Al-Darbi and tortured him while he was in their custody. 18 U.S.C. § 2340 (2012); M.C.R.E. 304(b)(3).

c. While Mr. Al-Darbi was in custody, the agents of the United States also intended to inflict severe physical or mental pain or suffering upon fellow detainees, including Mr. Abul Wahid, who died as a result of this maltreatment. The torture used against Mr. Al-Darbi ultimately resulted in charges being referred to court martial against PFC Damien Corsetti and another agent receiving a letter of reprimand for physically assaulting a fellow detainee and failing to follow approved interrogation techniques. Attachments B-D.

d. During the Corsetti court martial, the government stated that Mr. Al-Darbi had suffered cruel, inhuman, and degrading treatment while in custody, including the time period of his 24 August-3 September 2002 statements. The government provided sworn deposition testimony of Mr. Al-Darbi regarding the torture and cruel, inhuman, and degrading treatment that he suffered. Attachment B.

e. The information obtained by Mr. Al-Darbi's torture statement was shared with law enforcement agents. Mr. Al-Darbi's tortured statements led to the capture Mr. Nashiri, in October 2002, and Mr. Al-Darbi's statements were used to question Mr. Al-Nashiri.

f. During Mr. Al-Nashiri's time in custody he was tortured repeatedly. After years in custody and torture, US law enforcement officials obtained a statement from Mr. Al-Nashiri while in custody at Guantanamo Bay Cuba in 2007. Attachment E.

g. On 10 November 2008, Mr. Al-Darbi filed a motion with his military commission to suppress statements he previously made as the product of torture and other “physical and mental abuse,” which included being sodomized and further threatened with “rape” by his male interrogators. Attachment F.

h. While the prosecution has not provided a witness list, the defense anticipates that the government may seek to elicit testimony from Mr. Al-Darbi, a named conspirator in Charge V.

6. Argument:

A) Mr. Al-Darbi’s Statements, a Product of Torture, Must be Suppressed.

MRC 948r prohibits the use of any statements obtained through torture or cruel, inhuman, or degrading treatment, even if the statement was obtained under the color of the law. This does not just apply to statements of the accused; rather it applies to *any* statement, regardless of the declarant’s role within the commission.

During his time in custody at Bagram, Mr. Al-Darbi was subject to repeated torture or, at a minimum, cruel, inhuman, or degrading treatment as defined by the Detainee Treatment Act. US law enforcement agents interrogated Mr. Al-Darbi using “enhanced” interrogation tactics which, among other tactics, included physical acts of violence, threats, and sexual humiliation (placing genitalia against his face, pulling down Mr. Al-Darbi’s pants) - all prohibited interrogation methods and defined as cruel, inhuman, or degrading treatment under the Detainee Treatment Act. The illegal and coercive methods used against Mr. Al-Darbi while in custody ultimately led to the prosecution of PFC Damien Corsetti by the United States Army. Importantly, the United States government stated that Mr. Al-Darbi was the victim of this cruel, inhuman, and degrading treatment during the same time period that he provided the August 24-September 3, 2002 statements. See *U.S. v. Corsetti* ROT at 567-582.

The statements Mr. Al-Darbi provided to US law enforcement from August 24 to September 3, 2002, were produced by the use of torture or, at a minimum, cruel, inhuman, and degrading treatment. Under 10 U.S.C. § 948r these statements must be suppressed.

B) Testimony from Mr. Al-Darbi is a Derivative Product of Torture, Thus Inadmissible.

10 U.S.C. § 948r and the Manual for Military Commissions prohibit the introduction of evidence derived from torture. M.C.R.E. 304(a)(5) prohibits derivative evidence from statements obtained by torture or cruel, inhuman, or degrading treatment. The M.R.C. and M.C.R.E. protections prohibiting derivative evidence are analogous to the protections afforded under the 4th and 5th Amendments. Assuming the government intends to introduce testimony from Mr. Al-Darbi at the commission, any live testimony from Mr. Al-Darbi would be derivative evidence that was obtained through the use of torture and should not be permitted.

In the discussion of M.C.R.E. 304, the intent of the rule against derivative evidence is to “restrict the admission of evidence derived from statements obtained by torture or cruel, inhuman, or degrading treatment (other than where the evidence would have been obtained even if the statement had not been made).” M.C.R.E. 304 Discussion. In the Fourth and Fifth Amendment context, the fruits of illegally obtained evidence are admissible where the government proves that the connection between the illegal government action and the evidence offered at trial is “so attenuated as to dissipate the taint.” *United States v. Ghailani*, 743 F. Supp. 2d 261, 275 (S.D.N.Y. 2010) (citing *Nardone v. United States*, 308 U.S. 338, 341 (1939)). In *Ghailani*, the Court identified four factors relevant to determining whether live testimony is sufficiently attenuated from illegal government conduct so as to permit its admission at trial: 1) the willingness of the witness to testify, 2) the role played by the illegally seized evidence in gaining his cooperation, 3) the proximity between the illegal behavior, the decision to cooperate and the

actual testimony at trial, and 4) the motivation of the police in conducting the search. *Id.* at 275. These four factors are also relevant in the context of determining whether evidence derived from torture or cruel, inhuman, or degrading treatment is sufficiently attenuated to satisfy the “interest of justice” standard set forth in the M.C.A.¹

If the prosecution offers testimony from Mr. Al-Darbi, it may claim that he is “willing” to testify, like the witness at issue in *Ghailani*. However any “willingness” is illusory: Mr. Al-Darbi, a named co-conspirator, is a detainee in US custody who, in order to avoid indefinite detention at Guantanamo Bay, Cuba, signed a plea agreement ensuring his release in December 2017, in exchange for testifying against Mr. Al-Nashiri. Attachment G. Even more so than the witness in *Ghailani*, who was not in US custody at the time of the trial, Mr. Al-Darbi would not have come forward to testify on his own volition if not for previous capture and coerced statements. Mr. Al-Darbi is in fact a named conspirator in Charge V against Mr. Al-Nashiri. Like the witness in *Ghailani*, Mr. Al-Darbi’s willingness to testify cannot be a truly free and unconstrained decision. *Ghailani*, 743 F. Supp. 2d at 281.

