UNITED STATES OF AMERICA

v.

OMAR KHADR

D094- Supplemental Defense Motion

To Suppress Statements Procured Using Torture, Coercion and Cruel, Inhuman, and Degrading Treatment

8 March 2010

1. Timeliness: This motion is filed within the timeframe established by Rule for Military Commissions (R.M.C.) 905 and the Military Judge's 4 January 2010 scheduling order.

2. Relief Sought: The accused, Omar Khadr (Mr. Khadr), seeks an order declaring inadmissible into evidence all statements pursuant to § 948r of the Military Commissions Act of 2009 (MCA) and Military Commissions Rules of Evidence (M.C.R. Evid.) 304. The Prosecution has indicated that it will introduce statements by Mr. Khadr that he allegedly provided to Federal Bureau of Investigation (FBI) [redacted] Also, the Prosecution indicated that it will use statements by Interrogators 2, 11, 15, and 17. (D-094 Government Response at 22-23). The Defense respectfully moves this Commission to suppress each of the above-mentioned statements because they are the product of torture, involuntary, unreliable, do not serve the interest of justice, and are the fruit of the poisonous tree.[1]

3. Burden of Persuasion: Because this motion challenges the admissibility of Mr. Khadr's statements on the basis that they were obtained by use of torture and other forms of cruel, inhuman, and degrading treatment, the prosecution bears the burden of establishing the admissibility of these statements. M.C.R. Evid. 304(e).

4. Facts:

a. The facts in and attachments to this motion remain unchanged from the initial motion filed 7 November 2008 (D-094).

b. As stated, the instant motion extends specifically to those statements identified by the prosecution as statements of the accused on which the Prosecution intends to rely at trial. (*See* D-094 Government Response at 22-23).

c. The law and argument have been updated to reflect the recent changes to the MCA.

[1] The Defense notes that the above-mentioned government witnesses have either refused to speak with the Defense or the government has not provided adequate information for the Defense investigators to contact these witnesses. The Defense is optimistic that the Prosecution will work with the Defense to conciliate this witness issue.

5. Law and Argument:

I. MR. KHADR'S STATEMENTS ARE INADMISSIBLE BECAUSE THEY ARE THE PRODUCT OF TORTURE AND OTHER FORMS OF CRUEL, INHUMAN, AND DEGRADING TREATMENT.

a. The MCA provides "[n]o statement obtained by the use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. § [sic] 2000dd)), whether or not under the color of law, shall be admissible in a military commission under this chapter…" MCA § 948r(a). The Detainee Treatment Act (DTA) defines cruel, inhuman, and degrading treatment as "the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and Fourteenth Amendments. . . as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment." DTA §1003(d). The Senate, advising and consenting to the ratification of the Convention provided that "the United States considers itself bound by the obligation under Article 16 to prevent „cruel, inhuman or degrading treatment or punishment,' only insofar as the term „cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." 136 Cong Rec S 17486.

b. While cruel, inhuman and degrading treatment is defined by Constitutional jurisprudence, torture is defined by the Military Commission Rules of Evidence.[2] Torture[3] is defined as "an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." M.C.R. Evid. 304(b)(3). Severe mental pain or suffering is "the prolonged mental harm caused by or resulting from: (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality. . . " *Id*.

c. The facts demonstrate that Mr. Khadr suffered torture, as the term is defined in the Military Commission Rules of Evidence. All facets of Mr. Khadr's day-to-day existence have been within the exclusive control of the United States since July 27, 2002, when American forces captured the 15-year old Mr. Khadr. Food, water, medical care, as well as periods of wakefulness and sleep, are controlled by the United States. An interrogator explicitly told Mr. Khadr , "[y]our life is in my hands," and this same interrogator threatened Mr. Khadr that he would never leave Guantanamo. (Khadr Affidavit at ¶ 57). Canadian representatives told Mr. Khadr that his home country could do nothing to help him and he was under exclusive American control. *Id*. at ¶ 51-53. Control by the United States, however, was evident to Mr. Khadr from

[2] Defense counsel recognizes that the Military Commission Rules of Evidence are subject to change given the MCA.
[3] Torture is also an offense under the MCA. *See* MCA §950t(11)(B) and 18 USC §2340(2).

