UNITED STATES COURT OF MILITARY COMMISSION REVIEW

BEFORE THE COURT
RICHARDSON, PRESIDING JUDGE
POLLARD, ACTING CHIEF JUDGE
HOLIFIELD, MORRIS, KIRKBY, AND PARKER, APPELLATE JUDGES

UNITED STATES OF AMERICA,
APPELLANT

v.

ABD AL-RAHIM HUSSAYN MUHAMMAD AL-NASHIRI
ALSO KNOWN AS ABD AL-RAHIM HUSSEIN MUHAMMED AL-NASHIRI
AND ABD AL-RAHIM HUSSEIN AL-NASHIRI,
APPELLEE

CMCR 23-005

January 30, 2025

Colonel James L. Pohl, U.S. Army, military commission judge, arraignment; *Colonel Lanny J. Acosta, Jr.*, U.S. Army, military commission judge on ruling; and *Colonel Matthew S. Fitzgerald*, U.S. Army, military commission judge, presiding.

On briefs for appellant were *Michael J. O'Sullivan*; *Haridimos V. Thravalos*; *Bryce G. Poole*; and *Rear Admiral Aaron C. Rugh*, JAGC, U.S. Navy.

On brief for appellee were *Anthony J. Natale*; *Lieutenant Colonel Joshua Nettinga*, U.S. Air Force; *Lieutenant Commander Alaric Piette*, JAGC, U.S. Navy; *Annie Morgan*; *Katie Carmon*; and *Joaquin Padilla*.

PUBLISHED EN BANC OPINION OF THE COURT

Opinion for the court filed by RICHARDSON, PRESIDING JUDGE, with whom POLLARD, ACTING CHIEF JUDGE, HOLIFIELD, MORRIS, KIRKBY, and PARKER, concur.

Opinion for the court

RICHARDSON, PRESIDING JUDGE:

Appellee, Abd Al-Rahim Hussayn Muhammad Al-Nashiri (Al-Nashiri), also known as Abd Al-Rahim Hussein Muhammed Al-Nashiri and Abd Al-Rahim Hussein Al-Nashiri, is charged with multiple offenses relating to the attempted bombing of the USS THE SULLIVANS on January 3, 2000, and the bombings of the USS COLE on October 12, 2000, and the French supertanker *MV Limburg* on October 6, 2002. Gov't's App. 4424–35 (Sept. 5, 2023) (referred charge sheet dated September 28, 2011). These attacks killed seventeen United States Sailors and injured dozens of crewmembers aboard the USS COLE and killed one and injured approximately twelve *MV Limburg* crewmembers. *Id.* at 4426–28, 4432. Appellee is facing the death penalty. *Id.* at 4425. The United States Court of Appeals for the District of Columbia Circuit has "recount[ed] the details of Al-Nashiri's alleged offenses" and the procedural posture of the case in *In re Al-Nashiri* (*Al-Nashiri II*), 835 F.3d 110, 113–18 (D.C. Cir. 2016).

The appellant in this case, the government, filed the appeal now before us on September 5, 2023. Government counsel allege that the military judge at the time, Colonel Lanny J. Acosta, Jr., U.S. Army, made several errors in his ruling on Al-Nashiri's motion to suppress statements he made to United States government officials in January, February, and March 2007. Gov't's App. 1 (citing Class. App. Ex. 467). The government generally requests vacatur of a ruling granting suppression of appellee's statements and remand of the case to the commission for further proceedings. Gov't's Br. 11 (Sept. 5, 2023); *see id.* at 98. This is the fourth government appeal in appellee's case. Two of the other three appeals, Nos. 14-001 and 15-002, were decided in 2016 and No. 18-002 was decided in 2018. *See In re Al-Nashiri*, 577 F. Supp. 3d 1285, 1289 (CMCR 2021) (No. 21-004).[1]

[1] The following is a summary of the writ petitions and interlocutory appeals filed in Al-Nashiri's case, in this court and in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). *See In re Al-Nashiri* (*Al-Nashiri III*), 921 F.3d 224, 233 (D.C. Cir. 2019) (stating All Writs Act, 28 U.S.C. § 1651(a), permits Court to issue mandamus writs in aid of jurisdiction). Al-Nashiri has filed, and this court has resolved, seven petitions, each styled as *In re Al-Nashiri*: (1) No. 16-001, slip op. at 2 (CMCR Aug. 23, 2016) (order denying petition to set aside this court's decision because voluntary reassignment request by judge on CMCR panel was not improper); (2) No. 21-001, slip op. at 5 (CMCR Sept. 20, 2021) (order denying petition to mandate commission reconsideration of some rulings as moot and granting vacatur of order on admissibility of coerced admissions); (3) No. 21-004, 577 F. Supp. 3d 1285, 1288–89 (CMCR 2021) (denying petition alleging deficiency in classified information redaction process and seeking dismissal of all charges); (4) No. 23-002, 697 F. Supp. 3d 1280, 1283 (CMCR 2023) (denying petition alleging judicial bias arising from military judge's statements on counsel's performance in his ruling); (5) No. 23-001, slip op. at 1, 11 (CMCR Oct. 6, 2023) (order denying on jurisdiction grounds petition regarding evidence allegedly obtained from torture and derived therefrom and seeking partial vacatur of rulings); (6) No. 23-003, 2024 U.S. CMCR LEXIS 1, at *1–2 (Apr. 15, 2024) (denying petition for judicial disqualification and vacatur of certain orders for alleged appearance of bias from military judge's job application); and (7) No. 23-005 (petition under consideration). The government has filed, and this court has resolved, three interlocutory appeals, each styled as *United States v. Al-Nashiri*: (1) No. 14-001, 191 F. Supp. 3d 1308, 1310 (CMCR 2016) (reversing commission's dismissal of certain charges and specifications and reinstating); (2) No. 15-002, 222 F. Supp. 3d 1093, 1095 (CMCR 2016) (reversing

The military judge heard evidence on the suppression motion over several sessions from July 2022 through June 2023.[2] Gov't's App. 1; *see also, e.g.*, *id.* at 1235, 4115. He issued his written ruling on August 18, 2023, granting the defense motion in part. Specifically, the military judge granted "[t]hat portion of the motion related to the LHM [Letterhead Memorandum] statements made by the Accused to investigators during the January–February 2007 interviews," and he denied "[t]hat portion of the motion that [sought] to suppress the Accused's statements to the CSRT [Combatant Status Review Tribunal]," which were made in March 2007.[3] *Id.* at 50 (App. Ex. 467CCC); *see* Class. App. Ex. 467DDD (classified addendum to judge's ruling).

On August 23, 2023, the government filed with this court its notice to appeal that part of the military judge's ruling and classified ruling that suppressed appellee's LHM statements. The government asserts—and we agree—that we have jurisdiction to consider this appeal because "the evidence excluded" by the military judge's ruling "is substantial proof of a fact material in the proceeding." Gov't's Not. of Appeal (Aug. 23, 2023); Rule for Military Commissions (R.M.C.) 908(a)(2), Manual for Military Commissions, United States (MMC) (2019 ed.) (stating same); 10 U.S.C. § 950d(a)(2) (stating same). Appellee does not contest our jurisdiction. *See* Appellee's Br. 1 (Sept. 26, 2023) (citing 10 U.S.C. § 950d(a)(2)).

The government's main contentions are that the military judge incorrectly applied the law pertaining to the voluntariness of appellee's LHM statements, and he erred in his finding of facts, including about a behavior contract that allegedly was fundamental to inducing appellee's cooperation with his

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commission's decision excluding evidence and remanding); and (3) No. 18-002, 374 F. Supp. 3d 1190, 1196 (CMCR 2018) (reversing commission's decision to indefinitely abate proceedings and ordering resumption of trial), *vacated*, 921 F.3d 224, 241 (D.C. Cir. 2019) (No. 18-1279). In the D.C. Circuit, Al-Nashiri has filed eight writ petitions, each styled as *In re Al-Nashiri*. *See In re Al-Nashiri*, 577 F. Supp. 3d at 1289 (listing seven petitions as follows: (1) No. 09-1274, 2010 U.S. App. LEXIS 24338 (D.C. Cir. Nov. 9, 2010) (per curiam) (unpublished order granting voluntary dismissal); (2) No. 14-5229, 2014 U.S. App. LEXIS 22038, *1 (D.C. Cir. Nov. 18, 2014) (unpublished order denying); (3) No. 14-1203, 791 F.3d 71, 73 (D.C. Cir. 2015) (denying); (4) No. 16-1152, 2016 U.S. App. LEXIS 9947 (D.C. Cir. May 27, 2016) (per curiam) (unpublished order denying); (5) No. 15-1023 consolidated with 15-5020, 835 F.3d 110, 113 (D.C. Cir. 2016) (denying); (6) No. 18-1279, No.18-1315, 921 F.3d 224, 241 (D.C. Cir. 2019) (granting Al-Nashiri's petition No. 18-1279 and dismissing defense counsel's petition No. 18-1315); (7) No. 21-1208, 47 F. 4th 820, 828 (D.C. Cir. 2022) (dismissing on jurisdiction)); (8) No. 23-1159, 2024 U.S. App. LEXIS 12311 (D.C. Cir. May 21, 2024) (order dismissing on unopposed motion).

[2] The military commission also heard testimony from Dr. M in May 2022 on "matters that . . . includ[ed] suppression of the accused's statements." Gov't's App. 1243 (Sept. 5, 2023); *see infra* note 9 (explaining name substitutions).

[3] The quoted references to "Accused" throughout this opinion refer to appellee, Al-Nashiri.

interrogators.[4] The government asserts the military judge abused his discretion in suppressing appellee's statements to law enforcement agents on January 31, February 1, and February 2, 2007, "by (1) failing to correctly apply the controlling legal standard; (2) making factual findings unsupported by the record; and (3) failing to consider important facts."[5] Gov't's Br. 5. Government counsel contend we should "set aside the Military Judge's ruling and conclude that Al-Nashiri's statements to law enforcement in January–February 2007 should not be suppressed, or in the alternative, vacate that portion of the Ruling pertaining to the 2007 LHM statements and remand the case to the Commission for *de novo* reconsideration." Gov't's Reply Br. 47 (Oct. 6, 2023); Gov't's Br. 98.

For the reasons detailed below, we find no relief is warranted. We deny the government's appeal.

We find the military judge's recitation of facts in his 50-page ruling (in the Government's Appendix 1–50) useful as background facts for our analysis of the significant errors alleged by the government in their appeal and cite to those facts in our analysis of the issues.[6]

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[4] Dr. J described the dynamics of the relationship he and Dr. M had with appellee as "basically . . . a contract" by which appellee avoided "hard times" so long as he answered questions during his interrogations. Gov't's App. 2877; *see infra* Part I.A (discussing Drs. M and J's role in the contract).

[5] The government framed the issues as follows:

> I. DETERMINATIONS OF VOLUNTARINESS ARE CONTROLLED BY THE STANDARD CODIFIED BY CONGRESS AND THE PRESIDENT IN THE MILITARY COMMISSIONS ACT, AS INFORMED BY LONG-STANDING SUPREME COURT PRECEDENT. THE MILITARY JUDGE DID NOT CORRECTLY APPLY THAT LAW WHEN DETERMINING THE VOLUNTARINESS OF AL-NASHIRI'S 2007 STATEMENTS TO LAW ENFORCEMENT. SHOULD THE MILITARY JUDGE'S RULING BE SET ASIDE AS AN ABUSE OF DISCRETION?
>
> II. THE MILITARY JUDGE PREDICATED HIS RULING ON FINDINGS OF FACT THAT WERE CLEARLY ERRONEOUS AND NOT SUPPORTED BY THE RECORD. THE MILITARY JUDGE ALSO FAILED TO CONSIDER IMPORTANT FACTS THAT DEMONSTRATED VOLUNTARINESS. SHOULD THE MILITARY JUDGE'S RULING BE SET ASIDE AS AN ABUSE OF DISCRETION?

Gov't's Br. 1 (Sept. 5, 2023).

[6] As set out in Part II, *infra*, in our analysis of the errors alleged by the government in its appeal, in the absence of clear error, we are required to give deference to the military judge's findings of facts in his ruling. *See United States v. Denney*, 98 F.4th 327, 331 (D.C. Cir. 2024) (in sentencing guidelines case, stating "appellate courts . . . accept factual findings unless clearly erroneous"); *In re Sealed Case*, 552 F.3d 841, 849–50 (D.C. Cir. 2009) (noting Supreme Court has adopted the clearly erroneous standard for appellate review of "judicial factfinding in criminal cases" on issues unrelated to guilt); *United States v. Warda*, 84 M.J. 83, 90 (C.A.A.F. 2023) ("Absent clear error, we are bound by the military judge's findings of fact.").

I. Background

Appellee "was subjected by the CIA [(Central Intelligence Agency)] to physical coercion and abuse amounting to torture as well as living conditions which constituted cruel, inhuman, and degrading treatment" in the Rendition, Detention, and Interrogation [RDI] program between 2002 and 2006 at various locations. Gov't's App. 18. Al-Nashiri "provided information on past plots, associates, and Al Qaeda's structure and methods" while in the RDI program, *id.*, which included self-incriminating statements, *id.* at 29, 34–35. Al-Nashiri asserts he was interrogated approximately 200 times during the program.[7] *Id.* at 18 n.35 (citing Class. App. Ex. 467F, at 23 (Al-Nashiri's reply to the government's response to his motion to suppress)); *see also* Appellee's Br. 33.

A. History of captivity and interrogation

The following facts from the military judge's ruling describe how the RDI program worked:

> a. In the aftermath of the terrorist attacks on the United States perpetrated on 11 September 2001, the Central Intelligence Agency (CIA) developed the Rendition, Detention, and Interrogation (RDI) program to gather intelligence from suspected terrorists captured during the so-called war on terror. As a part of the RDI program, the CIA developed, with the approval of the Department of Justice (DOJ), a list of "Enhanced Interrogation Techniques" (EITs) to be used during interrogations of terrorism suspects. It was assumed that the use of such techniques would assist in the gathering of useful intelligence from terrorist operatives who were otherwise trained to resist interrogation.[8]

Gov't's App. 2.

> e. The CIA employed [psychologists] Drs. M and J to implement a program of interrogation for use on high-value detainees (HVDs) in CIA custody. The objective of the program was to service CIA intelligence requirements. In so doing, the

[7] The figure of approximately 200 interrogations does not distinguish between "interrogations," which may use Enhanced Interrogation Techniques (EITs) to obtain compliance from a detainee, and debriefings, which may not use EITs. Gov't's Reply Br. 17 n.93 (Oct. 6, 2023) (citing Dr. J's testimony at Tr. 23533, 23537 (Gov't's App. 2880, 2884)); *see* Gov't's App. 4134 (defense expert witness discussing similar). See *infra* Part I.A for discussion on EITs. The military judge found appellee "had been interrogated or debriefed somewhere between 145 to 200 times." Gov't's App. 41.