Further, the government will not be able to establish that the facts and contents of Mr. Al-Darbi’s coerced statements will not play a role in his decision to cooperate. *Ghailani*, 743 F. Supp. 2d at 282. Mr. Al-Darbi, an alleged co-conspirator, incriminated himself in these coerced statements, which undoubtedly remain a strong factor in persuading him to testify against Mr. Al-Nashiri.

Additionally, the passage of time does not create legitimate attenuation of taint in this case. “The critical question with respect to attenuation is not the length of time between a

¹ As noted by the Court in the conclusion of *Ghailani*, the Military Commissions Act of 2006 would have likely compelled the same result if *Ghailani* had been tried by military commission. “M.C.A. § 943r(a) and M.C.R.E. 304 preclude or restrict the use of ‘statements obtained by torture or cruel, inhuman, or degrading treatment,’ and evidence derived therefrom, and could require exclusion of Abebe’s testimony. Even if they did not, the Constitution might do so, even in a military commission proceeding.” *Ghailani*, 743 F. Supp. 2d at 288 n. 182.

previously coerced confession and the present confession, it is the length of time between the removal of the coercive circumstances and the present confession.” *Karake*, 443 F. Supp. 2d at 89. Here the coercive circumstances remain in place. And the long delay between Mr. Al-Darbi’s coerced statements to present day highlights the consequences of non-cooperation: Mr. Al-Darbi was held in US custody for over a decade without facing charges. Should he refuse to cooperate and testify against Mr. Al-Nashiri, he faces continued prosecution including a possible capital referral. As happened in *Ghailani*, the evidentiary hearing required by this motion will likely bolster the connection between Mr. Al-Darbi’s coerced statements and his decision to testify. And, like *Ghailani*, the prosecution will be unable to meet its burden of proving Mr. Al-Darbi’s coerced statements have no bearing on his decision to cooperate in testifying against Mr. Al-Nashiri. Plainly stated, any testimony Mr. Al-Darbi might provide is directly tied to his coerced statements provided as a result of the use of torture, or at a minimum, cruel, inhuman, or degrading treatment while in US custody. Accordingly, Mr. Al-Darbi’s testimony must be suppressed as the *per se* fruit of the poisonous tree.

C) All Evidence Obtained as a Result of Mr. Al-Nashiri’s Apprehension, Including His 2007 Statements, are a Derivative Product of Torture and Should be Suppressed.

Mr. Al-Nashiri was apprehended in October 2002, because of the information coerced from Mr. Al-Darbi during August- September 2002. As discussed above, the fruits of illegally obtained evidence must be excluded unless granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by means sufficiently distinguishable to be purged of the primary taint. *Ghailani*, 743 F. Supp. 2d at 275; M.C.R.E. 304(a)(5)(A). Any evidence obtained from the apprehension of Mr. Al-Nashiri, including Mr. Al-Nashiri’s so-called “clean team” 2007 statements, should be suppressed because it is derived

directly from the use of torture and cruel, inhuman, and degrading treatment against Mr. Al-Darbi.

There is no attenuation of taint from any of Mr. Al-Nashiri's statements from the coerced statements of Mr. Al-Darbi. Without the coerced statements of Mr. Al-Darbi, Mr. Nashiri would not have been apprehended and the government cannot prove that it had independent means with which to locate and apprehend Mr. Al-Nashiri. Like the witness in *Ghalini*, the government would not have located Mr. Al-Nashiri absent Mr. Al-Darbi's coerced statements. Mr. Al-Nashiri was apprehended, interrogated, and tortured as a direct result of the coerced statements from Mr. Al-Darbi. The United States then spent years torturing Mr. Al-Nashiri, which will—once the discovery process is complete—be the subject of extensive litigation before this Commission. But for the purpose of this motion, the nature and length of this torture means there can be no attenuation of taint from Mr. Al-Nashiri's initial apprehension due to coerced statements from Mr. Al-Darbi and Mr. Al-Nashiri's 2007 statements. The 2007 statements are directly related to years of conditioning, torture, and maltreatment that resulted only after Mr. Al-Darbi's coerced statements were used to locate and capture Mr. Al-Nashiri. The government cannot prove that Mr. Al-Nashiri would have been apprehended but for the use of coerced statements from Mr. Al-Darbi. Accordingly, all evidence obtained from Mr. Al-Nashiri's apprehension, including all of his statements, must be suppressed as the *per se* fruit of the poisonous tree.

7. Conclusion:

10 U.S.C. § 948r unequivocally prohibits statements obtained by the use of torture. Although certainly implied by the statute, the Manual for Military Commissions expressly states this includes evidence derived from statements obtained by torture. M.C.R.E. 304(a)(5)(A). Like *Ghailani*, the rule provides for admissibility of evidence that “would have been obtained

even if the statement had not been made.” *Ghailani*, 743 F. Supp. 2d. The rule also purports to allow the admissibility of evidence derived by torture when its use “would be consistent with the interests of justice.” *Id.* Whatever the amorphous “interests of justice” may be, they cannot override the express statutory prohibition on the use of such evidence, and admissibility must be determined solely on the inevitable discovery of the evidence in accordance with *Ghailani* and 10 U.S.C. § 948r. “The temptation to allow our revulsion at these bombings, the human instinct for vengeance, and fear of terrorist attacks to overcome principles upon which our nations rests—principles that, although not always observed, are ideals to which we aspire—is powerful. If our nation is to continue as a bastion of liberty, however, we must remain true to our principles and overcome that temptation.” *Ghailani*, 743 F. Supp. 2d at 265.