the very moment of his capture. He was moved to and from interrogations by stretcher when he was unable to walk. *Id*. at ¶ 7-20. He was given pain medication not based on his level of pain, but based on an interrogation schedule designed by the United States. *Id*. at ¶ 9. It was made very clear to Mr. Khadr that his treatment was at the whim of his American captors. It was also made clear that Mr. Khadr's release depended on whether he could tell his captors "something that enabled them to catch someone big." *Id*. at ¶ 26. The American government has provided no evidence that Mr. Khadr's custodial treatment was not intended to inflict severe physical or mental pain or suffering.

d. In addition to the above-described acts and threats of intentional infliction of severe pain and suffering, the teenage Mr. Khadr was threatened with rape and sexual violence. Mr Khadr was told that uncooperative detainees like him would be sent to Afghanistan to be raped. *Id*. at ¶ 55. He was told "they like small boys in Afghanistan." *Id*. In a different interrogation, Mr. Khadr was told that "Soldier Number 9" would be sent to interrogate him. *Id* at ¶ 56. It was specifically explained to Mr. Khadr by the interrogator that "Soldier Number 9" would rape him. *Id*. Mr. Khadr was told he would be sent to Egypt, Syria, Jordan or Israel to be raped. *Id*. at ¶ 23. These were actual, consistent, and intentional threats to Mr. Khadr, not passive comments. On one instance the interrogator pulled out a picture of Mr. Khadr and wrote on it so Mr. Khadr could clearly see the words: "This detainee must be transferred to Bagram." *Id*. (emphasis added). Upon being moved by the United States for the second time, Mr. Khadr was told "Welcome to Israel." *Id*. at ¶ 4, 32 and 33. Future transfer, for rape and other types of torture under the Military Commission Rules of Evidence, was a real and unambiguous threat to Mr. Khadr.

e. In addition to the above-mentioned implicit death threats, the 15-year old Mr. Khadr suffered explicit death threats while in American custody.. In Bagram, Mr. Khadr was threatened with asphyxiation. Interrogators tied a bag over his head causing him to choke and making it very difficult to breathe. *Id.* at ¶ 18. Agitated dogs were also brought into the same room by the interrogators presumably to raise Mr. Khadr's breathing level while bagged. *Id*. Mr. Khadr was asphyxiated again at Guantanamo to the point where he lost consciousness. *Id*. at ¶ 36. This loss of consciousness occurred at least 3 or 4 times in close sequence. *Id*. While in Bagram, Mr. Khadr could hear the screams of other detainees being interrogated. *Id*. at ¶ 29. Mr. Khadr had the opportunity to see the other detainees' injuries and knew their interrogators. *Id*. Mr. Khadr remembers seeing an older man with bandages and injuries resulting from abuse. *Id*. at 30. An interrogator explicitly told Mr. Khadr this man had died graphically illustrating to him that his death while in the custody of the United States was a very realistic outcome. *Id*.

f. Mr. Khadr's American captors subjected Mr. Khadr to excruciating pain and suffering. Mr. Khadr had two gaping wounds in his chest and was partially blinded by shrapnel. Mr. Khadr was forced to sit up or shackled in a specific way during interrogations in order to cause physical pain. *Id*. at ¶ 7-12. Mr. Khadr had bright lights directly shined into his eyes causing them to tear due to his injuries. *Id*. at ¶ 25. He was pulled forcibly from the stretcher during interrogations and suspended him from a door frame by his arms. *Id*. at ¶ 17, 19. Mr. Khadr had limited range of motion due to his obvious, gaping injuries and the positions he was forced into by the United States caused him great pain. *Id*. at ¶ 20. Mr. Khadr was forced to perform arduous tasks between interrogations such as carrying buckets and crates of water further exacerbating his

injuries. *Id*. at ¶ 22. Mr. Khadr was short-shackled and left in that position for many hours. *Id*. at ¶ 59. The positions alternated with his arms both in front and behind his legs with Mr. Khadr ultimately forced onto his stomach with his hands and feet shackled behind his back. *Id*. The United States knew Mr. Khadr was in pain because he explicitly told his interrogators. *Id*. at ¶ 20.