[8] When questioned, Dr. M agreed that he was asked to develop what became the EIT program "to get intelligence that the CIA [Central Intelligence Agency] felt they needed to prevent an imminent second wave of attacks against U.S. citizens or U.S. interests." *Id.* at 1251; *see id.* at 4152 (human intelligence expert witness explaining that intelligence information helps with forecasting future events).

> program officers sought to put detainees in a "compliance condition" and to force the detainees to answer questions from debriefers. In the event a detainee in the program was not providing the type, amount, or quality of information the agency desired, EITs would be employed—or escalated—in an attempt to extract that information.

Id. at 3 (citation footnote omitted);[9] *see id.* at 3, ¶ d.

> j. [Drs.] M and J's purpose for the EITs was to impart in the detainees a belief that the detainees themselves could end or even prevent their own suffering if they would comply and answer questions from the interrogator or debriefer. For example, [Dr.] M explained to the Accused that the Accused could stop the waterboarding by cooperating.
>
> k. After the EIT phase, detainees generally had a fear of going back into the EIT phase. [Dr.] J described their program as creating a "contract" between the interrogators and detainees, whereby the interrogators made sure the detainees understood that they would not go back into EITs if they continued to cooperate and provide intelligence.

Id. at 6–7.

The military judge also explained how maintenance visits from Drs. M and J conditioned appellee to cooperate with debriefers:

> ff. The purpose of maintenance visits was to remind detainees to be compliant and to provide information to debriefers when requested. Maintenance visits served as a reminder to the Accused that a failure to cooperate would breach the contract and result in the possibility of returning to the "hard times," reimplementation of the EITs. [Drs.] M and J believed their presence alone, given they had participated in the implementation of the EITs themselves, was enough to encourage compliance. They would also monitor debriefings, sometimes coming in and out of the room. Essentially, maintenance visits were intended to extend the impact of the physical duress applied to the Accused.

Id. at 16. For example, at detention Location 4 (Blue), "the Accused was put in a debriefing phase where he was debriefed by a female analyst. [Dr.] M sat in on the debriefing and encouraged the Accused to cooperate, reminding the Accused that they wanted to avoid any more 'hard times' if he failed to

[9] We have substituted with letters the names of the two psychologists, a psychiatrist testifying as an expert in forensic psychiatry (Dr. W), *id.* at 4288, 4420, a medical doctor testifying "as an expert in diagnosis and treatment of torture victims" and on "the appropriate standard of medical care for torture survivors" (Dr. C), *id.* at 3697, 3999, and a Special Agent (SA G). Alterations to names appearing in quotations are not indicated.

cooperate." *Id.* at 14 (citation footnote omitted); *see id.* at 12. "The last such 'maintenance visit' occurred at Location 9 sometime in 2006, before Al-Nashiri's transfer to Guantanamo Bay in early September 2006." Gov't's Br. 14 (citing Gov't's App. 3310–11); Gov't's App. 17–18 (stating similar).

During his entire time at the black site detention locations operated and/or managed by the CIA, Al-Nashiri "had no contact with anyone that was not either an employee or agent of the United States or another detainee. The Accused never knew where he was and was essentially held in solitary confinement for the better part of four years." Gov't's App. 18. Al-Nashiri was transferred to Naval Station Guantanamo Bay (Guantanamo Bay or NSGB) on September 5, 2006. *Id.*

B. Appellee's Letterhead Memorandum (LHM) statements

During the three days that appellee was interviewed by law enforcement in January and February 2007 at Guantanamo Bay, he "directly incriminated himself, providing extensive details regarding his direct role in the conspiracy that culminated in the attack on the USS COLE." *Id.* at 23. "At the end of the third day of interviews, the Accused told the agents that he did not want to continue the interviews as he had nothing more to say." *Id.* In his finding, the military judge addressed the measures taken to memorialize Al-Nashiri's interviews, as follows:

> v. None of the interviews of the Accused were recorded via audio or visual means. Additionally, no transcript was made of the interview. The only recording of what happened during the interviews is the Letterhead Memorandum (LHM) prepared by the [law enforcement] agents, summarizing what the Accused said during the interviews, as well as individual agents' notes.

Id.

Regarding how Al-Nashiri was treated during his LHM interviews, the military judge found as follows:

> t. The agents and the Accused shared tea and pastries during the interviews, and the Accused was permitted to and did take breaks at his discretion. The interviews lasted approximately three to six hours per day, including breaks. The atmosphere during the interviews was cordial and friendly. The Accused generally appeared to be in good spirits during the interview.
>
> u. Throughout the interview process, the agents continued to remind the Accused after breaks that he did not have to speak with them. The Accused was generally informed that he was "in charge" or "the boss" of the interview and that he could choose what they spoke about.

Id. (citation footnote omitted).

C. Effects of trauma

Appellee was diagnosed with Post-Traumatic Stress Disorder (PTSD) by a 2013 sanity board conducted under Rule for Military Commissions 706, and in 2014 by a doctor, defense expert Dr. C. *Id.* at 26. The military judge found that his PTSD was "likely related, at least in part, to the abuse he experienced in the RDI program." *Id.* He found "no evidence of [Al-Nashiri] having ever received any treatment specifically for PTSD." *Id.*

The military judge made several additional findings related to the "Effects of Trauma." *Id.* He found that "[s]ignificant physical and psychological effects of torture can last for ten years or more." *Id.* Additionally, the judge found "[i]f a captive faces a choice between compliance and 'extreme pain or suffering, then that's not a real choice.'" *Id.* (quoting *id.* at 3427 (testimony of government expert witness, Dr. W)).

II. Applicable Law

"In determining a government appeal, [we] may take action only with respect to matters of law for appeals taken under subsections (a)(1), (a)(2), or (a)(3)." R.M.C. 908(d)(2)(A); 10 U.S.C. § 950d(g) (stating similar). We review a "military judge's decision to exclude evidence . . . for an abuse of discretion," but review the "voluntariness of a confession . . . de novo." *United States v. Lewis*, 78 M.J. 447, 452–53 (C.A.A.F. 2019); *United States v. Nelson*, 82 M.J. 251, 255 (C.A.A.F. 2022) (stating same); *United States v. Yunis*, 859 F.2d 953, 957–58 (D.C. Cir. 1988) (regarding granting of suppression motion based on involuntariness of waiver of *Miranda*[10] rights, concluding trial judge's determination of voluntariness is reviewed "*de novo*" but "subsidiary factual findings are to be upheld unless clearly erroneous"); *see United States v. Eiland*, 738 F.3d 338, 347 (D.C. Cir. 2013) (in case on denial of suppression motion in a wiretap case, stating factual findings are reviewed for clear error and legal conclusions de novo). Our review of voluntariness thus involves a mixed question of law and fact: while we review voluntariness de novo, in our review of voluntariness we accept the military judge's findings of fact unless they resulted from an abuse of discretion. *See Yunis*, 859 F.2d at 958.

Regarding abuse of discretion, we "consider the evidence in the light most favorable to the party that prevailed at trial." *Nelson*, 82 M.J. at 255 (quoting *United States v. Mitchell*, 76 M.J. 413, 417 (C.A.A.F. 2017)); *see also United States v. Jones*, Nos. 77-1506, 77-1595, 1979 U.S. App. LEXIS 15864, at *29 (D.C. Cir. Mar. 28, 1979) (concluding "the general rule" in motion to suppress cases is that "the evidence must be viewed in the light most favorable" to the party who prevailed at trial).

[10] *Miranda v. Arizona*, 384 U.S. 436 (1966).

An abuse of discretion analysis considers whether there was a "clear misapplication of legal principles, arbitrary fact finding, or unprincipled disregard for the record evidence." *Eley v. District of Columbia*, 793 F.3d 97, 103 (D.C. Cir. 2015) (quoting *Kattan ex rel. Thomas v. District of Columbia*, 995 F.2d 274, 278 (D.C. Cir. 1993) (involving attorney fee award case)); *see King v. Palmer*, 950 F.2d 771, 785–86 (D.C. Cir. 1991) (en banc) (Edwards, Wald & Ginsburg, JJ., Mikva, C.J., dissenting) (discussing "highly deferential, abuse-of-discretion standard"). The United States Court of Appeals for the Armed Forces in *United States v. Rudometkin* captures this same standard as follows:

> A military judge abuses his or her discretion when: (1) the military judge predicates a ruling on findings of fact that are not supported by the evidence of record; (2) the military judge uses incorrect legal principles; (3) the military judge applies correct legal principles to the facts in a way that is clearly unreasonable; or (4) the military judge fails to consider important facts.

82 M.J. 396, 401 (C.A.A.F. 2022) (citations omitted).

To find an abuse of discretion where the trial judge's action rests upon a factual determination requires "far more than a difference in the judicial opinion between the trial and appellate courts." *United States v. Glenn*, 473 F.2d 191, 196 (D.C. Cir. 1972) (Robinson, J., dissenting) (citation omitted), *cited in United States v. Mosley*, 42 M.J. 300, 303 (C.A.A.F. 1995); *United States v. Wicks*, 73 M.J. 93, 98 (C.A.A.F. 2014) (stating "mere difference of opinion" is insufficient to support an abuse of discretion finding (citation omitted)). A finding of fact is clearly erroneous when "the reviewing court . . . is left with the definite and firm conviction that a mistake has been committed." *United States v. Miller*, 35 F.4th 807, 817 (D.C. Cir. 2021) (quoting *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948)); *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019) (stating same). Simply put, "[t]o be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)), *quoted in Miller*, 35 F.4th at 817; *and United States v. Byrd*, 60 M.J. 4, 12 (C.A.A.F. 2004).

"If the appellate court has a view as to the applicable legal principle that is different from that premised by the trial judge, it has a duty to apply the principle which it believes proper and sound." *Delaware & Hudson Ry. Co. v. United Transp. Union*, 450 F.2d 603, 620 (D.C. Cir. 1971). Nonetheless, a factfinder's choice concerning "two permissible views of the evidence . . . cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985), *quoted in United States v. Hale-Cusanelli*, 3 F.4th 449, 455 (D.C. Cir. 2021). When "two different evidentiary rulings would be reasonable, the

standard leaves the choice to the discretion of the trial judge." *United States v. Fonseca*, 435 F.3d 369, 377 (D.C. Cir. 2006).

III. Analysis

The government asserts that the standard of review on appeal for the military judge's exclusion of evidence is abuse of discretion. Gov't's Br. 46–48. We generally agree. However, as noted *supra*, we review the issue of voluntariness de novo. In our analysis, we consider the evidence in the light most favorable to the party that prevailed on this issue at the lower court—in this case, appellee.

The government asserts that (A) "the military judge did not correctly apply" the standard for voluntariness "codified . . . in the Military Commissions Act, as informed by long-standing Supreme Court precedent." *Supra* note 5 (emphasis omitted) (government framing of issues). Therefore, the government argues, his ruling on the voluntariness of appellee's 2007 statements to law enforcement "should be set aside as an abuse of discretion." Gov't's Br. 48 (emphasis omitted). Additionally, the government asserts that the military judge abused his discretion when he (B) "failed to consider important facts that demonstrated voluntariness," and (C) based his ruling on "findings of fact that were clearly erroneous . . . and not supported by the record," *id.* at 63 (emphasis omitted), 98; *see also supra* note 5. Included in its last complaint on unsupported factual findings, the government also asserts abuse of discretion regarding (D) the military judge's finding that appellee made his LHM statements in compliance with the terms of a putative contract. *See* Gov't's Br. 8. Finally, the government contends that (E) cumulative error warrants relief. *Id.* at 97 n.620. We consider these five contentions in turn.

A. Application of the law on voluntariness

1. The law

Military Commission Rule of Evidence 304 in the Manual for Military Commissions addresses the admissibility of statements of an accused. Rule 304(a)(1) prohibits statements "obtained by the use of torture, or by cruel, inhuman, or degrading treatment." *See also* 10 U.S.C. § 948r(a) (stating same). Rule 304(a)(2), however, permits the admission of statements voluntarily given by an accused:

> (2) *Other Statements of the Accused.* A statement of the accused may be admitted in evidence in a military commission only if the military judge finds—
>
> (A) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and
>
> (B) that—

> (i) the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or
>
> (ii) the statement was voluntarily given.

See also 10 U.S.C. § 948r(c) (stating same).

Military Commission Rule of Evidence 304(a)(4) addresses how the voluntariness of a statement given by an accused is established:

> (4) *Determination of Voluntariness*. In determining for purposes of (a)(2)(B)(ii) whether a statement was voluntarily given, the military judge shall consider the totality of the circumstances, including, as appropriate, the following:
>
> (A) the details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities;
>
> (B) the characteristics of the accused, such as military training, age, and education level; and
>
> (C) the lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.

See also 10 U.S.C. § 948r(d) (stating same).

Military Commission Rule of Evidence 304(d) addresses the burden of proof regarding admissibility of an accused's "other statements" made under Rule 304(a)(2):

> (d) *Burden of proof*. When an appropriate motion or objection has been made by the defense under [Rule 304], the prosecution has the burden of establishing the admissibility of the evidence. . . .
>
> (1) *In general*. The military judge must find by a preponderance of the evidence that a statement by the accused comports with the requirements of this rule before it may be received into evidence.

No corresponding burden of proof provision appears in 10 U.S.C. § 948r.[11]

[11] In its brief, the government appears to imply the military judge did not apply the standard of preponderance of the evidence in determining whether the government demonstrated that appellee's Letterhead Memorandum (LHM) statements were voluntary. The government argues:

The United States Supreme Court has addressed when an accused's confession is admissible in the context of alleged coercion. The Court has stated that "making a confession under circumstances which preclude its use" does not "perpetually disable[] the confessor from making a usable one after those conditions have been removed." *United States v. Bayer*, 331 U.S. 532, 541 (1947). In the seminal case *Schneckloth v. Bustamonte*, the Court listed some factors it has used in its analysis of the voluntariness of a confession:

> In determining whether a defendant's will was over-borne in a particular case, the Court has assessed the totality of all the surrounding circumstances -- both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused; his lack of education; or his low intelligence; the lack of any advice to the accused of his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment such as the deprivation of food or sleep.

412 U.S. 218, 226 (1973) (citations omitted), *quoted in United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008); *see also United States v. Murdock*, 667 F.3d 1302, 1305–06 (D.C. Cir. 2012) (stating similar (citing *Schneckloth*, at 226)). *See generally United States v. Karake*, 443 F. Supp. 2d 8, 49–52, 86–87 (D.D.C. 2006) (in Rwandan-custody case, discussing and citing cases on coercion and voluntary confessions).

"Voluntariness turns on whether the 'defendant's will was overborne' when he gave his statement, and the test for this is whether the statement was a 'product of an essentially free and unconstrained choice by its maker.'" *Murdock*, 667 F.3d at 1305 (first quoting *Schneckloth*, 412 U.S. at 226; and then quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)). "The 'ultimate issue of "voluntariness" is a legal question,' that 'requires [a] careful evaluation of all the circumstances of the interrogation[.]'" *Id.* (first brackets in original) (first quoting *Miller v. Fenton*, 474 U.S. 104, 110 (1985); and then quoting *Mincey v. Arizona*, 437 U.S. 385, 401 (1978)).