Mr. Al-Darbi’s statement and any live testimony from him must be suppressed for failure to comply with the M.C.A. as it is the product of torture and, at a minimum, cruel, inhuman, and degrading treatment. Because Mr. Al-Nashiri was apprehended as a direct result of the coerced statements of Mr. Al-Darbi, and because information extracted from Mr. Al-Darbi was used in the torture of Mr. Al-Nashiri, all statements of Mr. Al-Nashiri must also be suppressed as fruit of the poisonous tree.

8. Oral Argument: The defense requests oral argument on this motion.

9. Witnesses:

[REDACTED]

[REDACTED]

Mr. Damien Corsetti

10. Conference with Opposing Counsel: The defense has conferred with the prosecution, and they object to this motion.

11. List of Attachments:

- A. Statement(s) of Mr. Al-Darbi, dated 24 August- 3 Sep 2002 (55 pgs)
- B. U.S. v. Corsetti, Unauthenticated Verbatim Record of Trial (16 pgs)
- C. Autopsy Report of Abdul Wahid, dated 13 Nov 2003 (7 pgs)
- D. Letter of Reprimand for Sergeant "Doe", dated 31 Mar 2005 (1 pg)
- E. 2007 Statement of Mr. Al-Nashiri, dated 2 Feb 2007 (34 pgs)
- F. U.S. v. Darbi - Defense Motion to Suppress Statements, dated 10 Nov 2008 (14 pgs)
- G. U.S. v. Darbi - Offer of Pretrial Agreement w/Appendix, dated 20 Dec 13 (10 pgs)

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RICHARD KAMMEN
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CERTIFICATE OF SERVICE

I certify that 16 January 2015, I electronically filed the forgoing document with the Clerk of the Court and served the foregoing on all counsel of record by e-mail.

/s/ Thomas Hurley
THOMAS F. HURLEY, MAJ, USA
Assistant Detailed Defense Counsel

ATTACHMENT A

**PAGES 12-67 ARE REDACTED IN
FULL**

ATTACHMENT

B

1 [Bailiff did as directed.]

2 Please be seated. The court is called to order all parties

3 are present to include the members. Members sorry for the delay.

4 I'm handing out these findings instructions and in that regard you

5 can just sit back and listen. I will give you a verbatim copy of the

6 instructions I'm about to give you.

7 Members of the court when you close and deliberate and vote

8 on findings each of you must resolve the ultimate question of whether

9 the accused is guilty or not guilty based upon evidence presented

10 here in court and part of the instructions, which I will give you.

11 My duty is to instruct you on the law. Your duty is to determine the

12 facts, apply the law to the facts and determine the guilt or

13 innocence of the accused. The law presumes the accused to be

14 innocent of the charges against him.

15 You'll hear an exposition of the facts by counsel for both

16 sides as they view them, bear in mind that the arguments of counsel

17 are not evidence. Argument is made by counsel in order to assist you

18 in understanding and evaluating the evidence, but you must base the

19 determination of issues in the case on evidence as you remember it.

20 and apply the law as I instruct you. During the trial some of you

21 took notes you may take your notes with you into the deliberation

22 room; however, your notes are not a substitute for the record of

23 trial.

1 I'll now advise you of the elements of each offense
2 alleged. In the Specification of charge I, the accused is charged
3 with the offense of violating a general order, in violation of
4 Article 92 of the Uniform Code of Military Justice. In order to find
5 the accused guilty of this offense you must find by legal and--you
6 must be convinced by legal and competent evidence beyond a reasonable
7 doubt first, that there was in existence of certain lawful general
8 order in the following terms.

9 United States Central command General Order Number 1a dated
10 19 December 2000, which prohibited the possession and consumption of
11 alcohol. Second, the accused had a duty to obey such an order and
12 third, that at or near Bagram Airfield Afghanistan on diverse
13 occasions between on or about 1 August 2002 to on or about 1 February
14 2003, the accused violated this lawful general order by wrongfully
15 possessing and consuming alcohol. As a matter of law, the order in
16 this case as described in the specification if in fact there was such
17 an order it was a lawful order.

18 In Specification 2 of Charge I, the accused is charged with
19 the offense of willful dereliction of duty, also in violation of
20 Article 92 of the Uniform Code of Military Justice. In order to find
21 the accused guilty of this offense, you must be convinced by legal
22 and competent evidence beyond a reasonable doubt, first, that the
23 accused had a certain prescribed duty, that is, to conduct

1 interrogations of detainees according to approved tactics, techniques
2 and procedures. Second that the accused actually knew of the
3 assigned duty and third that at or near Bagram Airfield Afghanistan
4 on diverse occasions between on or about 1 August 2002 to on or about
5 1 February 2003, the accused is derelict in the performance of that
6 duty by willfully failing to conduct interrogations of detainees
7 according to approved tactics, techniques and procedures.

8 In Specification 3 of Charge I again the accused is charged
9 with the offense of willful dereliction of duty come in violation of
10 Article 92 of the Uniform Code of Military Justice. In order to find
11 the accused guilty of this offense you must be convinced by legal and
12 competent evidence beyond a reasonable doubt first, that the accused
13 had certain prescribed duty, that is, to conduct interrogations of
14 detainees according to approved tactics, techniques, and procedures.
15 Second, that the accused actually knew of the assigned duty and third
16 that at or near Bagram Airfield Afghanistan between on or about 1
17 August 2002 to on or about 1 February 2003, the accused is derelict
18 in the performance of that duty by willfully failing to prevent his
19 interrogation partner from falling articles of garbage and soiled
20 toilet paper onto the person of Ahmed al Darbi, also known as [REDACTED]
21 A duty may be imposed by regulation, lawful order, or custom of the
22 service. A person is derelict in the performance of duty when he
23 willfully fails to perform them.