g. While in the custody of the United States, Mr. Khadr was subjected to procedures designed to disrupt his senses and personality. Mr. Khadr was forced into hours of isolation and segregation without meaningful human contact. *Id*. at ¶ 32, 34, 40, 58, 62. He was forced into sensory deprivation during travel and forced into extreme temperatures. *Id*. at ¶ 32, 53. He attempted to track time during captivity but his detailed journal was forcibly removed. *Id*. at ¶ 63. Mr. Khadr endured periods without food and sleep causing him dizziness. *Id.* at ¶ 35. Mr. Khadr was subjected to a sleep deprivation program "known as the „frequent flyer program' to make him less resistant to interrogation" by causing disorientation and confusion. Canada v. Khadr [2010] SCC 3 (Attachment A at 4). Further, Mr. Khadr was forced to endure significant humiliation. While detained, Mr. Khadr was forced to pick up garbage only to have his captors dump the same garbage back on the floor and force him to pick up the garbage again. Khadr Affidavit at ¶ 24. During interrogations Mr. Khadr was repeatedly forced to urinate on himself. *Id*. One interrogator purposefully expelled intestinal gas from his anus (i.e., "farted") into Mr. Khadr's face. *Id.* at ¶ 27. During another interrogation not only was Mr. Khadr forced to urinate on himself, the interrogator poured pine oil onto the floor and used Mr. Khadr as a human mop dragging him back and forth across the floor. *Id*. at ¶ 59. After returning to his cell, Mr. Khadr was refused a change of clothing for two days. *Id*.

h. The threatened and actual pain and suffering caused Mr. Khadr prolonged mental harm. Early interrogators made notes and expressed concerns for Mr. Khadr's mental health. *See* D-094 Attachment K ("KHADR appeared suicidal and depressed.");D-094 Attachment M ("The investigators asked KHADER [sic] if he had nightmares about the attack and if he felt he needed someone to talk to, from a psychological aspect."). During interrogations Mr. Khadr cried repeatedly. (Khadr Affidavit ¶ 11). Months later Mr. Khadr openly sobbed during a meeting with a Canadian delegation. *Id*. at ¶ 45. To date, almost eight years following his initial capture in Afghanistan, Mr. Khadr continues to have nightmares about his abuse. *Id*. at ¶ 61.

i. The United States' treatment of Omar Khadr mirrors the treatment of detainees in Iran, Egypt, Lebanon, Libya, Nepal, Syria, and Turkey. When evaluating whether those countries complied with the Convention Against Torture,[4] the American State Department concluded that prolonged solitary confinement with sensory deprivation, suspension from door frames, sleep deprivation, dousing with cold water and threats of rape, death or indefinite detention constitute torture. *See, e.g.*, State Department Reports on Human Rights Practices[5] – Iran (2007) ("[C]ommon [torture] methods included prolonged solitary confinement with sensory deprivation, beatings, long confinement in contorted positions, [and] sleep deprivation."); Egypt (2007) ("Principal methods of torture and abuse … included stripping and blindfolding victims; suspending victims by the wrists and ankles in contorted positions or from a ceiling or doorframe with feet just touching the floor; . . . dousing victims with cold water"); Lebanon, 2007 ("Torture

[4] This treaty forms the basis for the United States' definition of torture that is found in the MCA.
[5] All available at http://www.state.gov/g/drl/rls/hrrpt/.

methods …included physical abuse, sleep deprivation, and prolonged isolation."); Libya, 2007 ("The reported methods of torture and abuse included chaining prisoners to a wall for hours; . . . suffocating with plastic bags; depriving detainees of sleep, food, and water; hanging by the wrists; … threatening with dog attacks; and beatings on the soles of the feet."); Nepal (2007) (Torture techniques used "included beatings with plastic pipes, submersion in water, sexual humiliation, restricted movement, and prolonged sensory deprivation. . . . Prisoners were also threatened with sexual abuse, rape, death, or indefinite detention."); Syria (2007) (Torture techniques included "dousing victims with freezing water and beating them in extremely cold rooms"); Syria (2007) ("Reported abuses included … sexual assault and threats of sexual assault."); Syria (2005) ("[F]our young men … were subjected to various forms of torture and ill-treatment, including . . . dousing with cold water, standing for long periods of time during the night, subjected to loud screams and beatings of other detainees."); Turkey (2007) ("[S]ecurity officials mainly used methods that did not leave physical signs, including repeated slapping, exposing detainees to cold, stripping and blindfolding detainees, food and sleep deprivation, threatening detainees or their family members, dripping water on detainees' heads, isolation, and mock executions.").