> Before the Commission, the United States had to prove by a preponderance of the evidence that Al-Nashiri voluntarily gave his LHM statements. Considering the burden by which the Government was required to establish voluntariness, the Military Judge's selective consideration of correct facts and reliance on erroneous facts to support his conclusion of involuntariness constituted an abuse of discretion.

Gov't's Br. 91 (citation footnotes omitted). We find this implication has no support. As discussed herein, the military judge articulated the correct standard, weighed the evidence presented within the bounds of his discretion, and came to a reasonable conclusion that the government failed to meet its burden of proof regarding the admissibility of appellee's 2007 LHM statements.

The Supreme Court also has considered the admissibility of a confession that followed an earlier confession made without an adequate advisement of rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Oregon v. Elstad*, the Supreme Court stated: "The relevant inquiry is whether . . . the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements." 470 U.S. 298, 318 (1985).

2. Analysis of applicable law

The government criticizes the military judge's interpretation of the controlling law inasmuch as his interpretation affected (i) the factors he considered in his analysis of the voluntariness of appellee's LHM interviews, and (ii) the weight he gave those factors. *See* Gov't's Br. 51–62; Gov't's Reply Br. 45–46. Nonetheless, the government's contention that the military judge abused his discretion in his consideration of the law is narrow. Government counsel do not assert he misidentified controlling law. Indeed, they note: "The Military Judge's application of both [the *Elstad*] attenuation factors and [the *Schneckloth*] voluntariness factors signaled the Military Judge's own recognition of [the codified] statutory requirement" in 10 U.S.C § 948r(d)(1)–(3). Gov't's Br. 50–51; *see* Mil. Comm. R. Evid. 304(a)(4)(A)–(C). Counsel explain that application of these factors was required because they were "seek[ing] to admit a statement of the accused that follow[ed] earlier coerced statements." Gov't's Br. 50. They add: "Congress mandated a 'totality' assessment for questions of voluntariness, of which attenuation is a critical piece, but, under circumstances such as these, not the only piece." *Id.* at 53. We outline, then consider, the government's primary claims of error relating to the *Schneckloth* and *Elstad* factors in the military judge's voluntariness analysis.

As a backdrop to their argument, government counsel assert that codification of *Schneckloth* and *Elstad* reveals Congress' intent to leverage case law on the standard of voluntariness in Mil. Comm. R. Evid. 304(a)(4) "to 'guide[] the discretion of the judge' in his analysis." Gov't's Br. 49 (alteration in original).[12] Government counsel claim the military judge "diverted from authority" in his interpretation of *Schneckloth*, which resulted in him erroneously excluding from his voluntariness analysis facts present around the time of appellee's law enforcement interviews. *Id.* at 47–48. Additionally, they assert the military judge "misconstrued the [*Schneckloth*] factors as *collectively* applicable to the attenuation analysis [under Rule 304(a)(4)(C)] and therefore misapplied the voluntariness test." Gov't's Reply Br. 43. Put another way, they assert the military judge erroneously blurred the "two distinct, but equally

[12] (quoting *Proposals for Reform of the Military Commissions System: Hearing Before the Subcomm. on the Const., C.R., and C.L. of the H. Comm. on the Judiciary*, 111th Cong. 33 (2009) (statement of David Kris, Assistant Att'y Gen., Nat'l Sec. Div., Dep't of Justice)).

important, standards" in his consideration of the totality of the circumstances. *Id.* at 41.

In their brief, government counsel concede that "the Military Judge recited the complete list of applicable [*Schneckloth*] factors." Gov't's Br. 51. Indeed, the judge listed *and analyzed* eight of the factors he considered to be included in "the totality of all the surrounding circumstances" concerning appellee and his interrogation, as follows: "Youth. . . . Education and intelligence. . . . Lack of rights advisement. . . . Length of detention. . . . Repeated and prolonged nature of the questioning. . . . Use of physical punishment such as the deprivation of food or sleep. . . . Circumstances of the statement. . . . [and] Psychological impact on the accused." Gov't's App. 40–42. Government counsel nonetheless find error in the military judge's "application of those factors" as a "depart[ure] from long-standing, controlling precedent on this issue." Gov't's Br. 51. In short, the government claims the military judge abused his discretion in applying "statutorily identified factors" inconsistent with "controlling authority." *Id.* at 51–52.

First, we find no clear support in the law—and government counsel provide us none—for their suggestion that the military judge was required to conduct separate voluntariness and attenuation analyses. We find nothing in the text of Mil. Comm. R. Evid. 304(a)(4) leading to the conclusion that the voluntariness factors in subparagraphs (A) and (B) of the Rule must be divorced from the attenuation factors in (C) when application of (C) "is 'appropriate' and therefore must be considered." *Id.* at 50. Likewise, we find no support for the government's "separation" argument in 10 U.S.C. § 948r(d).

Next, the government asserts that *Schneckloth* and its progeny demand "careful consideration of the circumstances surrounding *the challenged statement itself*—rather than a previous, coerced statement—looking for signals that the declarant was or was not in control of his decision to answer questions." *Id.* at 52 (citing *Culombe*, 367 U.S. at 603, *cited with approval in Schneckloth*, 412 U.S. at 225–26).[13] The government contends that "[t]he Military Judge nevertheless repeatedly and erroneously emphasized the circumstances of the former RDI Program, instead of applying the focused, contemporaneous analysis required by the seminal test for voluntariness." *Id.* at 53–54.

We disagree with the government's suggestion that the military judge over-emphasized appellee's prior coerced interrogations and failed to adequately consider circumstances contemporaneous with his LHM interviews. Simply put, *Schneckloth* and its progeny do not prohibit the military judge from giving weight to appellee's history of coercive interrogations as part of the totality of

[13] In *Culombe v. Connecticut*, the Supreme Court stated that inquiry into a confession's voluntariness involves "finding the crude historical facts, the external, 'phenomenological' occurrences and events *surrounding the confession*." 367 U.S. 568, 603 (1961) (emphasis added).

the circumstances under Mil. Comm. R. Evid. 304(a)(4) (or 10 U.S.C. § 948r(d)). This approach is not novel. For example, in *Mohammed v. Obama*, 704 F. Supp. 2d 1, 26 (D.D.C. 2009), the court considered petitioner's history of interrogations,[14] stating:

> When considering the amount of time which has elapsed between the coerced confession and the subsequent one, courts have never insisted that a specific amount of time must pass before the taint of earlier mistreatment has dissipated. . . . .
>
> A totality of the circumstances inquiry, therefore, cannot be reduced simply to mechanical computations of time.

The district court noted: "The significant fact about all of these decisions [addressing factors relevant to voluntariness] is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances." *Id.* (quoting *Schneckloth*, 412 U.S. at 226).

Whether or to what extent other courts have considered the history of interrogations, however, is not dispositive in this case. The military judge here recognized the circumstances surrounding the LHM interviews of appellee were significantly different than the circumstances in other cases:

> bb. Most, if not all, Supreme Court and U.S. Court of Appeals for the Armed Forces cases dealing with the issue of subsequent statements made following an initial unwarned or coerced statement deal with a *single* prior inadmissible statement being made before a second warned or uncoerced statement. . . . [H]ere, the Accused was in U.S. custody for four years prior to the "second" statement. During those four years, the Accused was coerced and psychologically conditioned to cooperate with questioners—dozens of times. If there was ever a case where the circumstances of an accused's prior statements impacted his ability to make a later voluntary statement, this is such a case.

Gov't's App. 43–44.

We find the military judge did not misunderstand or misinterpret *Schneckloth* or *Elstad* as they apply to this case. We have carefully considered each of the military judge's specific conclusions and find no error. Further, we find the military judge did not err in considering all three prongs of Mil. Comm.

[14] See also the following Naval Station Guantanamo Bay (Guantanamo Bay or NSGB) cases considering prior coercion as part of the totality of circumstances: *Al-Hajj v. Obama*, 800 F. Supp. 2d 19, 27 (D.D.C. 2011) (considering coercion in Kabul four to five months before Guantanamo Bay statements); *Anam v. Obama*, 696 F. Supp. 2d 1, 5–7 (D.D.C. 2010) (considering coercion in Afghanistan six months before Guantanamo Bay statements); *Al Rabiah v. United States*, 658 F. Supp. 2d 11, 35–36 (D.D.C. 2009) (considering coercion in year prior to Combatant Status Review Tribunal (CSRT) confessions).

R. Evid. 304(a)(4) (or 10 U.S.C. § 948r(d)) together in his consideration of the totality of the circumstances as part of his analysis of the voluntariness of appellee's LHM statements.

B. Consideration of important facts

The government alleges a failure to consider important facts bearing on voluntariness. We consider two—namely, appellee's age and military training.[15]

1. Appellee's age

Regarding important facts bearing on the voluntariness of appellee's 2007 LHM interviews, the government first addresses appellee's age. Government counsel apparently contend that "age" consists of two parts—youth (or inexperience) and its counterpart, adulthood (or life experience). *See* Gov't's Br. 55–56. Counsel note, however, that the military judge only weighed appellee's youth. *Id.* at 55. They argue that he failed to weigh appellee's adult status at the time of his LHM interviews when he was a 44-year-old man with "significant life experience." *Id.* at 55 & n.404.

We decline to accept the government's suggestion that "age," as used in Mil. Comm. R. Evid. 304(a)(4)(b), requires consideration of "significant life experience." Government counsel have provided no legal authority to support their position.[16] Our review of case law reveals that youth is the component of age that relates significantly to a voluntariness analysis. Here, whether at the time of his coerced interrogations or when he gave his LHM statements, appellee was well into adulthood. *See* Gov't's App. 40–41 (judge finding appellee was in late twenties to early thirties from capture date until February 2,

[15] Contrary to the government's contention on the relevance of appellee's mental health and Post-Traumatic Stress Disorder (PTSD), Gov't's Br. 76–79, these were not important facts. The military judge gave little weight to mental health. He did not mention PTSD as a factor in his voluntariness analysis, *see* Gov't's App. at 40–42, although he referenced appellee's 2013 and 2014 PTSD diagnosis in the findings of fact, *id.* at 26. *See infra* Part III.D.2.d(i) (discussing government's allegations on PTSD). Further consideration of this contention is unnecessary.

[16] Government counsel observe the military judge's ruling recognized that "voluntariness of *juvenile* confessions must be evaluated with 'special care.'" Gov't's Br. 55 (quoting *Gilbert v. Merchant*, 488 F.3d 780, 791 (7th Cir. 2007)). *Gilbert* held that a fourteen-year-old "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences" of a police interrogation. 488 F.3d at 791 (quoting *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962)). The court noted this is so because of "the way in which an adolescent develops psycho-socially and his brain matures." *Id.* at 791–92. We find *Gilbert* does not support the government's argument that "significant life experience . . . should have weighed *against* suppression." Gov't's Br. 55. In *Gilbert*, the court essentially interpreted "age" consistent with its ordinary meaning—the "period of time someone has been alive"—and recognized a youth's limited cognitive ability to understand a rights warning. Dictionary .cambridge.org (last visited Jan. 15, 2025).

2007), 130 (reflecting age of forty-four in November 2007), 132 (reflecting same).

As such, we find the military judge did not err by finding appellee was not a youth and conversely by not giving special consideration to appellee's adult status in his analysis on voluntariness.

2. Appellee's military training

The government asserts the military judge failed to consider appellee's military training in his ruling on the inadmissibility of appellee's LHM statements. Gov't's Br. 56–57. While not specifically addressed in his written analysis, we cannot conclude the military judge failed to consider it. He may have given military training less weight than the factors discussed in his ruling, but that was within the military judge's discretion. We find no error.[17]

Moreover, even if he failed to consider appellee's military training, the military judge still did not err in that Mil. Comm. R. Evid. 304(a)(4) does not *require* consideration of military training. It requires a consideration of "the totality of the circumstances, including, as appropriate . . . the characteristics of the accused." Mil. Comm. R. Evid. 304(a)(4)(B). Those characteristics can include factors "such as military training," *inter alia*. *Id.* We also know the military judge was acutely aware of the nature of his legal responsibility because the preface to his admissibility ruling included an acknowledgment that "courts consider the totality of all the surrounding circumstances, regarding both the characteristics of the accused and the details of the interrogation." Gov't's App. 40 (citing *Schneckloth*, 412 U.S. at 226–27).

For these reasons, we find the military judge did not commit error with respect to consideration of appellee's military training and the weight he gave to that training—if any.

C. Unsupported findings of fact

[17] As to the government's claim that the military judge "failed to consider numerous important facts in the record," such as appellee's "own words" (also described herein as "unguarded statements"), Gov't's Br. 62, the judge clearly stated the factors he listed were not an exclusive list. He stated: "The Commission has considered, *among others*, the following factors in the analysis of the voluntariness of the Accused's statements to investigators in January–February 2007[.]" Gov't's App. 40 (emphasis added). See *infra* Part III.D.2.e(ii) for our discussion on "unguarded statements." Additionally, the military judge stated myriad times he considered "the totality of the circumstances." *E.g.*, Gov't's App. 33. We may take him at his word. *United States v. Murdock*, 667 F.3d 1302, 1307 (D.C. Cir. 2012). *Murdock* held that the lower court was not required to address all government contentions, including that the appellant "was a 33-year-old adult who had been incarcerated previously." *Id.* (citation omitted). As in *Murdock*, we need not demand the military judge discuss every finding or address every contention made by the parties. *See id.* (citing *Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48, 55 (1st Cir. 1998)).

The government asserts the military judge made several factual findings unsupported by the record. We address five of those contentions, relating to (1) the geographic location of appellee's rectal feeding, (2) CIA operational control, (3) appellee's changed circumstances, (4) Special Agent (SA) G's whereabouts, and (5) absence of a cleansing statement.

1. "Rectal Feeding" location

The military judge correctly found that Location 6 was located at Echo II on Guantanamo Bay, and Location 7 was not on Guantanamo Bay. *Id.* at 15, 17; *see* Gov't's Br. 17–18, 81. He also found as fact that "[a]t Location 6, the CIA responded to a hunger strike by 'force feeding' [Al-Nashiri] rectally." Gov't's App. 16 (quoting Declassified Findings and Conclusions and Executive Summary of S. Rep. No. 113-288, at 100 n.584 (2014) [hereinafter SSCI Exec. Sum.]).[18] Both parties conclude that forced "rectal feeding" occurred at Location 7, not Location 6. Gov't's Br. 6, 64; Appellee's Br. 7; Gov't's Reply Br. 3. The record does indeed show that the military judge erred in his finding about the rectal feeding location. Nonetheless, the parties remain split over the significance of this error. *See* Gov't's Br. 6, 64–65; Appellee's Br. 37; Gov't's Reply Br. 3–6.