1 "Dereliction" is defined as a failure in duty, a
2 shortcoming, or delinquency. "Willfully" means intentionally, it
3 refers to the doing of an act knowingly and purposely, specifically
4 intending the actual probable consequences of the act. The
5 individual reasonably should have known of duties may be demonstrated
6 by regulations, manuals, customs, and testimonies of persons who have
7 held similar or related positions or similar evidence.

8 The three Specifications of Charge II, the accused is
9 charged with the offense of--hold on a second--there's a lesser
10 included offense as to dereliction of duty that I need to find here.
11 It appears that this version that I printed, I did not keep all the
12 changes that I made to the instructions. Let me take a break, I need
13 to reprint these so that I can instruct you on the lesser included
14 offense of negligent dereliction of duty, which applies to
15 Specifications 2 and 3 of charge I. Sorry about that members this
16 should only take me about five minutes to reprint these to include
17 that language. The court's in recess.

18 [The court recessed at 1210 hours on 1 June 2006.]

19 [The court-martial was called to order at 1220 hours on 1 June 2006.]

20 MJ: The court is called to order. All parties present are
21 present as before except the members are absent. Counsel I cut and
22 pasted the lesser included instructions to maltreatment instead of,
23 which was Charge III instead of to Charge I. So, I just cut and

1 pasted it back to the appropriate place, if you follow along in the
2 instructions as I go through then you'll see where I made the
3 mistake. Alright bailiff you can recall the members.

4 Please be seated. All parties are again present to now
5 include the members. Sorry to the members.

6 As I was saying, the court is further advised the offense
7 of negligent dereliction of duty as a lesser included offense of the
8 offenses set forth in Specifications 2 and 3 of Charge I. When you
9 vote, if you find the accused not guilty of the offense charged, that
10 is willful dereliction of duty, then you should consider the lesser
11 included offense of negligent dereliction of duty also Violation of
12 Article 92 of the Uniform Code of Military Justice. In order to find
13 the accused guilty of this lesser included offense, you must be
14 convinced by legal and competent evidence beyond a reasonable doubt
15 first, the accused has certain prescribed duty, that is to conduct
16 interrogations of detainees according to approve tactics, techniques,
17 and procedures. Second, the accused knew or reasonably should have
18 known of the assigned duty and third that on or about near Bagram
19 Airfield Afghanistan on diverse occasions between on or about 1
20 August 2002 to on or about 1 February 2003, the accused is derelict
21 in the performance of that duty by failing to conduct interrogations
22 of detainees according to approve tactics, techniques and procedures.

23 And as to Specification 3 of Charge I, first the accused a

1 certain prescribed duty, that is to conduct interrogations of
2 detainees according to approved tactics, techniques, and procedures.
3 Second, the accused knew for reasonably should have known of the
4 assigned duty and third at or near Bagram airfield Afghanistan
5 between on or about 1 August 2002 to on or about 1 February 2003, the
6 accused is derelict in the performance of that duty by failing to
7 prevent his interrogation partner from throwing articles of garbage
8 and soiled toilet paper onto the person of Ahmed al Darbi also known
9 as [REDACTED]. A duty may be imposed by regulation, lawful order, or
10 custom of the service. Person's derelict in the performance of duty
11 when he negligently fails to perform them or when he performs them in
12 a culpably inefficient manner. Dereliction is defined as failure in
13 duty, a shortcoming, or delinquency; "negligently" means the act or
14 failure to act by a person under duty to use due care, which
15 demonstrates a lack of care, which a reasonably prudent person would
16 appear to under the same or similar circumstances. "Culpably
17 inefficient" means inefficiency for which there is no reasonable or
18 just excuse, it means a reckless gross deliberate disregard for the
19 foreseeable results of a particular act or failure to act. That an
20 individual reasonably should have known of duties may be demonstrated
21 by regulations, manuals, customs, testimonies of persons who have
22 held similar related positions, or similar evidence.

1 The offense charged in Specifications 2 and 3 of Charge I
2 differs from the lesser included offense of negligent dereliction of
3 duty; in that the offense charged requires as an essential element
4 that you be convinced beyond a reasonable doubt that the accused's
5 dereliction was willful; whereas the lesser offense of negligent
6 dereliction of duty does not include such element.

7 In the three Specifications of Charge II, the accused is
8 charged with the offense of maltreatment in Violation of Article 93
9 of the Uniform Code of Military Justice. The elements of these three
10 offenses are the same except as I indicate. In order to find the
11 accused guilty of each specification of this offense you must be
12 convinced by legal and competent evidence beyond a reasonable doubt.
13 First, as to Specification 1 persons under U.S. control also known as
14 puks were subject to the orders of PFC Damien M. Corsetti, the
15 accused. As to Specification 2 Ahmed al Darbi also known as [REDACTED]
16 was subject to the orders of PFC Damien M. Corsetti, the accused and
17 as to Specification 3 Omar al Faruk also known as [REDACTED] a subject in
18 the orders of PFC Damien Corsetti, the accused and second that as to
19 Specification 1 at or near Bagram Airfield Afghanistan on diverse
20 occasions from on or about 1 August 2002 to on or about 1 February
21 2003. The accused maltreated persons under U.S. control by sitting
22 on top of them during interrogations.

1 As to Specification 2 at or near Bagram Airfield
2 Afghanistan between on or about 1 August 2002 to on or about 1
3 February 2003; the accused maltreated Ahmed al Darbi by sitting on
4 top of him, throwing articles of garbage onto his person, putting a
5 cigarette ash onto his person, walking across his handcuffs in order
6 to inflict pain upon Ahmed al Darbi and forcefully pulling hairs out
7 of Ahmed al Darbi's chest. And as to Specification 3 at or near
8 Bagram Airfield Afghanistan between on or about 1 August 2002 to on
9 or about 1 February 2003, the accused maltreated Omar al Faruk by
10 grabbing Omar al Faruk by the head and shoulders, by removing Omar al
11 Faruk's pants so that his genitalia were exposed to a female
12 interrogator, Sergeant Selena Salcedo, and by bending Omar al Faruk
13 over an interrogation table and waving a water bottle around in close
14 proximity to Omar al Faruk's buttocks.