j. Less extreme conduct has been characterized as torture by United States courts. The California Supreme Court characterized a situation where a 17-year old boy "without the aid or advice of friend or counsel, was thereafter questioned and brutally beaten by the police twice a day for three days" as torture. *People v. Jones*, 24 Cal. 2d 601, 610 (1944).

k. Most recently, however, the Canadian Supreme Court determined that the specific use of sleep deprivation as an interrogation method was an illegal process that was a violation of [Mr. Khadr's] fundamental rights protected by international law. (Attachment A at 13-21). The violation was so fundamental that it deprived Mr. Khadr of "life, liberty or security of the person." *Id*.

II. MR. KHADR'S STATEMENTS ARE INADMISSIBLE BECAUSE THEY ARE INVOLUNTARY, UNRELIABLE AND DO NOT SERVE THE INTERESTS OF JUSTICE.

a. Statements not procured by torture or other forms of cruel, inhuman or degrading treatment may be admissible in a military commission "only if the military judge finds (1) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value and 2) that (A) 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 (B) the statement was voluntarily given. MCA § 948r(c).

b. In order to determine voluntariness the military judge "shall consider the totality of the circumstances, including, as appropriate, the following: (1) the details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities, (2) the characteristics of the accused, such as military training, age, and education level, (3) 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." MCA § 948r(d).

c. Mr. Khadr's statements are involuntary because of the physical violence involved to extract the statements and Mr. Khadr's youth.

1. A statement is coerced if the "will was overborne" at the time of confession. *See, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *Haynes v. Washington*, 373 U.S. 503, 513 (1963). In *Stein v. New York*, the Supreme Court held that confessions obtained using physical violence or the threat of physical violence are *per se* involuntary, meaning that there is no need for a court to consider the totality of the circumstances and "weigh or measure [the] effects on the will of the individual victim" before excluding such confessions. 346 U.S. 156, 182 (1953). The Court explained:

> Physical violence or threat of it by the custodian of a prisoner during detention serves no lawful purpose, invalidates confessions that otherwise would be convincing, and is universally condemned by the law. When present, there is no need to weigh or measure its effects on the will of the individual victim. The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to guard against miscarriages of justice by treating any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt.

Id. at 180.

Here, as explained in more detail above, Mr. Khadr's statements are the product of both physical violence and the threat of physical violence. He was denied medical treatment to increase his pain and make him more susceptible to interrogation. He was dropped on the floor five times while shackled. An interrogator told Mr. Khadr "[y]our life is in my hands." Interrogators threatened him with rape. His interrogators had him short-shackled, attempted to asphyxiate him, terrorized him with dogs, covered him in freezing water and left in a cold room, and hung him from the door frame. Thus, Mr. Khadr's statements were involuntary. (Khadr Affidavit *passim*).

2. A defendant's youth is weighed heavily in the voluntariness analysis. *See* 87 A.L.R.2d 624 § 1(c), *see also In re Gault*, 387 U.S. 1, 55 (1967) ("[T]he greatest care must be taken to assure that [a minor's] confession was voluntary in the sense that it was not coerced or suggested, but also that it was not the product of ignorance of rights, or adolescent fantasy, fright, or despair."). In three separate cases, the Supreme Court has found a confession involuntary and inadmissible primarily because of the defendant's age.[6] The interrogations in those cases, all quite ruthless, pale in comparison to those suffered by Mr. Khadr.

[6] In several other cases, the Supreme Court has found the confession of a minor involuntary but did not focus on the age of the defendant. *See, e.g.*, *Chambers v Florida*, 309 US 227 (1940) (young defendants arrested without warrant, held in jail without formal charges, threatened with mob violence, and questioned 5 days; confession held coerced); *McNabb v United Sta*tes 318 US 332 (1943) (decided

a) In *Haley v. Ohio*, 332 U.S. 596 (1948) a 15-year old boy was detained at midnight and questioned for five hours. He was alone, without the support of counsel or his parents. The Court held the confession inadmissible:

> [W]hen, as here, a mere child--an easy victim of the law--is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a. m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him.