The government's reply identifies three segments of the military judge's ruling that relate to rectal feeding. Those segments from the ruling are as follows:

> hh. . . . At Location 6, the CIA responded to a hunger strike by "force feeding" [the Accused] rectally.
>
> . . . .
>
> l. . . . [stating in footnote 42] The Accused was previously held in Echo II when it was a black site in 2003–2004. The FBI [Federal Bureau of Investigation] interview in 2007 actually occurred in the same complex—and perhaps even the same cell—where the Accused was subjected to abuses such as "rectal feeding."
>
> . . . .
>
> p. . . . Aside from two visits with the ICRC [International Committee of the Red Cross] once he was returned to NSGB, the Accused was still held in the same location as the former CIA black site where he was previously held and subjected to forced "rectal feeding."

[18] Senate Report No. 113-288 is the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, which is over 6,700 pages long. The declassified Executive Summary of the Senate Report is 683 pages long.

Gov't's App. 16 (quoting SSCI Exec. Sum. 100 n.584), 22 n.42, 35, respectively), *quoted in* Gov't's Reply Br. 5 n.26.

In his response brief, appellee states the government "is correct that Mr. Al-Nashiri was rape[d] at BLACK (Location 7)." Appellee's Br. 37.

The parties, however, assign different significance to the military judge's error. The government argues:

> Because Location 6, not Location 7, is where the LHM interviews occurred, this distinction is significant to an accurate application of the legally required attenuation factors. The Military Judge's erroneous connection of [the rectal feeding] event to the location of the LHM interviews distorted his conclusion that earlier coercive conditions had not dissipated such that Al-Nashiri could not voluntarily speak to law enforcement agents.

Gov't's Br. 6. Government counsel maintain that the military judge's "clearly erroneous connection" of these two events "factored heavily into his rejection of the Government's attenuation argument." *Id.* at 64–65 (citing Gov't's App. 22 n.42, 35).

Appellee, on the other hand, argues "the military judge did not build his ruling on this point" and instead was "most persuaded by the contract established and maintained by Drs. M and J." Appellee's Br. 37 (quoting Gov't's App. 1). Moreover, appellee argues:

> The fact that Mr. Al-Nashiri was assaulted at BLACK is worse for [the government]. Drs. J and M conducted a "maintenance visit" with Mr. Al-Nashiri inside his cell in Echo II. This is the same cell where he is later interrogated by [law enforcement]. What prompts this visit is poor behavior on Mr. Al-Nashiri's part . . . .
>
> Because of Mr. Al-Nashiri's poor behavior in Echo II, Mr. Al-Nashiri is deemed to no longer be a candidate for the "desirable location" of Guantanamo Bay and is rendered to BLACK (Location 7) as punishment. Within weeks after his arrival he is anally raped.

Id. at 37–38 (in second paragraph, citing Class. App. Ex. 467BBB, at Bates No. 10015-00264025);[19] *see* Class. App. Ex. 467F (Al-Nashiri's reply to the

[19] In footnote 223 on page 38 of their response, defense counsel refer to Appellee Appendix C. 1875 (corresponding to Bates No. 10015-00245976). That citation is misplaced. After this court contacted the parties for clarification, we corrected it to read Bates No. 10015-00264025 at the request of defense counsel.

government's response to his motion to suppress), Attach. J, at Bates 10015-00245645–46.[20]

The question before us, then, is *whether the military judge predicated his ruling granting appellee's motion to suppress his LHM statements on an erroneous finding of fact about the location of appellee's rectal feeding. See Rudometkin*, 82 M.J. at 401 (stating a ruling based on findings of fact unsupported by record evidence reveals an abuse of discretion). We find he did not. Our discussion has three parts.

First, as we discuss, the military judge considered myriad circumstances. These circumstances included the "[u]se of physical punishment such as the deprivation of food or sleep," which was one of eight factors he specifically discussed in his ruling. Gov't's App. 42. We find that exclusion of the rectal feeding location from the eight listed factors, *see id.* at 40–42, indicates that the military judge gave little weight to the rectal feeding location in his analysis of appellee's motion.

The military judge considered the location of rectal feeding in his analysis of the government's argument that Al-Nashiri's conditions of confinement improved significantly. The judge found that "once he was returned to NSGB, the Accused was still held in the same location as the former CIA black site where he was previously held and subjected to forced 'rectal feeding.'" *Id.* at 35. This singular circumstance in a lengthy attenuation analysis, which led the military judge to conclude that there was no significant change in appellee's coercive conditions before his LHM interviews, shows how little weight he actually gave to the erroneous finding. *See id.* at 32–35.

Second, in his finding of facts on appellee's LHM interviews, the military judge stated, "the agents advised the Accused that the room where the interview was taking place may have been *familiar* to him from his time in the custody of a different organization but that, even so, he was in DOD [Department of Defense or DoD] custody now." *Id.* at 22 (emphasis added; citation omitted after *familiar*). In the footnote after "familiar," the military judge stated that appellee "was previously held in Echo II when it was a black site in 2003–2004. The FBI interview in 2007 actually occurred in the same complex—and perhaps even the same cell—where the Accused was subject to abuses such as 'rectal feeding.'" *Id.* at 22 n.42.

[20] We note that the record reveals mixed reasons for Al-Nashiri's move out of Guantanamo Bay. *Compare* Class. App. Ex. 444L, Attach. C, Tab 4 [hereinafter App. Ex. 444L], Bates No. 10025-00245965–66, at 128–29 of 628, *and* Gov't's App. 16 (finding move was made in anticipation of potential Supreme Court decision), *with* App. Ex. 444L, Bates No. 10015-00127086, at 398 of 628. We further note that it is unclear from the record whether Guantanamo Bay was relatively more desirable than Location 7, as appellee suggests. *Compare* Appellee's Br. 38 (Sept. 26, 2023), *with* App. Ex. 444L, Bates No. 10015-00138047–48, at 404–05 of 628. The government does not challenge Al-Nashiri's claim about the desirability of Guantanamo Bay. *See* Gov't's Reply Br. 4 n.22. We need not decide whether Guantanamo Bay was relatively desirable to resolve the issues before us.

That the military judge put these statements *in a footnote* to a finding of fact belies the assertion that it was a finding of fact at all, much less a finding that "factored heavily" into the military judge's analysis. Gov't's Br. 64. We conclude that the rectal feeding location was not a significant factor in the ruling.

~~(C)~~ Third, government counsel note the military judge compared Al-Nashiri's conditions of confinement while in CIA custody and DoD custody. They assert the judge "found that, after transfer to DoD custody, Al-Nashiri 'was still held in the same *location as the former CIA black site* where he was previously held [during the RDI Program].'" *Id.* at 65 (bracketed alteration in original; underline added) (quoting Gov't's App. 35). The government claims "Al-Nashiri, however, after being transferred to DoD custody, was never housed in Echo II but was instead detained at Camp 7. [redacted] *Id.* at 65–66.

Government counsel argue that we should narrowly read "location" in the ruling to mean the very same facility on Guantanamo Bay. They contend "the Military Judge incorrectly conflated Al-Nashiri's CIA confinement location in Guantanamo Bay (Location 6, Echo II) with Al-Nashiri's DoD confinement location in Guantanamo Bay (Camp 7), which in turn undermined his conclusions of law." Gov't's Reply Br. 7; *see also* Gov't's Br. 65–66. We decline to read "location" narrowly. The military judge did not state that Echo II was the same as Camp 7. He said Al-Nashiri was "held in the same location as" Echo II. Gov't's App. 35; *see supra* paragraph p (quoted text from judge's ruling). Furthermore, the government does not dispute that the location of each was the same—Guantanamo Bay.

For all these reasons, we find the military judge's finding placing appellee's rectal feeding at Location 6 to be erroneous, yet insubstantial. The military judge did not predicate his ruling on the location of the rectal feeding, but rather on the psychological conditioning of appellee.

2. Operational control by the Central Intelligence Agency (CIA)

The government contends the military judge erred in finding as fact that (i) forced grooming and (ii) forced cell extractions (FCEs) demonstrated CIA operational control over appellee at the time of his LHM interviews in 2007. Gov't's Br. 6–7; Gov't's Reply Br. 2, 10–13. Government counsel identified three parts of the commission ruling relevant to their position, as follows:

> c. ~~(CUI)~~ At least [redacted] of the Accused were conducted between November 2006 to March 2007. *See* [Class. App. Ex.] 467ZZ. Not unlike how the contract operated in the RDI program, the guard force responded with the overwhelming physical force of FCEs to assert control over him when the Accused was non-compliant or misbehaved in some way.

Gov't's App. 19, *cited in* Gov't's Reply Br. 10; *see* Gov't's Reply Br. 11–12 (citing argument section in Gov't's Class. Reply Br. Addendum 6–9).

> j. Second, [law enforcement agents] told the Accused he was in the legal custody of the Department of Defense (DOD) and he would not return to his previous captors. However, unbeknownst to the agents, after the 14 HVDs including the Accused arrived at NSGB in September 2006, they were held separately from other detainees and "remained under the operational control of the CIA."

Gov't's App. 21 (quoting SSCI Exec. Sum. 160), *cited in* Gov't's Br. 66; *and* Gov't's Reply Br. 8.

> p. Additionally, [after transfer to DoD custody in September 2006, Al-Nashiri] was still under the complete domination and control of his captors as demonstrated by forced cell extractions and forced grooming.

Id. at 35, *cited in* Gov't's Br. 6, 67; *and* Gov't's Reply Br. 10.

Regarding grooming, government counsel assert that the military judge found as fact that confinement officials gave appellee "a forced haircut." Gov't's Reply Br. 12; *see* Gov't's Br. 67. They contend "there is no evidence to suggest that Al-Nashiri's hair and beard were forcefully cut at any point in the five months leading up to his LHM interview." Gov't's Reply Br. 12; Gov't's Br. 67. We disagree with this interpretation of the military judge's finding.

The military judge found that forced grooming was an indicator of complete control and was imposed after appellee's transfer to DoD custody. Gov't's App. 35. The military judge cited to an authority for an example of a forced grooming that indeed occurred after transfer to DoD custody. *Id.* (citing Class. App. Ex. 467ZZ); *see* Gov't's Reply Br. 12–13 (citing Class. App. Ex. 467C, Attach. C (Bates No. 10015-00030229)). He did not, however, find as fact that appellee was the recipient of forced grooming in the months leading to his LHM interviews. In reaching this conclusion, we considered the facts and argument in the government's classified pleadings. *See* Gov't's Class. Br. Addendum 9–10; Gov't's Class. Reply Br. Addendum 6–8. That classified material does not change our decision.

The government's primary argument, however, against forced grooming as evidence of "complete domination and control" by appellee's captors is appellee's voluntary grooming.[21] Gov't's Br. 6–7, 67; Gov't's Reply Br. 12–13.

[21] Government counsel also contend that the military judge "attribute[d] a forced haircut . . . occurring one and one-half months *after* his LHM interview," Gov't's Reply Br. 12–13, to appellee's "state of mind at the time of his LHM [interview]," *id.* at 13. First, we do not agree with this contention. Second, that forced grooming may have occurred after appellee's LHM interviews could have some relevance. *Cf. Haley v. Ohio*, 332 U.S. 596, 600 (1948) (finding denial of parental visitation with fifteen-year-old son *after* his confession was

We fail to see how evidence that voluntary grooming was offered and/or accepted while in DoD custody demonstrates the absence of involuntary grooming during the same time period. Moreover, the offer of voluntary grooming does not show lack of complete control by confinement officials; notably, those officials decided whether to offer appellee voluntary grooming at all.

Regarding FCEs, the government raises two points in support of its claim that the military judge erred in finding FCEs demonstrated CIA operational control. In our analysis of these points, we considered the government's classified pleadings. *See* Gov't's Class. Reply Br. Addendum 6–9. Counsel's recitation of classified facts and their argument do not change the outcome of our analysis in this section, which follows.

In their first point, government counsel focus on when and how many FCEs were conducted against appellee. Counsel assert in their initial brief that "the facts underlying the Military Judge's concern with forced cell extractions long post-dated Al-Nashiri's LHM statements, rendering them meaningless to a proper determination of whether the prior taint had dissipated when Al-Nashiri spoke with law enforcement agents." Gov't's Br. 7 (citation footnote omitted); *see id.* at 67–68 (discussing relevance of post-dated FCE).

~~(CUI)~~ In their reply brief, however, government counsel explain that [redacted] were conducted before the LHM statements, the last of which occurred more than three weeks prior to the LHM interviews." Gov't's Reply Br. 11. The government further asserts that the military judge miscounted FCEs by three: "The Military Judge erroneously states that there [redacted] from September 2006 to March 2007. But there were only [redacted] from September 2006, when Al-Nashiri was transferred to DoD custody, to March 14, 2007, the date of Al-Nashiri's Combatant Status Review Tribunal ("CSRT")." *Id.* at 10 (emphasis added; citation footnote omitted).

We find that the exact number of FCEs was not an important part of the military judge's analysis. Instead, his primary point was that FCEs were used on appellee at Guantanamo Bay before appellee's LHM interviews—*while he was in DoD custody*. The military judge found that FCEs occurring while appellee was in DoD custody showed appellee "was still under the complete domination and control of his captors." Gov't's App. 35. In other words, FCEs were just one factor that could have led appellee to believe that his circumstances in DoD custody had not changed significantly from his prior circumstances.

In their second point about FCEs, the government addresses the level of force used in FCEs. The government argues that the FCEs were similar to those

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germane due to violation of "ordinary standards of human relationships"), *cited in Schneckloth*, 412 U.S. at 226. Third, the government's stated implication is so slight as to not warrant any consideration.

used at correctional institutions throughout the United States. Gov't's Reply Br. 11. We find reliance on this asserted fact to be misguided.

As an initial matter, in his finding on FCEs and "complete domination and control," the military judge did not mention the level of force used in the FCEs. Gov't's App. 35. That the level of force was left unmentioned indicates how little weight, if any, the judge gave to it in his analysis of "complete domination and control." Moreover, the military judge did not find that FCEs were excessively harsh; he found that the guards' FCEs of appellee involved "overwhelming physical force." *Id.* at 19. This "overwhelming" force indicated to the military judge that appellee was under the control of others, and nothing more.

Equally important, appellee was not just another prisoner in maximum security confinement. As the military judge found:

> o. Following four years of essentially solitary confinement in a series of CIA-controlled black sites—including the very location where the LHM statement was taken—the Accused was "transferred" to DOD custody in September 2006. The LHM [statement] was taken four months later. Four months is a considerable amount of time; however, it is a small fraction of time compared to the years the Accused spent held incommunicado in inhumane and degrading living conditions.

Id. at 34 (citation footnotes omitted).