15 Subject to the orders of includes persons under direct or
16 immediate command of the accused and all persons who by reason of
17 some duty are required to obey the lawful orders of the accused, even
18 if those persons are not in the accused's direct chain of command.
19 The maltreatment must be real although it does not have to be
20 physical. The imposition of necessary or proper duties on a soldier
21 in the requirement that those duties be performed does not establish
22 this offense, even though their duties are hard, difficult, or
23 hazardous. "Maltreated" refers to treatment which when viewed

1 objectively under all the circumstances is abusive or otherwise
2 unwarranted, unjustified, and unnecessary for any lawful purpose and
3 that results in physical or mental harm or suffering or reasonably
4 could have caused physical or mental harm or suffering. Assault
5 improper punishment of sexual harassment may constitute this offense.

6 You must find beyond a reasonable doubt that Ahmed al Darbi
7 was subject to the orders of the accused during interrogations, in
8 that regard I charge you as follows; if you find that Ahmed al Darbi
9 was confined in an area, where the accused had sufficient authority
10 and jurisdiction to impose restrictions and conditions upon the
11 detainees activities. Where the accused could have caused the
12 detainee to remain in a specific area within the Bagram Collection
13 Point and to comply with the BCP regulations and where the accused
14 actually exercised restraint over the said detainee. You may find
15 that Ahmed al Darbi was subject to the accused orders.

16 Sexual harassment includes deliberate or repeated offense
17 of comments or gestures of a sexual nature. For sexual harassment to
18 also constitute maltreatment the accused conduct must under all
19 circumstances constitute maltreatment as I have defined that term for
20 you, along with all the other circumstances you must consider
21 evidence of the consent or acquiescence of the alleged victim for the
22 lack there of to the accused actions; the fact that an alleged victim
23 may have consented or acquiesced does not alone proves that he was

1 not maltreated, but is one factor to consider in determining, whether
2 the accused maltreated the alleged victim.

3 In the specification of Charge III, the accused is charged
4 with the offense of wrongful use of a controlled substance in
5 Violation of Article 112a of the Uniform Code of Military Justice.

6 In order to find the accused guilty of this offense, you must be
7 convinced by legal and competent evidence beyond a reasonable doubt.

8 First, that at or near Bagram Airfield Afghanistan between on or
9 about 1 August 2002 and on or about 1 February 2003 the accused used
10 hashish, a scheduled one controlled substance. Second, that the
11 accused actually knew he used the substance. Third that the accused
12 actually knew that the substance he used was hashish or of a
13 contraband nature. Fourth that the accused--that they used by the
14 accused was wrongful. And fifth that at the time the accused used
15 the substance as alleged the accused was receiving special pay under
16 37 US Code Section 310.

17 "Use" means the administration and digestion or physical
18 assimilation of a drug into one's body or system. Use includes such
19 acts as smoking, sniffing, eating, drinking, or injecting. To be
20 punishable under Article 112 a, use of a controlled substance must be
21 wrongful. Use of a controlled substance is wrongful, if it is
22 without legal justification or authorization. Knowledge of the
23 accused by the presence of the substance and knowledge of its

1 contraband nature may be inferred from the surroundings
2 circumstances; however, the drawing of this inference is not
3 required. You are advised that hashish is a controlled substance
4 onto the laws of the United States. If all the other elements are
5 proved beyond a reasonable doubt, but should not be convinced that the
6 accused used a controlled substance while he was receiving special
7 pay under 37 US Code Section 310 as described in the specification,
8 but you're satisfied beyond a reasonable doubt that the accused used
9 a controlled substance. You may nevertheless reach a finding of
10 guilty; however, you're required to modify the specifications by
11 exceptions and substitutions so that it properly reflects your
12 finding. You may eliminate the phrase while receiving special pay
13 under 37 US Code Section 310 by excepting out this language.

14 In Specification 1 of Charge IV, the accused is charged
15 with the offense of assault consummated by battery in Violation of
16 Article 128 of the Uniform Code of Military Justice. In order to
17 find the accused guilty of this offense you must be convinced by
18 legal and competent evidence beyond a reasonable doubt. First, that
19 at or near Bagram Airfield Afghanistan between on or about 1 August
20 2002 and on or about 1 February 2003, the accused did bodily harm to
21 Ahmed al Darbi also known as [REDACTED]; second the accused did so by
22 striking Ahmed al Darbi in the face, groin, and chest with his

1 hands and knees, and third at the bodily harm was done with unlawful
2 force or violence.

3 An assault is an attempt or offer with unlawful force or
4 violence to do bodily harm to another. An assault in which bodily
5 harm is inflicted is called a battery. A "battery" is an unlawful
6 and intentional for culpably negligent application of force or
7 violence to another. The act must be done without legal
8 justification or excuse and without the lawful consent of the victim.
9 Bodily harm means any physical injury to or offense of touching of

10 another person in however slight. "Culpable negligence" is a degree
11 of carelessness greater than simple negligence. "Simple negligence"
12 is an absence of due care. The law requires everyone at all times
13 demonstrate the care for the safety of others that a reasonably
14 careful person would demonstrate under the same or similar
15 circumstances; that is what due care means. Culpable negligence on
16 the other hand is a negligent act accompanied by a gross, reckless,
17 want or deliberate disregard for the foreseeable results to others.