Regarding the ruling's conclusion on operational control, the government questions the military judge's judicial notice of a Senate report. The military judge found that appellee "remained under the operational control of the CIA" while he was in DoD custody on Guantanamo Bay. *Id.* at 21 (quoting SSCI Exec. Sum. 160). Government counsel fault the military judge because he "relied on a conclusion from the SSCI [Executive Summary] Report that inaccurately capture[d] the facts of the underlying source document." Gov't's Br. 66 (citing argument section in Gov't's Class. Br. Addendum 8–10). Relatedly, the parties disagree over the scope of the military judge's judicial notice of the SSCI Executive Summary Report.

Government counsel posit that they agreed only to judicial notice of the existence of the SSCI Executive Summary Report—not all facts within that lengthy Report. *Id.* at 64 n.451; Gov't's Reply Br. 8. Rather, counsel contend that they agreed to stipulate only to "verifiable facts" in the SSCI Executive Summary Report.[22] Gov't's Br. 64 n.451; Gov't's Reply Br. 9 & n.53. They

[22] In previous hearings in this case, the government used the term "verifiable" when indicating it would stipulate to some of the statements of fact in the SSCI Executive Summary Report. "[T]he verifiable factual recitations of what occurred to the Accused are sourced to the same Executive Branch documents the government has reviewed." Gov't's Suppl. App. 5139 (Oct. 6, 2023) (government's 2016 notice to commission of compliance

argue that the Report's statement on CIA operational control is not a verifiable fact "and is, in fact, inaccurate[.]" Gov't's Reply Br. 8–9. As an unverifiable fact, the government contends the military judge committed error in his ruling in relying on the conclusion in the SSCI Executive Summary Report on CIA operational control. *Id.* at 9; *see* Gov't's Br. 64 n.451.

Appellee responds that while the government "perpetuates the propagandized message that detainees were 'turned over to the Department of Defense' the SSCI [Executive Summary] Report found that detainees in Camp 7 remained 'under the operational control of the CIA.'" Appellee's Br. 40. Moreover, he contends that the Report's conclusion on operational control is "supported by evidence in the classified record," albeit without citation to a specific page in a classified record that consists of over 175,000 pages.[23] *Id.*

It appears the military judge did not fully understand the government's position—ostensibly, that the military judge was supposed to ascertain which facts were "verifiable." In any event, the government never argued to the military judge whether or not it was a "verifiable fact" that Camp 7 detainees were under the operational control of the CIA.[24] Even if the military judge erred in relying on the SSCI Executive Summary Report for his finding on operational control, that reliance was not an abuse of discretion in the absence of a specific objection by the government during commission proceedings. *See* Gov't's Reply Br. 9 (acknowledging lack of objection to judicial notice but noting government's established position on stipulating only to verifiable facts).

Assuming the scope of judicial notice was error, this error would not change our ruling. The military judge clearly did not give significant weight to the CIA's role at the time of appellee's LHM interviews. Instead, he gave weight to the fact that appellee "was still under the complete domination and control of *the U.S. government*." Gov't's App. 42 (emphasis added). He highlighted that appellee "could not be expected" to appreciate the differences between interrogation under CIA authority and the interviews by law enforcement under DoD authority. *Id.* at 38. He found that, given the prior conditions of coercion and abuse, "[t]he change of interlocutors . . . mean[t] little." *Id.* at 43; *see also id.* at 38. From appellee's perspective, his law

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with discovery order in appellee's case). Government counsel compared facts in the SSCI Executive Summary Report to the facts in other documents that were in the government's possession, and agreed to stipulate to the truth of those facts it could verify. *See, e.g.*, Gov't's App. 2634.

[23] This court's Rule of Practice 15(a), revised February 3, 2016, provides: "All references to matters contained in the record shall show record page numbers and any exhibit designations."

[24] We note the government filed with this court a notice of an opinion in which the D.C. Circuit found the CIA did not state it retained operational control over Guantanamo Bay detainees in a case involving a Freedom of Information Act request. *Connell v. CIA*, 110 F.4th 256, 262, 264 (D.C. Cir. 2024), *aff'g*, No. 21-cv-627, 2023 U.S. Dist. LEXIS 54171 (D.D.C. Mar. 29, 2023). The Court found that the "SSCI executive summary's reference to CIA 'operational control' is not an 'official' [CIA] acknowledgment." *Id.* at 264.

enforcement interviewers in 2007 "were merely the newest faces" in a long line of examiners. *Id.* at 43. Regarding our findings in this segment of our analysis on operational control, we considered the facts and argument in the government's classified pleadings. *See* Gov't's Class. Br. Addendum 3–9; Gov't's Class. Reply Br. Addendum 1–6. Those pleadings did not affect our decision.

The government further asserts that, regardless of actual control, appellee "understood that he was in DoD custody and that he would not be returning to CIA custody." Gov't's Br. 66. This argument—that the subjective understanding of control, not actual, is relevant to voluntariness—is addressed *infra* at Part III.D.2.e.

3. Change in Al-Nashiri's circumstances

The government next challenges the following portion from section 4 of the military judge's ruling, titled "Law & Analysis," specifically taking issue with the last sentence:

> 1. Consideration of the details of the taking of the January–February 2007 statements includes not only the specific manner in which the agents conducted the interviews in 2007, but also the totality of the circumstances surrounding the Accused's detention beginning in 2002. The Government bears the burden of producing sufficient evidence that the coercive circumstances of the Accused's confinement by the CIA from 2002 to September 2006, including the extreme abuse inflicted upon the Accused in 2002 and 2003, his continuous interrogation, continued isolation, detention, and psychological abuse, were attenuated over the course of the few short months between September 2006 to January 2007 when the law enforcement interviews were conducted. *During the litigation of the motion, the Government offered no significant evidence to demonstrate that the coercive circumstances which began in October 2002 changed in any significant way through late 2006, when he was finally ostensibly turned over to the DOD.*

~~(CUI)~~ Gov't's App. 33 (emphasis added). Government counsel disagree with the ruling's assessment of their evidence, stating they "clearly showed that Al-Nashiri's circumstances greatly improved at Guantanamo Bay." Gov't's Br. 7. Government counsel detail facts to demonstrate the improved confinement conditions appellee experienced "upon arrival at Guantanamo Bay in September 2006," which included [redacted] daily showers, access to library books, [redacted] extensive medical care, and social interactions with other detainees." *Id.*; *see id.* at 80 & n.534 (discussing improved conditions at Location 6 (Echo II) and later locations).

While the government's claims about improved treatment at Guantanamo Bay may be correct, counsel's claim of error on this point is misplaced. The military judge's ruling on the nature of appellee's confinement, quoted *supra*

paragraph 1, addressed appellee's circumstances "from 2002 to September 2006," before his transfer to DoD custody. This is apparent from the next paragraph of the ruling, in which the military judge explains how the contract served to continue the coercion from 2003 until September 2006:

> m. . . . . [A]lthough the EITs may have ceased in 2003, the Accused was subjected to constant reminders by his original tormentors of the unwritten contract, and the fact that a failure to cooperate with debriefers upon demand could lead to a return to the "hard times." *Unsurprisingly, the Accused continued to make statements while in CIA custody from late 2002 until September 2006*. These statements, made during the course of scores of interrogations and debriefings over four years, were not merely unwarned, but instead were actually coerced, with the constant looming threat of "hard times" to come if the Accused failed to live up to his end of the "contract." As in *Karake*, "here, the coercion was a product of both discrete beatings, as well as the general conditions of confinement." *See* 443 F. Supp. 2d at 89. The Government has failed to establish that there was any meaningful relief from those conditions prior to the FBI interview.

Gov't's App. 33–34 (emphasis added; footnote citation omitted).

Under a subsection to "Law & Analysis," section 4 of the ruling, which specifically addressed admissibility of appellee's LHM statements, the military judge expanded upon his conclusions about circumstances before and after appellee's arrival at Guantanamo Bay:

> aa. Any resistance the Accused might have been inclined to put up when asked to incriminate himself was intentionally and literally beaten out of him years before. For years, the Accused was coerced and psychologically conditioned to cooperate with questioners—dozens, if not hundreds of times. To refuse to cooperate was to face the prospect once again of experiencing drowning, the fear of summary execution, days of sleeplessness while shackled naked in a cell, confinement to small boxes, forced rectal feeding, or other physical and mental abuse. Through all that, the Accused implicated himself again and again. *The Commission finds that the limited changes in the Accused's circumstances from September 2006 until February 2007 were not meaningful enough to erase the effects of what came before*. The change of interlocutors also means little under these circumstances as the Accused was met by numerous different debriefers over the years. From his perspective, [the LHM interviewers] were merely the newest faces. *Further, the Government has done little to establish that the Accused's circumstances materially changed from 2003 until his arrival at NSGB in September 2006*.

Id. at 43 (emphasis added). Here, the military judge acknowledged that appellee's circumstances improved somewhat after his arrival at Guantanamo Bay, but found those changes "not meaningful enough."

The government takes issue with this point—the military judge's determination that the improvement in circumstances after appellee's arrival at Guantanamo Bay did not materially change the conditions of appellee's confinement at the time of the LHM interviews. We find no error. The government position, in general, is based on a change in the availability of tangible things or amenities and observable physical actions applied to appellee before and after September 2006, such as what type of meals were provided or what type of toilet was available or what measures were taken to cause appellee pain or fear. The military judge, however, explained in his ruling that while torture was necessary to build the contract, little to no harsh treatment was required to keep the contract active. *See id.* at 16–17. The contract essentially brought forward to the present all the coercive conditions that appellee endured while in CIA custody. Simply stated, it was the contract, predicated on the previous torture as it was, that comprised the "coercive conditions" at the time of appellee's LHM interviews—not the prior sparse amenities or observable torture.

Even if confinement officials had offered appellee more amenities, overall, after his transfer to Guantanamo Bay than what was previously available to him, or if he had experienced no consequences for disciplinary infractions at Guantanamo Bay, this fact would not contradict the military judge's conclusion—that there was no "meaningful relief" from the coercive contract and "the general conditions of confinement" it imposed on appellee before and throughout his LHM interviews. *Id.* at 34 (citation omitted).

We thus find that the military judge did not err when he determined: the government failed to demonstrate that improved confinement conditions at Guantanamo Bay resulted in a material change in the coercive conditions that existed when appellee gave his LHM statements. We considered the additional facts provided by the government counsel in their classified pleading. *See* Gov't's Class. Br. Addendum 1–3. Those additional facts do not change our conclusion.

4. Special Agent G's whereabouts

Government counsel fault the military judge for finding that SA G was "[p]resent at the site during the implementation of the EITs on Abu Zubaydah," Gov't's Br. 68 (alteration in original) (quoting Gov't's App. 6–7), the first detainee subjected to EITs while in CIA custody, Gov't's App. 7. Once again, we read the military judge's finding differently than the government.

First, counsel assert that this finding "is incorrect and is conclusively disproved by the factual record." Gov't's Br. 68. They claim that SA G "departed [that] location . . . by around May or early June 2002," *id.*, before the

DoJ's approval of EITs in late summer 2002, *id.* at 69.[25] Second, the government argues that appellee "mischaracterizes the record to suggest that SA G was *de facto* complicit in the administration of EITs simply because he was present at [the site], where Abu Zubaydah was subjected to 'nudity, sleep deprivation, loud noise, and temperature manipulation.'" Gov't's Reply Br. 13–14 (footnotes omitted). Government counsel contend "[t]here is no evidence to support the claim that Al-Nashiri mistakenly believed" SA G was at Zubaydah's site when EITs were applied to Zubaydah or that he "associated SA G with his own RDI Program detention. Without that awareness, any such fact could not have impacted Al-Nashiri's subjective willingness to speak with law enforcement agents [in 2007]." Gov't's Br. 68.

Appellee claims that "there is conflicting evidence" about SA G's departure date. Appellee's Br. 40.

The government urges adoption of their position: that the military judge relied on "incorrect presumptions supported by incorrect facts" to imply that appellee *believed* SA G was involved in his RDI program. Gov't's Br. 69. We decline to do so. The military judge clearly did not state as much, and the record does not support a conclusion that he implied or presumed it. *See* Gov't's App. 7, 38–40, 43. More importantly, the military judge did not address SA G's whereabouts in his analysis—an indication that he gave it little weight. *See id.* at 38–40, 43. Therefore, regardless of the correctness of the finding on SA G's whereabouts when Abu Zubaydah was subject to EITs, we find no error.

5. The dungeon and the cleansing statement[26]

The military judge described in his ruling how appellee's situation during his first four years of detention from 2002 until September 2006 impacted his LHM interviews:

> u. . . . The Accused, having been required to answer the questions of various debriefers over the years under the threat of return to the "hard times," could not be expected to ascertain whether [the law enforcement interviewers] were actually from a different agency than the one that had tortured him for years. He was in no position to know whether Drs. M and/or J were watching the interviews in the next room and prepared to intervene with more abusive treatment should he violate the contract. He had no reason

[25] In a footnote to the government's brief, counsel assert "the CIA was using certain interrogation techniques at the beginning of Abu Zubaydah's interrogations at Location 3, before August 4, 2002, [but] DOJ-approved EITs were not being applied to him." Gov't's Reply Br. 13 n.76.

[26] "A 'cleansing' statement advises a suspect that the contents of previous unwarned statements may not be used against him" in a later criminal trial. *United States v. Lewis*, 78 M.J. 447, 451 n.4 (C.A.A.F. 2019) (citation omitted) (involving rights advisement under Article 31(b), Uniform Code of Military Justice, Manual for Courts-Martial, 10 U.S.C. § 831(b) (2012), which is substantially similar to a *Miranda* rights advisement).

> to doubt that he might, without notice, suddenly be shipped back to a dungeon like the ones he had experienced before. He had no real reason to know whether NX2 [a previous interrogator] lurked nearby with a pistol, a drill, or a broomstick in hand in the event he chose to remain silent or to offer versions of events that differed from what he told his prior interrogators.

Id. at 38–39; *see supra* Part I.A (quoted text from paragraph ff of ruling describing purpose of maintenance visits). He acknowledged that appellee had been treated "with fairness and respect and [without] any form of coercion" during his LHM interviews but found "this fact alone [did] not necessarily erase" all the prior treatment. Gov't's App. at 38.

The military judge also found "the rights advisement failed in one major respect." *Id.* at 36 (citing, *e.g.*, *Missouri v. Seibert*, 542 U.S. 600, 612 (2004) (discussing whether *Miranda* warning after interrogation affords "a real choice about giving an admissible statement at that juncture")); *see infra* Part III.D.2.e(iii) (discussing rights advisement). Specifically, "[t]he agents did not tell the Accused that prior statements he made while in CIA custody and while being abused by the CIA interrogators could not be used against him in court," Gov't's App. 22, or "against him at any future trial," *id.* at 36.

The government contends that the military judge

> erroneously characterized the details of Al-Nashiri's LHM interviews as giving Al-Nashiri "no reason to believe that his many prior incriminating statements" made during the former RDI Program "would not eventually be used against him if he ever saw the inside of a courtroom" and "no reason to doubt that he might, without notice, suddenly be shipped back to a dungeon like the ones he had experienced before."

Gov't's Br. 7–8 (citation footnote omitted). In support of their argument, government counsel state the following:

> Indeed, law enforcement agents made clear—before beginning any questioning on the first day of the interviews and every day thereafter—that: (1) Al-Nashiri's presence was voluntary; (2) Al-Nashiri did not have to talk with law enforcement; (3) Al-Nashiri could end the meeting at any time; (4) the agents were not interested in any statements Al-Nashiri had made during the former RDI Program; and (5) any statement Al-Nashiri did make to the law enforcement agents could be used against him in court. In other words, unlike any prior questioning Al-Nashiri had experienced, the law enforcement agents thoughtfully and fully informed Al-Nashiri that he was the "boss" and that he had certain rights when speaking with them.

Id. at 8.

First, we note government counsel do not dispute the absence of a cleansing statement. Additionally, the advice agents provided to appellee before his LHM interviews claiming *no interest in prior statements* is not the equivalent of the more specific advisement that his *prior statements could not be used against him in a criminal trial*. Government counsel's recitation of facts (including facts about how the LHM interviews were conducted), *see id.* at 26–37, does not conclusively contradict the finding that appellee had "no reason to believe that his many prior incriminating statements" would not later be used against him in a trial, Gov't's App. 38. *See* Gov't's Br. 7–8 (government's argument). Government counsel have not demonstrated that the military judge "erroneously characterized the details of Al-Nashiri's LHM interviews." *Id.* at 7.

We find no error in the military judge's finding on the rights advisement: law enforcement never notified appellee that his prior incriminating statements made during CIA custody could not be used in a later prosecution against him. Nor did the judge err in finding that appellee had "no reason to doubt" that he might unexpectedly be transferred and exposed to EITs again at a different site. Gov't's App. 38.

D. The contract and voluntariness

Finally, although framed as erroneous findings of fact, the government essentially finds fault in a different, broader area—the effects of "an implicit 'contract.'" Gov't's Reply Br. 17. The government asserts the military judge "minimized," "misconstrued, dismissed the significance of, or otherwise failed to consider important facts that demonstrated Al-Nashiri's mental state at the time of the LHM interviews." Gov't's Br. 8, 11. We find no abuse of discretion in the military judge's findings of fact on the contract, and agree with the contested conclusions thereon, which we consider next in more detail.

The primary focus of the government challenge to the military judge's ruling on appellee's motion to suppress is on the findings of fact about the contract and his application of the law to those facts. In part, government counsel assert that

> the Military Judge abused his discretion by finding that Al-Nashiri believed he had no choice but to answer law enforcement's questions based only on the Military Judge's assumption that a "contract" must have at some point existed between Al-Nashiri and RDI Program questioners and the psychological impact of that contract continued through the LHM interviews despite the absence of evidence supporting that critical conclusion.

Id. at 8.

1. Significance of the contract

In his ruling, the military judge provided a succinct description of the concept of the contract:

> k. After the EIT phase, detainees generally had a fear of going back into the EIT phase. [Dr.] J described their program as creating a "contract" between the interrogators and detainees, whereby the interrogators made sure the detainees understood that they would not go back into EITs if they continued to cooperate and provide intelligence. The interrogators wanted the detainee to realize that he had a "pathway" whereby, if he provided even a little information, he could start to find a way out of captivity. The interrogators tried to ensure the detainees understood the contract was valid and EITs would not happen unless the detainee became non-compliant again. Therefore, the threat of a return to the EIT phase continued to dangle over the heads of detainees such as the Accused like a proverbial sword of Damocles.

Gov't's App. 6–7. He also described "[m]aintenance visits" from Drs. M and J "as a reminder to the Accused that a failure to cooperate would breach the contract and result in the possibility of returning to the 'hard times,' reimplementation of the EITs." *Id.* at 16. The military judge noted that the doctors had eventually "concluded physical pressures were no longer necessary because the contract could be maintained with emotional and psychological coercion." *Id.* at 17. The last maintenance visit was in 2006, before appellee was transferred to Guantanamo Bay. *Id.* at 18.

The military judge's consideration of the psychological impact of the RDI program on appellee as a factor in his voluntariness analysis reveals the great significance he gave to the contract:

> 8. Psychological impact on the accused. This factor is perhaps the most important and weighs most heavily towards suppression. The entire goal of the RDI program and the contract created by Drs. M and J was to provoke an involuntary response to stimuli which would condition compliance from the Accused. The compounding effects of the program—both physical and psychological—could not be removed by the law enforcement agents in 2007 and cannot be ignored by the Commission.

Id. at 42. After consideration of "the totality of all relevant circumstances," he determined that he was "most persuaded by the contract established and maintained by Drs. M and J." *Id.* at 44. The military judge concluded:

> cc. . . . The contract required the Accused to speak to the agents in January and February 2007. The Accused had no reason to believe the contract had lapsed. He therefore had only the Hobson's choice of refusing to talk and risking the consequences or

> continuing to comply and implicating himself for the 201st time. The Commission finds this to be no choice at all and cannot be confident the Accused believed he was free to remain silent on 31 January 2007[, the first of his three days of LHM interviews].

Id.

2. Contours of the contract

The government argues that the record does not support the military judge's finding about appellee having made his LHM statements in compliance with a theoretical contract. Gov't's Reply Br. 16. Counsel argue that any contract during the RDI program (a) "*related to forward-looking intelligence information*," *id.*, and (b) any contract requiring cooperation "*ended long before the LHM interviews*," *id.* at 19. Stated differently, they assert the contract did not apply to the LHM interviews and, even if it did, it ended before those interviews began. We find the military judge did not err in finding that a contract existed and was in force when appellee gave his LHM statements.

a. "Forward-looking intelligence"

We first examine the government's argument that the contract was forward-looking. Government counsel claim the military judge abused his discretion in finding that there existed a contract concerning information about past events where the finding is unsupported by the record. *See id.* at 16–19. They instead contend that any theoretical contract had the goal of "elicit[ing] cooperation" to acquire "forward-looking intelligence information to prevent the next attack," which goal was not considered by the military judge. *Id.* at 17; *see id.* at 18–19. In short, they state the purpose of the RDI program and the EITs—and similarly the purpose of the contract—was to get intelligence, not confessions, and RDI interrogators were not interested in appellee's statements about the past.

Government counsel argue that appellee knew there was a difference between past events and future intelligence, and his early interactions with Drs. M and J under the contract revealed the contract's forward-looking purpose. *Id.* at 18. They explain that appellee's "willing[ness] to share information about past events *even before* the application of *'contract'-forming EITs*"[27] demonstrates that the theoretical contract "would not have coerced or conditioned Al-Nashiri to voluntarily participate in his LHM interviews"

[27] "Contract-forming EITs" suggests an argument that the contract could not be formed until EITs were put into use. Under this argument, once their use began, the final condition necessary for the contract's formation was realized and the contract became effective and active. The use of EITs on detainees began in early August 2002 (starting with Abu Zubaydah), after the DoJ approved their use. Gov't's App. 2984 (testimony of Dr. J); *see id.* at 1262, 2813–16 (Drs. M and J testifying that DoJ approval was required before EIT use). We find little merit in this argument and give it no further consideration.

concerning past events. *Id.* (emphasis added). Therefore, as a contract formed to get information about future acts (intelligence), the contract simply did not apply to appellee's LHM statements about past events.

Government counsel do not dispute the military judge's findings that (i) the LHM interviewers "told the Accused they were aware he may have made prior statements but that they were 'not interested' in the previous questioning or his previous answers," Gov't's App. 21; *see* Gov't's Br. 8, 27–28, 60, 85, and that (ii) the LHM interviewers had "reviewed intelligence products prior to the interviews in order to be able to demonstrate to detainees that the agents knew a lot about them,"[28] Gov't's App. 19.

We find the military judge did not err when he decided not to limit his understanding of the contract to forward-looking intelligence. He found that, at the time of the LHM interviews, appellee did not know what to believe:

> v. . . . Given all he had experienced before and with the understanding that he had already incriminated himself numerous times in the past, the Commission is unsurprised that the Accused chose not to gamble by immediately putting his faith and trust in yet another group of U.S. officials who showed up at a former black site to "debrief" him.

Gov't's App. 39. The military judge concluded that appellee was conditioned to answer questions from United States government officials—be they debriefers, interrogators, or interviewers—not that he was conditioned to answer questions only about future events. The military judge did not err in making this conclusion. It was within the military judge's discretion to consider the contract from this perspective.

b. Evidence of conditioned cooperation

The government contends that "no evidence supports the Military Judge's finding that the 'contract' . . . conditioned Al-Nashiri to cooperate with law enforcement agents at Guantanamo Bay in January–February 2007." Gov't's Br. 10. We disagree.

Dr. J testified as a lay witness over several days at the hearing sessions on Appellate Exhibit 467, the motion to suppress. *See* Gov't's App. 2732–34, 2891, 3146, 3312. He discussed the conditioning of appellee specifically and detainees generally. The following exchanges with appellee's counsel, all occurring on April 14, 2023, are illustrative. In direct examination by assistant defense counsel, Dr. J testified:

[28] Knowledge that one's interviewers know "a lot about" prior self-incriminating statements, Gov't's App. 19, is not insignificant. *See Anam*, 696 F. Supp. 2d at 7 (expressing concern over interrogators' access to detainee's previous, coerced confessions).

> Q. And we talked about earlier that threat of return to prior status was ever present?
>
> A. Yeah. It diminished significantly by the time they got to this location [No. 7] for those that had been in the program already, like [Al-Nashiri].
>
> Q. Yep. But they knew it was there?
>
> A. They always knew it was there. I mean, they weren't reminded intentionally every day. It never came up. But you don't forget that, so of course they were cognizant of that.

Id. at 3246–47. On redirect, also by assistant defense counsel, Dr. J further testified:

> Q. Let's go through a couple things. You made a comment on cross-examination that Mr. al Nashiri was able to get back on track. Did I catch that correctly?
>
> A. Yes, you did.
>
> Q. And by back on track, you mean he was fulfilling the terms of the contract that had been established between, I'll say, you and him; is that accurate?
>
> A. Yes. He re-established that with his debriefer, I'm talking about, and they were able to make progress together, yep.
>
> Q. And as we talked about on direct, what that contract was is he provides information and they don't put him back into EITs?
>
> A. Correct.

Id. at 3288. Dr. J gave the following testimony in response to questions from the military judge:

> Q. Okay. But they -- it wasn't as involved. This was still maintenance visits at every location, correct?
>
> A. Correct.
>
> Q. And what were you maintaining?
>
> A. A rapport between the debriefing staff and the detainee.
>
> Q. Were you maintaining the contract that you discussed earlier?

> A. Yes. Sometimes it would involve amenities. Sometimes they had a consternation about food, and we would try and resolve those issues.
>
> Q. And the maintenance of the contract, as we discussed earlier -- as I heard earlier was cooperate and discuss openly or return to EITs, correct?
>
> A. That's correct.

Id. at 3299.

Dr. J's testimony supported the military judge's finding about the enduring effect of the contract. The military judge did not commit error on this matter. Moreover, in contrast to some suggestion by the government,[29] Dr. W's testimony did not contradict Dr. J's testimony. Indeed, to some extent Dr. W endorsed the psychology of conditioning. *See infra* Part III.D.2.d (introductory paragraphs and paragraph (i)). The government has not persuaded us that "no evidence" supported the military judge's findings about the enduring effect of the contract on appellee.

In sections c and d, which follow, we address the contract's duration—that is, when it ended. Government counsel maintain the contract was inactive when appellee gave his LHM statements because (i) facts and expert witness testimony show that the contract and appellee's conditioning were not in effect at the time of the LHM interviews, Gov't's Reply Br. 19–30, and (ii) other evidence shows appellee understood the contract was inactive when he gave his LHM interviews, *id.* at 30–38.

c. The contract's enduring effect

Here, we consider the government's argument that the contract and conditioning were not in effect during appellee's LHM interviews based on certain "objective evidence." *Id.* at 25; *see id.* at 20–25. In support of their argument, counsel contend that the evidence establishes (i) diminishing consequences for appellee's disciplinary infractions before his transfer to Guantanamo Bay, becoming "remarkably more benign," *id.* at 21 (quoting Gov't's App. 3435 (testimony of Dr. W)); (ii) eventual suspension of debriefings as "unfruitful," *id.* at 21–22; and (iii) the absence of cue stimuli (such as a towel,[30] threats of "hard times," or presence of Dr. M or Dr. J) near or during appellee's LHM interviews, *id.* at 22–25. Without providing a legal

[29] The government argued Dr. W had "testified that even if Al-Nashiri was 'pressured' to confess while in CIA custody, 'when that pressure is relieved and the person is no longer under duress, then that person fairly quickly assumes much more autonomous thinking and freewill; in other words, that duress has to be maintained or there is no conditioning.'" Gov't's Br. 43–44 (quoting Gov't's App. 3555–56).

[30] A towel placed around the back of a detainee's neck to pull him close in without injury to the neck or spine was an EIT known as the "attention grasp." Gov't's App. 2852–54.

basis, *see* Gov't's Br. 62, counsel conclude that in light of these points of fact "a reasonable person in Al-Nashiri's situation would have believed that [the] 'contract' . . . was no longer in effect" and had ended by January 31, 2007, the first day of appellee's LHM interviews, Gov't's Reply Br. 25.

We are not persuaded that the evidence highlighted by the government required the military judge to conclude that the contract was inactive at the time of appellee's LHM interviews. First, "more benign" consequences from appellee's "lack of cooperation," Gov't's Reply Br. 21 (citation omitted), is not the same as *no consequences*—even the government does not make this assertion.[31] Second, the government's description of objective evidence relates to factors the military judge could and, for the most part, did consider.[32] We note, for example, the military judge found that the conditions at the last three locations where appellee was held before his transfer to DoD custody at Guantanamo Bay "were an improvement," Gov't's App. 18, and "between September 2006 to March 2007, confinement conditions at NSGB improved slightly," *id.* at 19.

The military judge's comparison of the contract's "threat of a return to the EIT phase" to "a proverbial sword of Damocles," *id.* at 7, has support in Dr. J's testimony, *see supra* Part III.D.2.b. That testimony indicates that specific cue stimuli were not required for detainees to know the threat of return to prior status always loomed. In sum, the military judge did not err in his consideration of evidence when he analyzed the enduring effect of the contract. His ultimate conclusion—that the government did not show that the coercive contract was no longer in effect when appellee gave his LHM statements—was not erroneous.

d. Expert testimony

Government counsel next raise error with respect to expert testimony and the contract's duration. First, they assert that the military judge ignored Dr. W's testimony about the contract and make a related argument pertaining to appellee's mental capacity; second, counsel assert that expert testimony was required to support the findings of fact on appellee's capacity to give a voluntary statement.