18 In Specification 2 of Charge IV, the accused is charged
19 with the offense of simple assault and also in Violation of Article
20 128 Uniform Code of Military Justice. In order to find the accused
21 guilty of this offense, you must be convinced by legal and competent
22 evidence beyond a reasonable doubt. First that at or near Bagram
23 Airbase Afghanistan between on or about 1 August 2002 and on or about

1 1 February 2003, the accused offered to do bodily harm to Ahmed al
2 Darbi. Second accused did so by showing Ahmed al Darbi a condom and
3 his penis and then stating "this is special for you, this is your God
4 and I'm going to fuck you," and third that the offer was done with
5 unlawful force or violence.

6 An act of force or violence is unlawful if done without
7 legal justification or excuse and without the lawful consent of the
8 victim. An assault is an offer with unlawful force or violence to do
9 bodily harm to another. An offer to do bodily harm is an intentional
10 act which foreseeable causes another to reasonably believe that force
11 will immediately be applied to his person. Specific intent to
12 inflict bodily harm is not required; there must be an apparent
13 present ability to bring about bodily harm. Physical injury
14 offensive touching is not required. The mere use of threatening
15 words is not an assault.

16 In Specification 1 of Charge V, the accused is charged with
17 offense of indecent acts with another in Violation of Article 134 of
18 the Uniform Code of Military Justice. In order to find the accused
19 guilty of this offense, you must be convinced by legal and competent
20 evidence beyond a reasonable doubt. First that at or near Bagram
21 Airfield Afghanistan between on or about 1 August 2002 and on or
22 about 1 February 2003, the accused committed a certain wrongful act
23 with Ahmed al Darbi also known as [REDACTED] by showing his penis to

1 Ahmed al Darbi, placing his penis near Ahmed al Darbi's face, and
2 placing his groin against Ahmed al Darbi's buttocks. Second the act
3 was indecent and third that under the circumstances the conduct of
4 the accused was the prejudice of good order and discipline in the
5 Armed Forces or was of a nature to bring discredit upon the Armed
6 Forces.

7 Conduct prejudicial to good order and discipline is conduct
8 which causes a reasonably direct and obvious injury to good order and
9 discipline. Service discrediting conduct is conduct which tends to
10 harm the reputation of the service or lower it in public esteem.
11 Indecent acts signifies that form of immorality relating to sexual
12 impurity, which is not only grossly vulgar, obscene and repugnant to
13 common propriety, but tends to insight lust and deprave the morals
14 with respect to sexual relations.

15 In Specification 2 of Charge V, the accused is charged with
16 offense of indecent exposure in Violation of Article 134 of the
17 Uniform Code of Military Justice. In order to find the accused
18 guilty of this offense you must be convinced by legal and competent
19 evidence beyond a reasonable doubt. First that at or near Bagram
20 Airfield Afghanistan between on or about 1 August 2002 and on or
21 about 1 February 2003, the accused while in an interrogation exposed
22 his genitalia to public view in an indecent manner. Second that the
23 exposure was willful and wrongful and third that under the

1 circumstances the conduct of the accused was to the prejudice of good
2 order and discipline in the armed forces or was of a nature to bring
3 discredit upon the Armed Forces.

4 Conduct prejudicial to good order and discipline is conduct
5 which causes a reasonable direct and obvious injury to good order and
6 discipline. Service discrediting conduct is conduct which tends to
7 harm the reputation of the service or lower it in public esteem.

8 Indecent means a form of exhibition of a person's private parts which
9 signifies that form of immorality relating to sexual impurity, which
10 is not only grossly vulgar, obscene and repugnant to common

11 propriety, but tends to excite lust and deprave the morals with
12 respect to sexual relations. In exposure becomes indecent when it
13 occurs at such time and place that a person reasonably knows or
14 should know that his act will be open to the observation of another.

15 Willful means an intentional exposure to public view. The exposure
16 must be done with the intent to be observed by one or more members of
17 the public.

18 In Specification 3 of Charge V, the accused is charged with
19 an offense of communicating indecent language in Violation of Article
20 134 of the Uniform Code of Military Justice. In order to find the
21 accused guilty of this offense you must be convinced by legal and
22 competent evidence beyond a reasonable doubt. First at or near
23 Bagram Airfield Afghanistan, between on or about 1 August 2002 and on

1 or about 1 February 2003, the accused communicated certain language
2 to wit: "this is special for you, this is your God and I'm going to
3 fuck you," or words to that effect. Second the language was indecent
4 and there that under the circumstances the conduct of the accused was
5 to the prejudice of good order and discipline in the Armed Forces or
6 it was of a nature to bring discredit upon the Armed Forces.

7 Conduct prejudicial to good order and discipline is conduct
8 which causes a reasonable direct and obvious injury to good order and
9 discipline. Service discrediting conduct is conduct which tends to
10 harm the reputation of the service or lower it in public esteem.

11 Communicated to means that the language was actually made known to
12 the person to whom it was directed. Indecent language is language
13 that the accused intends will corrupt morals or insight lustful
14 thoughts. The focus is more on just the language itself because the
15 context under which the language is communicated and not merely the
16 words alone must prove that the language was indecent. You must
17 consider the circumstances under which the communication was made and
18 whether under those circumstances the language whether coarse or
19 profane or seemingly chaste or innocuous was grossly offensive to the
20 community sense of modesty, decency, or propriety because of the
21 languages tendency to corrupt morals or to incite lustful thought.

22 The community standards to apply are those of the military
23 as a whole not just the standards that may exist in the accused unit.

ATTACHMENT

C



Office of the Armed Forces Regional Medical Examiner

Landstuhl Regional Medical Center
Landstuhl, GE - APO AE 09186
DSN (314) 486-6781/7492
Comen 001 49 (0) 6371 86 6781/7492



FINAL AUTOPSY REPORT

Name: BTB Wahid, Abdul
SSAN: N/A
Date of Birth: N/A
Date of Death: 6 NOV 03
Date of Autopsy: 13 NOV 03
Date of Report: 13 NOV 03

Autopsy No.: A03-144
Rank/SVC: Afghan Civilian
Org: Afghanistan Local National
Place of Death: Helmand Prov, Afghanistan
Place of Autopsy: Bagram AF, Afghanistan
Investigative Agency: USACIDC

Circumstances of Death: The decedent, an Afghan local national civilian, was found unresponsive while under guard by the Afghanistan Militia Forces at the FOB Gereshik, Afghanistan, approximately 1430 hours. An initial autopsy was performed by a FST, TF Warrior, KAF General Surgeon on orders of the local command.

Authorization for Autopsy: Office of the Armed Forces Medical Examiner, IAW 10 USC 1471

Identification: Visual recognition; fingerprints and specimens for DNA obtained

Cause of Death: Multiple Blunt Force Injuries Complicated by Rhabdomyolysis

Manner of Death: Homicide

Autopsy Diagnoses:

1. Multiple blunt force injuries
 - a. Head injuries:
 - i. Multiple abrasions, bilateral forehead and temporal areas
 - ii. Bilateral scleral hemorrhages
 - iii. Focal subgaleal hemorrhages, bilateral fronto-parietal areas
 - b. Torso and extremity injuries:
 - i. Crusted abrasions; anterior chest and abdomen; right upper arm and elbow, left knee and proximal lower leg
 - ii. Focal contusions; left lateral shoulder, right posterior thigh and scrotum
 - iii. Confluent contusions with subcutaneous and peri-muscular hemorrhages; lower back (L>R), buttocks, posterior thighs and knees; anterior thighs and both groin areas
 - iv. Intramuscular hemorrhage with associated necrosis, left lower back
 - v. Peri-recticular hemorrhage
2. Moderate pulmonary congestion and edema
3. Moderate pulmonary anthracosis
4. Moderate pulmonary hilar anthracotic lymphadenopathy
5. Mild cerebral edema with bilateral uncus and cerebellar tonsil herniation
6. Moderated hepatic fatty change
7. Moderate visceral autolysis

Toxicology: Negative

Special Studies: Urine chemistry positive for myoglobin

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RTB Wahid, Abdul

Opinion: Based on these autopsy findings and the investigative and historical information available to me the cause of death of this Afghan male believed to be Abdul Wahid is multiple blunt force injuries of the lower torso and legs complicated by rhabdomyolysis (release of toxic byproducts into the system due to destruction of muscle). The manner of death, in my opinion, is homicide. The decedent was not under the pharmacologic effect of drugs or alcohol at the time of death.

Original signed on file

Kathleen M. Ingwersen
LTC(P), MC, USA
Armed Forces Regional Medical Examiner

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BTB Wahid, Abdul

I. POSTMORTEM EXAMINATION:

GENERAL: The postmortem examination is performed at Bagram Airfield, Afghanistan, on 13 November 2003. The autopsy is performed by Forensic Pathologist, Dr. Kathleen M. Ingwersen, LTC(P), MC, USA, the Armed Forces Regional Medical Examiner (AFRME). Assisting in the autopsy procedures is [REDACTED] DAC GS-11, Forensic Pathologist Assistant and CPT [REDACTED] DC USA.

The autopsy is witnessed by SAs [REDACTED] 87th MP DET, Bagram AF, U.S. Army Criminal Investigation Command (USACIDC), [REDACTED]

The autopsy is started at approximately 0430 hrs.

B. PHOTOGRAPHY: Photographs are taken by Mr. [REDACTED] DAC GS-11, Forensic Pathologist Assistant, and are on file in the Office of the Armed Forces Regional Medical Examiner, Landstuhl Regional Medical Center, Landstuhl, Germany.

C. AUTHORIZATION: The autopsy is authorized by the Armed Forces Medical Examiner under Title 10 U.S. Code, Section 1471, with an SF 523 signed by the Armed Forces Regional Medical Examiner, appointed representative.

D. IDENTIFICATION: The remains are identified visually as Abdul Wahid by the Afghan Militia Forces guarding the decedent at FOB Gershak AF. Postmortem dental examination including dental X-rays is performed by CPT [REDACTED] DC USA, Forensic Odontologist. Specimens are obtained and submitted for potential DNA analysis. Fingerprints are obtained.

E. MEDICAL RECORD REVIEW: Outpatient Dental and Medical Records are not available at autopsy.

II. GROSS AUTOPSY FINDINGS:

A. CLOTHING AND PERSONAL EFFECTS: The remains are presented for autopsy unclothed wrapped in a blanket. No clothing or personal effects accompany the remains at autopsy.

B. EXTERNAL EXAMINATION: The remains are those of a well developed, well nourished Afghan male of average build that has been previously, partially autopsied. The prior autopsy incision is sutured. The body is moderately well preserved and shows signs of early decomposition as evidenced by "greening" of the chest and abdomen. It has not been embalmed. Injuries are described below in the Evidence of Injury Section.

RIGOR: Passing in the jaw and extremities.

LIVIDITY: Fixed on the posterior dependent surfaces.

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 BTB Wahid, Abdul

TEMPERATURE: That of the refrigeration unit.

SKIN: Multiple irregular crusted abrasions, each averaging $\frac{1}{4}$ " in greatest dimension, are scattered over the lower anterior chest and left upper abdomen. Both buttocks have focal areas of skin slippage. Recent injuries are described below in the Evidence of Injury Section. No non-traumatic abnormalities are identified.

HAIR: Straight black hair, up to 4", covers the head. Facial hair consists of a red-brown beard and mustache. The remaining body hair, the color of the head hair, is in a normal adult male distribution.

HEAD/SCALP/FACE: Dried blood, secretions and dust cover the face. The head is normocephalic, the scalp is intact and the facial features are normally developed. Injuries are described below in the Evidence of Injury Section. No non-traumatic abnormalities are identified.

EARS: Unremarkable.