As a preliminary matter, we address the quality of Dr. W's testimony on the issues before the military judge. The record reveals that Dr. W avoided opining on whether appellee believed his lack of cooperation with LHM interviewers could have resulted in negative consequences (including withdrawal of amenities and privileges or a return to EITs). Dr. W, in fact,

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[31] [redacted] For example, government counsel assert that the Forced Cell Extractions (FCEs)—at [redacted] were no more excessive than the measures used in civilian institutions. Gov't's Reply Br. 11.

[32] We need not quarrel with the government's description of "objective evidence."

endorsed the concept that a detainee could be conditioned to cooperate and testified that consideration thereof required a case-by-case analysis.

Many of his answers had the caveat of "case-by-case basis." For example, the military judge summarized a case in which individuals, who were "extremely" abused by one law enforcement agency, were questioned by a different law enforcement agency. Gov't's App. at 3557. He then asked Dr. W, "were those individuals conditioned or were they operating under free will when they confessed to those crimes?" *Id.* He answered that it would depend on their perception of the difference between the two sets of questioners, explaining that "[y]ou have to take it on a case-by-case basis." *Id.*

Moving from the law-enforcement hypothetical to the facts in appellee's case, the military judge asked if maintenance visits would "keep somebody conditioned to cooperate under questioning." *Id.* at 3558. Dr. W answered, "I think it's in the eye of the beholder, and you really have to take it on a case-by-case basis." *Id.* He testified that the "hard times" individual detainees feared could range from withdrawal of privileges to EITs, *id.*, and continued cooperation "also depend[ed] on their experience [with] the EITs and how they were affected," *id.* at 3559. Dr. W did not "want to presume or speculate" and thus discussed in his testimony some variables to consider with an examinee. *Id.* at 3559. He explained that he needed to interview appellee to formulate a more definite opinion on the military judge's question. *Id.* at 3558–59.

(i) Ignoring Dr. W's testimony?

Turning to the government's first point, counsel assert that the military judge ignored Dr. W's testimony about the contract and they suggest he gave no weight to Dr. W's testimony that appellee exercised freewill at his LHM interviews. Gov't's Br. 74–76; Gov't's Reply Br. 29–30. The record does not support either assertion.

The military judge clearly did not ignore Dr. W's testimony in his findings. For example, during a hearing on April 20, 2023, Dr. W gave the following testimony in response to the military judge's questions:

> Q. A person is captured and held and they are told you either cooperate with us or you receive the EITs, is that a valid choice? Is that person making a valid choice when they cooperate?
>
> A. I don't think that the person's necessarily exerting free will.
>
> Q. Okay.
>
> A. They're giving -- they're being given a narrow lane within which to operate, but just in the -- the choice is rather obvious under the circumstances.

> Q. Now, Dr. J has testified that the purpose of the program that they were involved in, that they managed, was to create a contract where a person would choose to cooperate rather than to return to EITs. Is the choice to cooperate under those conditions a valid choice?
>
> A. Again, whether -- in my professional opinion, I don't think that it's a choice that really implicates free will.
>
> Q. Okay.

Gov't's App. 3553. The military judge reflected this testimony in his ruling when he concluded appellee's situation left appellee with "no choice at all" and stated that the commission "cannot be confident the Accused believed he was free to remain silent on 31 January 2007." *Id.* at 44. The military judge also quoted from Dr. W's testimony in finding as fact that, "If a captive faces a choice between compliance and 'extreme pain or suffering, then that's not a real choice.'" *Id.* at 26 (quoting *id.* at 3427 (Tr. 24476)).

Another example showing how the military judge considered Dr. W's testimony is located in his finding on the admissibility of appellee's CSRT statements. Dr. W testified that to determine whether a "social contract"[33] is active, one must look at "[t]he degree to which one or both parties are actually participating in [that contract]." *Id.* at 3562. The military judge apparently incorporated this part of Dr. W's testimony into his CSRT finding, as follows:

> hh. . . . After day three of the LHM interviews, however, likely based upon the relaxed and cordial interactions between himself and the agents and the repeated reminders that he was "the boss" during the interviews, the Accused reached a point where he was willing to assert his right to terminate the interview. When he terminated the interview after three days, he presumably did so because he no longer feared unknown consequences that might follow. By the time of the CSRT hearing, the Accused knew for sure that he did not suffer any consequences for terminating the interview in early February. In other words, the Accused would have known after the LHM interviews that he had an actual choice whether or not he would speak.

Id. at 46.

In sum, the military judge determined that, by the end of the LHM interviews, coercive conditions had dissipated: appellee could conclude that his participation in the contract was no longer inescapable. Thus, the military judge did not ignore Dr. W's testimony about the contract. Whether or not he gave "great weight" to Dr. W's testimony, Gov't's Br. 74 (citation omitted), the

[33] The "social contract" is the "contract" and "theoretical contract" referenced throughout this decision. *See* Gov't's App. 3540.

evidence recited in the above examples shows the judge certainly gave it some weight. *See infra* paragraph (ii) (discussing weight given to Dr. W's testimony).

Related to their first point concerning Dr. W's testimony on the contract, government counsel assert the military judge found that appellee was suffering from PTSD symptoms at the time of his LHM interviews. *See* Gov't's Br. 76–79. They note Dr. W testified "that the circumstances surrounding the law enforcement interviews demonstrated Al-Nashiri's capacity for voluntariness," *id*. at 74, highlighting that he

> concluded, based on his review of the extensive record, that in Al-Nashiri's 2007 LHM interviews (1) he was not exhibiting any symptoms of learned helplessness, (2) he was not exhibiting any symptoms of PTSD, and (3) he was able to make voluntary statements to the law enforcement agents in his interviews.

Id. at 72–73 (footnote citations omitted).

At the outset, we observe the military judge's ruling does not state or imply that appellee was exhibiting symptoms of PTSD (or learned helplessness[34]) when he gave his LHM interviews. *See* Gov't's App. 26. Therefore, we see no merit in the government's contentions thereon.

Regarding the government argument that the military judge ignored Dr. W's testimony about appellee's capacity to make voluntary statements, Gov't's Br. 72–75, the military judge's ruling states:

> ee. . . . The Commission concludes that the Government has not proven by a preponderance of the evidence that the presumed taint from the prior years of physical and psychological torment was dissipated when the Accused was again confronted with interrogators in January–February 2007. Instead, the evidence supports a conclusion that the Accused did what he was trained to do: comply. Compliance is not the same as the "mental freedom" addressed by the Supreme Court in *Ashcraft* [*v. Tennessee*, 322 U.S. 143, 154 (1944)]. Compliance is not enough to establish the voluntariness of the Accused's statements.

Gov't's App. 45.

The government notes, but raises no claim of error, about the military judge's finding that appellee "was diagnosed with PTSD by an R.M.C. 706 board in 2013 and by Dr. C in 2014." Gov't's Br. 76; *see* argument section in Gov't's Class. Br. Addendum 10. Instead, counsel argue the military judge

[34] Dr. W testified that learned helplessness means "passive defeatism, where a person no longer takes initiative," Gov't's App. 3376, as when someone long in illegal captivity does not try to leave or report the crime when the opportunity presents itself, *id*. at 3377–78. Learned helplessness, however, is undefined in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) and it is not a diagnosis. *Id*. at 3376.

should have "consider[ed] important facts resulting from the R.M.C. 706 board." Gov't's Br. 76.

In his ruling, the military judge considered the effects of the trauma caused by the torture and abuse appellee experienced in the four years before his LHM interviews, without focusing on details from the Rule for Military Commissions 706 board. *See, e.g.*, Gov't's App. 26, 33, 42. We do not find specific facts from that board so important that their omission from the military judge's ruling was an error.[35] We considered the additional facts and argument provided by the government in its classified pleadings. *See* Gov't's Class. Br. Addendum 10. Our conclusion on this issue remains unaffected.

(ii) Necessity of expert testimony?

In their second point, government counsel argue the military judge erred in finding that appellee "felt psychologically bound by a 'contract'" without "supportive expert testimony." Gov't's Br. 70 (citation omitted). They argue that "[b]ecause the Military Judge is not a trained psychiatrist, he should have afforded Dr. W's unopposed expert opinion on conditioning 'great weight.'" *Id.* at 74 (citation omitted).

We disagree with the government's suggestion that the issues surrounding the contract related to "technical questions . . . beyond the competence of lay determination." *Id.* at 71 n.485 (alteration in original; citation omitted). We tend to agree with appellee's argument, in which he states the government "suggests that because of Dr. W's credentials, the military judge should have abdicated his decision[-]making authority to Dr. W. Instead, the military judge in his discretion gave Dr. W's opinion the weight he believed it deserved." Appellee's Br. 25 (citation footnote omitted).

Even if we presume the military judge gave Dr. W's testimony less weight than the government argues it deserved, we see at least two good reasons for doing so. First, Dr. W did not look at the totality of the circumstances in his voluntariness analysis before he rendered his opinion. He, instead, limited his opinion to circumstances surrounding a particular place and time—from the day appellee arrived at Guantanamo Bay in September 2006 through the date of his CSRT statements in March 2007. Gov't's App. 3657. The government made this point clear at the hearing. After defense counsel cross-examined Dr. W about appellee's experience with EITs and torture, *see id.* at 3602–56, and after the military judge asked him about the intentions behind EITs and maintenance visits, *see id.* at 3551–61, assistant trial counsel asked:

[35] We reviewed the military judge's supplemental findings of fact in classified Appellate Exhibit 467DDD and the report of the Rule for Military Commissions 706 board in Attachment R to classified Appellate Exhibit 467C.

> Q. And so to clarify, the relevant time frame that you're looking at that you've testified to is arrival at GTMO [Guantanamo Bay], September 2006, to -- through March, the CSRT?
>
> A. Yes.
>
> Q. So assuming that every act that [defense counsel] went through that happened during [Al-Nashiri's] time in the RDI program, assuming all of that to be true with every intention that was stated, is that relevant at all to your opinion that you've rendered today for his statements in 2007?
>
> A. No, it's not.

Id. at 3657–58; *see also id.* at 3538–39 (Dr. W providing same time frame for his testimony).

Second, while Dr. W read Dr. J's testimony on the contract and maintenance visits, *id.* at 3526, he did not recall some parts of that testimony. In particular, he did not recall Dr. J testifying to making "regular visits to renew the contract . . . being if you do what we want you to do, which in part was answer our questions, you can avoid the bad stuff." *Id.* at 3525. When asked if Dr. J testified that "the intent . . . was that people were conditioned to answer questions when they were asked," Dr. W replied, "that's not how I heard Dr. J express it." *Id.* at 3431–32. He explained his understanding of Dr. J's testimony as being "that people were conditioned to cooperate . . . and [be] collaborative."[36] *Id.* at 3431.

The limited scope of Dr. W's analysis (to events around appellee's LHM and CSRT interviews) and his interpretation of Dr. J's viewpoints on conditioning and maintenance are good reasons for why the military judge might have given less weight to his testimony. We find that the government has not demonstrated (i) that the military judge ignored Dr. W's testimony, and (ii) that expert testimony was required to support the judge's findings of fact.[37] The military judge did not err with respect to the weight he gave to Dr. W's expert testimony.

e. Subjective understanding on voluntariness

In the fifth and final argument regarding the contract that we discuss, the government argues the military judge did not consider, ignored, minimized,

[36] Relatedly, in addition to record evidence, Dr. W relied on out-of-court conversations with Drs. M and J to understand the intent or purpose of maintenance visits. Gov't's App. 3431–32, 3525–27, 3539–40. This may have colored how he comprehended Dr. J's in-court testimony on maintenance or impacted his recollection of that testimony. *See id.* at 3431–32, 3525–27, 3539–40.

[37] Given the outcome of our decision, there is no need to consider appellee's allegations questioning the thoroughness of Dr. W's review of the record. *See* Appellee's Br. 25–29. We decline any invitation to do so.

mischaracterized, or misconstrued evidence supporting a subjective understanding by appellee that his statements in the LHM interviews were voluntary. The government asserts appellee "understood that he was in DoD custody and that he would not be returning to CIA custody," regardless of actual control. Gov't's Br. 66. We consider five of the government's arguments in support of its position: (i) the response to any misbehavior by appellee after his transfer to DoD, Gov't's Reply Br. 20–22, (ii) his own "unguarded statements" on being interviewed, (iii) the rights advisement LHM interviewers gave him, (iv) his ICRC meetings, and (v) the improvement in his confinement conditions over time, *id.* at 30–38.

(i) Response to behavior upon transfer to Department of Defense (DoD)

~~(CUI)~~ Government counsel argue that "Al-Nashiri's habitually problematic behavior upon transferring to DoD custody—including repeatedly [redacted] 3. . . demonstrates Al-Nashiri's own understanding about the lack of force of the purported 'contract' and his capacity for free will." Gov't's Br. 10. They further argue that behavior like this at Guantanamo Bay "before the LHM interviews is strong circumstantial evidence of [appellee's] subjective understanding that he was no longer in the 'hard times' and would not return to them." *Id.* at 11. In other words, the government claims that appellee believed his confinement circumstances would not worsen again because his behavior did not prompt a move to a less desirable location or did not cause re-initiation of EITs or coercion, as it had in the past. A contra inference is that belligerent behavior is irrelevant because "hard times" were the contractual consequences for appellee when he did not answer questions—not the consequences for crudeness towards the guards. Here, the military judge was free to draw the inference that he believed appropriate, and we agree with his conclusion.

While appellee's behavior upon transfer to DoD custody could be considered circumstantial evidence of appellee's subjective understanding on whether the contract was in effect, the military judge did not err in giving this evidence less weight than the government would like.

(ii) "Unguarded statements" about Letterhead Memorandum (LHM) interviews

The government asserts the military judge ignored another fact—appellee's "unguarded statements." *Id.* at 93. Counsel state: "Indeed, at least *ten* days before his LHM interviews, another detainee counseled Al-Nashiri based on that detainee's experience during the law enforcement interviews." *Id.* Counsel contend that "[d]uring this discussion, Al-Nashiri outlined his intent to lie during his upcoming FBI interviews." *Id.* These unguarded statements, they argue, "further demonstrat[e] the control [appellee] understood he would have during the interviews and that he was not under fear of the consequences of

breaching a 'contract.'" *Id.* (citing argument section in Gov't's Class. Br. Addendum 11–12).

While the military judge did not specifically mention these facts in his ruling, they would have done little to tip the scale towards voluntariness. The military judge acknowledged that appellee had *some reasons* to believe he could refuse to talk to the LHM interviewers without negative consequence and considered appellee's choices after years of conditioning:

> v. In essence, when the agents finally provided the Accused with some form of a rights advisement, he had to ask himself whether he was willing to risk that he could say nothing, without harsh ramifications, or whether he would just continue to abide by the contract, as he was conditioned to do for several years, and repeat the same incriminating statements he had made numerous times. Given all he had experienced before and with the understanding that he had already incriminated himself numerous times in the past, the Commission is unsurprised that the Accused chose not to gamble by immediately putting his faith and trust in yet another group of U.S. officials who showed up at a former black site to "debrief" him.