EYES: Brown irides surround equal pupils partially obscured by mild corneal clouding. The sclerae are white with bilateral lateral and medial hemorrhages. The conjunctivae are injected most prominent on the right.

NOSE: Unremarkable.

MOUTH/LIPS: Blood is in the mouth which is otherwise unremarkable.

TEETH: Dentition is in good repair.

NECK: Unremarkable with no evidence of injury.

CHEST/ABDOMEN/BACK/ANUS: Injuries are described below in the Evidence of Injury Section. No non-traumatic abnormalities are identified.
 The abdomen is flat.

EXTERNAL GENITALIA: Normal adult circumcised male with bilaterally descended testes.

ARMS/HANDS/FINGERNAILS: Unremarkable except for injuries described below in the Evidence of Injury Section. The palmar surfaces of the fingers have black ink. The fingernails are short, irregular and intact.

LEGS/FEET/TOENAILS: Unremarkable except for injuries described below in the Evidence of Injury Section.

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C. INTERNAL EXAMINATION:

BODY CAVITIES: The body is opened by the usual Y-shaped incision. The pleural and peritoneal surfaces are smooth and glistening and the pericardium is unremarkable. There are no fibrovascular adhesions or abnormal collections of fluid. The mediastinum and retroperitoneum show no abnormalities. The leaves of the diaphragm are intact and the organs are normally disposed. There is moderate visceral autolysis and no evidence of injury.

HEAD/CENTRAL NERVOUS SYSTEM: Reflection of the scalp shows the usual scattered reflection petechiae. Focal subgaleal injury is described below in the Evidence of Injury Section. The calvarium is intact. Removal of the calvarium shows the epidural space to be normal. No collections of subdural blood are present. The brain is removed in the usual manner and is mildly heavy. The leptomeninges are smooth and glistening and the gyri demonstrate the usual orientation and configuration with mild flattening and sulcal narrowing. There is mild uncus and cerebellar tonsil herniation. The vessels at the base of the brain are normally disposed and no anomalies or significant atherosclerosis is identified. Serial sections of the brain show the cerebral cortical ribbon to be intact. The lateral ventricles are normal. The usual anatomical landmarks of the cerebrum, basal ganglia, thalamus, mid brain, pons, medulla, and cerebellum demonstrate no abnormalities. The pituitary fossa is unremarkable. The Foramen Magnum demonstrates the normal orientation and the first portion of the spinal cord viewed through the Foramen Magnum is unremarkable.

NECK: Examination of the soft tissues of the neck, including strap muscles, thyroid gland and large vessels, reveals no abnormalities. The hyoid bone and larynx are intact.

CARDIOVASCULAR SYSTEM: The heart is of normal size and shape. The epicardium is intact and unremarkable. The chambers demonstrate the usual shape and configuration with no gross hypertrophy. The coronary arteries are normally disposed and there is no atherosclerosis. Cut surfaces of the myocardium show a normal color slightly darkened by autolysis. The valves are intact with the usual anatomic relationships. The aorta follows the usual course and exhibits no significant atherosclerosis. The origins of the major vessels are normally disposed and unremarkable. The great vessels of venous return are in the usual position and unremarkable.

RESPIRATORY SYSTEM: The larynx, trachea, and bronchi show no abnormalities. The right and left lungs are mildly heavy. Marked diffuse anthracosis is scattered over the pleural surfaces. Cut surfaces show an autolytic deep red parenchyma exuding a moderate amount of blood and frothy fluid with no identifiable evidence of natural disease or injury.

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HEPATOBIILIARY SYSTEM: The liver is of normal weight and has a smooth, glistening capsule. Cut surfaces show the usual anatomic landmarks with a deep red-brown unremarkable parenchyma with focally interspersed small tan-yellow patches. The gallbladder contains 10 ml of bile. No abnormalities are present in the mucosal lining. The biliary tree is normally disposed and no abnormalities are demonstrated.

INTESTINAL TRACT: The pharynx and esophagus are unremarkable. The stomach lies in the normal position and contains approximately 60 ml thick brown-gold fluid without food particles. No tablets, capsules or residues are identified. The mucosal lining is intact. The small bowel and large bowel are unremarkable. The appendix is unremarkable.

LYMPHORETICULAR SYSTEM: The spleen is of normal weight and shape and has a smooth glistening capsule with an autolytic parenchyma. The thymus is not identified. Except for bilateral anthracotic pulmonary hilar lymph adenopathy, the lymph nodes show no notable pathologic change.

URINARY SYSTEM: The right and left kidneys are of normal size and weight. The cortical surfaces are smooth with moderately good preservation of the cortex and good cortico-medullary differentiation. The pelves and ureters are unremarkable. The bladder is unremarkable and contains 50 ml of yellow urine.

INTERNAL GENITALIA: The prostate is palpably unremarkable. On cut sections, the testes show no abnormal masses and injuries described below.

ENDOCRINE SYSTEM: The pituitary, thyroid, adrenals, and pancreas show the usual anatomic features without evidence of natural disease or injury.

MUSCULOSKELETAL SYSTEM: No fractures are identified and the skeletal muscle demonstrates the normal appearance. The bone marrow, where visualized, is unremarkable.

MISCELLANEOUS: The abdominal fat measures approximately 1-2 cm in thickness and is without abnormalities. No hernias are identified.

D. EVIDENCE OF MEDICAL TREATMENT: None.

E. EVIDENCE OF INJURY: Multiple Blunt Force Injuries

(1) **HEAD AND NECK INJURIES:** Externally, patchy irregular abrasions cover an area of 1 x 1/4" on the left lower forehead and 1 x 1/4" on the right lower forehead. A 1/4" greatest dimension irregular abrasion is on the left temporal area and on the right upper cheek, beneath the lateral eye, is a 1/4 x 1/8" irregular abrasion. On internal examination, there are focal bilateral fronto-parietal subgaleal hemorrhages.