Gov't's App. 39.

In other words, appellee's unguarded statements were not conclusive evidence on his subjective understanding of voluntariness for any particular statement he made during his LHM interviews. Appellee's rights advisement also informed his understanding. *See* discussion *infra* paragraph (iii). In our review, we find that it was reasonable for the military judge to give appellee's unguarded statements less weight than other evidence of appellee's subjective understanding of voluntariness.

The government highlights that "immediately after Al-Nashiri finished speaking with law enforcement on February 2, 2007, [when he gave his last LHM interview,] he told a fellow detainee that he knew detainees could terminate their LHM interviews at any time and that the FBI could not force them to continue." Gov't's Br. 9. Government counsel argue:

> This clear and unambiguous statement, corroborated by the testimony of the interviewing agents, demonstrates Al-Nashiri's subjective understanding that the LHM questioning in January–February 2007 fundamentally differed from the interrogations during the former RDI Program. . . . By ignoring direct and collective evidence of Al-Nashiri's state of mind in favor of a speculative conclusion that Al-Nashiri suddenly and only appreciated the change in questioning and his confinement circumstances on February 2, 2007, the Military Judge assumed the role of "mind reader" and not that of fact finder.

Id. at 9–10.

We disagree with the government's characterization of the military judge's holding. The military judge generally accepted the government's argument about appellee's subjective understanding of voluntariness with respect to the CSRT statements he made in March 2007, after the conclusion of his LHM interviews. *See* Gov't's App. 46–49. Concerning appellee's LHM statements, however, there is a deficiency in the government's argument on their voluntariness. That deficiency lies in a record that does not adequately show which specific LHM statements by appellee came *after he realized* he could refuse to talk to the FBI without risk of "hard times."

The military judge voiced this very concern stating, in part:

> x. . . . Although the Commission is convinced that by the end of the third day of the interviews, the Accused understood that he was not required to speak to the agents and that he was confident that he would not suffer a return to the "hard times" by refusing to speak, the Commission cannot find that he understood that fact when the interviews began. Further, because the interviews were not recorded and the LHM does not reflect a timeline of when statements [and] certain admissions were made, the Commission cannot assume that the incriminating statements reflected therein were only made after the Accused finally came to the realization that he could trust what [the LHM interviewers] had told him about his right to refuse to talk.

Id. at 39–40. Thus, it was clear to the military judge that appellee made voluntary statements in March, but unclear whether any particular LHM statement in January or February was voluntary in the absence of assumptions, which he was unwilling to make.

We find the military judge did not fail to consider appellee's unguarded statements, including those statements highlighted by the government. Nor did he err in his consideration of them. In reaching this conclusion, we considered additional facts and argument in the government's classified pleadings. *See* Gov't's Class. Br. Addendum 11–12; Gov't's Class. Reply Br. Addendum 9–12. That classified material does not impact our decision.

(iii) Rights advisement

The government questions the military judge's consideration of the rights advisement LHM interviewers gave to appellee. Counsel assert:

> First, the Military Judge concluded that the lack of "traditional" *Miranda* warnings to Al-Nashiri weighed in favor of suppression, finding that the admonishments the agents gave to Al-Nashiri were merely an attempt "to increase the likelihood of obtaining incriminating information from [him]." . . . [T]he Military Judge

> failed to consider the simpler, more direct explanation: *Miranda* warnings did not apply to Al-Nashiri, an alien belligerent not present in the territorial United States, and the rights of which Al-Nashiri was apprised were the rights available to him under the law.

Gov't's Br. 8–9 (first brackets in original; citation footnote omitted). Government counsel concede acknowledgement by the military judge "that the law does not require *Miranda* advisements" but claim he "nevertheless punished the Government for failure to go above the law." *Id.* at 61–62; *see id.* at 58 n.423.

The government has not demonstrated the military judge "punished the government" or failed to consider that appellee had no right to a "traditional" *Miranda* warning. The military judge clearly stated a correct understanding on the inapplicability of *Miranda* in a footnote to his decision, as follows:

> This is not to imply that the Accused is entitled to a *Miranda* warning or that he is entitled to suppression of his statements due to the lack of such a warning. Clearly, the Military Commissions Act does not require such a warning and the Commission does not find that *Miranda* applies to unprivileged alien enemy belligerents held at NSGB while awaiting trial for alleged law of war violations. However, the nature of the rights advisement provided to the Accused by the law enforcement agents can be considered among the totality of the circumstances surrounding the January–February 2007 interviews.

Gov't's App. 36 n.61. Additionally, the military judge noted the FBI policy that *Miranda* warnings, in general, were not required prior to interviewing DoD detainees held at Guantanamo Bay. *Id.* at 21 n.40.

In his analysis of *Elstad*, the military judge identified *the benefit—not requirement*—of reading *Miranda* warnings to remove taint from a previous unwarned but voluntary admission. *See id.* at 31. The Supreme Court in *Elstad*, the military judge remarked, held that a *Miranda* warning after a voluntary, but unwarned statement "ordinarily should suffice to remove the conditions" prohibiting admissibility of the prior statement, *id.*, a benefit of giving a *Miranda* warning. He further noted: "Despite demonstrating, on numerous occasions, the ability to provide a full rights advisement to other detainees in foreign countries, . . . the U.S. government, including the DOJ and the CIA, chose to create a specific and limited rights advisement for the Accused."[38] *Id.* at 35–36 (citing App. Ex. 518 (Gov't's App. 749–50) (checklist of rights for certain detainee interviews, initialed by DoJ on January 31, 2007)); *id.* at 35,

[38] The military judge seemingly found that law enforcement, the prosecution team, the DoJ, and the CIA created a special rights advisement for appellee so the government could obtain new incriminating statements that left appellee "in the dark in several important respects." Gov't's App. 35; *see id.* at 35–36. While this motivation could have been at play, we acknowledge there may be other explanations for the particular rights warning given to appellee.

n.60 (listing three other detainees who received rights warnings akin to *Miranda*); *see id.* at 2150–53 (SA G describing process of reading rights to appellee). The military judge looked beyond the issue of whether *Miranda* or similar warnings were required. He looked to how giving such warnings might have helped shape the conditions for a voluntary admission.

For the above reasons, we find the government's concerns with respect to appellee's rights advisement lack merit. The military judge clearly did not conclude appellee was entitled to *Miranda* rights, and he expressed a non-punitive reason for concluding a *Miranda* warning could have moved the scales towards voluntariness.

(iv) International Committee of the Red Cross (ICRC) visits

Again, the government takes issues with the weight the military judge gave to evidence, rather than asserting a failure to consider it. The government asserts that "[t]he Military Judge failed to *meaningfully consider* Al-Nashiri's meetings with the ICRC at Guantanamo Bay during October and December 2006." Gov't's Reply Br. 15 (emphasis added). The government reasons that appellee gave permission for his name to be used in the ICRC report "with full knowledge that this report would be provided to United States officials" and he "certainly would not have done so if he remained in fear of future harsh treatment." *Id.* Government counsel continue, stating "[t]he ICRC meetings provide unassailable proof that Al-Nashiri's conditions of confinement had radically changed." *Id.*

The military judge addressed the ICRC meetings in his ruling by acknowledging that appellee had "two visits with the ICRC once he was returned to NSGB." Gov't's App. 35. That these visits, in fact, occurred, do not make it "certain" or "provide unassailable proof" that appellee knew he never again would face harsh treatment for noncooperation. We find that the military judge did not err by giving the facts surrounding appellee's communications with the ICRC less weight than the government would like.

(v) Improvement in confinement conditions

Government counsel claim the military judge "downplayed the change in conditions of [appellee's] confinement." Gov't's Br. 80. They assert conditions from Location 2 to Camp 7 "drastic[ally] improve[d]" and this change "subjectively demonstrates that any 'contract' was no longer in effect." Gov't's Reply Br. 37. They claim the military judge erroneously focused on "the conditions of confinement between Location 9 (CIA) and Camp 7 (DoD)." *Id.* We disagree that the military judge's focus was limited in this way. As explained *supra* Part III.C.3, we find the military judge did not err in giving the change in confinement conditions less weight than the government would like.

On this point, "[b]etween 2002 and 2006 in the RDI program, the [military judge found] that the Accused was subjected by the CIA to physical coercion and abuse amounting to torture as well as living conditions which

constituted cruel, inhuman, and degrading treatment." Gov't's App. 18. In a general comparison of the conditions at the sites, the military judge also found that "Locations 7, 8, and 9 were an improvement compared to 3, 4, and 5. Though the detainees remained in solitary confinement with constant bright lights, they got bunks in Location 7 and a real toilet in Location 9." *Id.* Regarding Locations 8 and 9, the military judge found:

> kk. . . . DETENTION SITE VIOLET (Location 8), which also included solitary confinement and bright lights[, had] . . . no EITs, as [Drs.] M and J concluded physical pressures were no longer necessary because the contract could be maintained with emotional and psychological coercion.
>
> ll. . . . DETENTION SITE ORANGE (Location 9) . . . was an open compound, but detainees were still held in solitary confinement. Detainees had access to a library and food choices. This is where [Dr.] J conducted his last maintenance visit with the Accused sometime in 2006, the same year the Accused was transferred for the last time to Guantanamo Bay.[39]

Id. at 17–18.

The government would like the military judge to have focused more on the improvement in confinement conditions throughout appellee's captivity, stating "[t]hese are important facts that the Military Judge should have considered in his voluntariness analysis." Gov't's Reply Br. 38. The military judge, however, did not ignore conditions of confinement. Indeed, he specifically described the conditions at each of appellee's confinement locations during the four years prior to his LHM interviews in abundant detail. *See* Gov't's App. 8–18. The core of the government's issue thus is with the weight the military judge gave to the facts he found.

We find that the military judge did not err in terms of the weight he gave to the confinement conditions. He could have found, as government counsel suggest, that appellee's conditions drastically improved, which would prove "that any 'contract' was no longer in effect." Failure to so find, however, was not error.

E. Cumulative error

Government counsel assert in a footnote to their brief that the ruling should be vacated because "the cumulative effect of . . . numerous errors" requires it. Gov't's Br. 97 & n.620. They summarize their claims of error, including contentions about the military judge's (i) "faulty consideration of the[] facts establishing voluntariness by a preponderance of the evidence," and

[39] The government agrees that Dr. J's last maintenance visit with appellee was at Location 9 in 2006. Gov't's Br. 14 (citing Gov't's App. 3310–11 (Dr. J testifying to this fact)).

(ii) entry of "findings of fact informing his attenuation analysis that were contradicted by the record." *Id.* at 97. Counsel add that the factual errors informing the attenuation analysis addressed the location of appellee's rectal feeding, CIA operational control over appellee and forced grooming of appellee after his transfer to Guantanamo Bay in September 2006, and SA G's presence when another detainee was subjected to EITs. *Id.*

When "individual errors are insufficiently prejudicial" to warrant relief, the effect of the cumulative errors can be prejudicial. *United States v. McGill*, 815 F.3d 846, 947 (D.C. Cir. 2016) (per curiam); *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011) (stating similar). "Assertions of error without merit are not sufficient to invoke [the cumulative error] doctrine" when the court has "found no merit in appellant's assertions of error." *United States v. Gray*, 51 M.J. 1, 61 (C.A.A.F. 1999); *United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) ("One error is not cumulative error."); *cf. United States v. Addem*, 40 F.4th 666, 688–89 (D.C. Cir. 2022) (finding where court has "identified only two non-prejudicial errors, the cumulative error doctrine is of no help").

We have found the military judge's finding on the rectal feeding location to be erroneous. *See* discussion *supra* Part III.C.1. We have not found the other three findings noted by the government to be erroneous.[40] Instead, we have determined that counsel did not prove these other allegations and ultimately, whether or not the three findings were erroneous, they were non-prejudicial—other facts proved to be key to the military judge's resolution of the issues at hand. *See* discussion *supra* Part III.C.2, C.4.

For example, we found that the government's "voluntary grooming evidence" did not establish the absence of forced grooming; in other words, the government's alleged error is not a sound allegation and thus lacks merit. We found that when and how many FCEs occurred did not undermine the military judge's primary point—that FCEs were administered to appellee before his LHM interviews *while he was in DoD custody*. Again, the allegation is based on a miscomprehension of the military judge's analytical approach to the underlying issue and therefore is without merit. We also found the military judge did not state or imply that appellee *believed* SA G was involved in his RDI program; thus, the government's allegation about the finding again fails.

Having found only one erroneous finding of fact, the doctrine of cumulative error thus has no home here.

[40] Government counsel add that the military judge "minimized" details of how the LHM statements were taken, "reversed the weight to be given to certain voluntariness factors," and "diagnos[ed] Al-Nashiri's mental state" in a way that was inconsistent with the diagnoses of the medical experts in the case. *Id.* at 97–98. We understand this to be, in general, government counsel's summary of their raised claims of error. If instead they are claims of "oddities," we see no explanation of how they amount to error. *Getma Int'l v. Republic of Guinea*, 862 F.3d 45, 49 (D.C. Cir. 2017). Thus, the court is still left with just one error by the military judge.

IV. Conclusion

Having viewed the evidence in the light most favorable to appellee, and considering the issue of voluntariness de novo, we conclude that the military judge did not abuse his discretion in suppressing appellee's LHM statements to law enforcement on January 31, 2007, and February 1 and 2, 2007, at Guantanamo Bay while appellee was in DoD custody. *See* Mil. Comm. R. Evid. 304(a)(2), (4); *Schneckloth*, 412 U.S. at 226; *Elstad*, 470 U.S. at 318. The military judge correctly applied the controlling legal standard, his significant factual findings are supported by the record, and he did not disregard important facts. *See Eley*, 793 F.3d at 103; *Rudometkin*, 82 M.J. at 401. He applied correct legal principles to the facts in the record in a way that is not "clearly unreasonable." *Rudometkin*, 82 M.J. at 401. It is not error—but within the military judge's discretion—to give less weight to certain facts than the government would like. While we find that the military judge erred in his finding of fact on the location of appellee's rectal feeding, this error does not warrant vacatur of his ruling. Finally, given our decision that only one of appellant's assertions of error was meritorious, the doctrine of cumulative error does not apply here. *Sager*, 227 F.3d at 1149; *Gray*, 51 M.J. at 61; *see McGill*, 815 F.3d at 947; *Pope*, 69 M.J. at 335.

The government's appeal seeking (i) to set aside the military judge's ruling and find that appellee's LHM statements to law enforcement in January and February of 2007 should not be suppressed or, in the alternative, (ii) to vacate that part of the ruling concerning the 2007 LHM statements and remand the case to the commission for de novo reconsideration is **DENIED**.

FOR THE COURT:

Mark Harvey
Clerk of Court, U.S. Court of Military Commission Review