Id. at 599-600.

b) In *Reck v. Pate*, 367 U.S. 433 (1961) a 19-year old signed a confession after almost 80 hours without counsel, contact with his family, or a court appearance. Although there was no physical brutality, the Court found the confession involuntary on account of the defendant's youth, his lack of the assistance of counsel, family or friends, and his physically weakened condition. *Id.* at 444.

c) Finally, in *Gallegos v. Colorado*, 370 U.S. 49 (1962), the defendant signed a statement after being detained for five days, during which time he saw no lawyer, parent, or other friendly adult. Although the boy was not subject to prolonged questioning, the Court found the fact that he was held incommunicado for five days, during which his mother tried to see him and he was not allowed the assistance of counsel, gave "the case an ominous cast." *Gallegos*, 370 U.S. at 54. As in *Haley*, the Court emphasized that, without the protection of an adult, the boy could not have resisted the pressure from the police. "[T]he youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, the failure to see to it that he had the advice of a lawyer or a friend" together required the Court to find that the confession had been coerced. *Id.* at 55.

3. In the instant case, Mr. Khadr's interrogations share all of the qualities of the aforementioned cases where the interrogations were constitutionally infirm, yet Mr. Khadr's interrogations are even more constitutionally unacceptable. He suffered through countless more

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primarily on the delay in arraignment of defendants, but the court noting that they were ignorant and inexperienced young men); *Lee v Mississippi*, 332 US 742 (1948) (17-year-old defendant; confession obtained as the result of duress, threats, and physical violence by police officers, held coerced); *Payne v Arkansas* 356 US 560 (1958) (19-year-old defendant, mentally dull, arrested without warrant and held incommunicado for 3 days; confession held coerced).

interrogations and endured harsher methods without the benefit of a lawyer, parent, or friendly adult. Unlike the defendants in *Haley*, *Reck*, and *Gallegos*, Mr. Khadr was physically abused.[7] He was contorted and shackled into painful positions. He was asphyxiated, terrorized by dogs, doused with freezing water and left in the cold. He was blinded by bright lights. He was abused until he could no longer stand and used as a human mop to wipe his own urine from the floor of an interrogation chamber. The majority of these interrogations took place when Mr. Khadr was a teenager. Thus, the evidence directs this Commission to find the statements involuntary and thus, inadmissible.

d. Mr. Khadr's statements are unreliable because children are more susceptible to giving inaccurate statements when coerced.

1. Coerced statements are inherently untrustworthy. *See, e.g.*, *Stein v. New York*, 346 U.S. 156, 182 (1953) ("The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to guard against miscarriages of justice by treating any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt."); *United States ex rel. Caminito v. Murphy*, 222 F.2d 698, 703 (2d Cir. 1955) ("Aristotle … wrote of torture 'that people under its compulsion tell lies quite as often as they tell the truth, … sometimes recklessly making a false charge in order to be left off sooner … so that no trust can be placed in evidence under torture.'"); *King v. Warickshall*, 168 Eng. Rep. 234, 235 (K.B. 1783) ("[A] confession forced from the mind by the flattery of hope, or torture of fear … comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it."); *Jackson v. Denno*, 378 U.S. 368, 385-86 (1964) (courts cannot tolerate "the probable unreliability of confessions that are obtained in a manner deemed coercive"); *United States v. Monge*, 2 C.M.R. 1, 4 (C.M.A. 1952) (noting that a confession "following inducements calculated to arouse either hope or fear is just as untrustworthy in a court-martial as it is in a civilian criminal court"); *United States v. Lewis*, 12 M.J. 205, 208 (C.M.A. 1982) ("The prohibitions of . . . the Fifth Amendment against coerced confessions are based on the concept that involuntary statements must be excluded because of their inherent potential for unreliability.").

2. The United States Army Field Manual recognizes this principle and advises that during interrogations the "[u]se of force is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the [human intelligence] collector wants to hear." Field Manual at §§ 5.73-76

3. The tendency of a person to lie under pressure is magnified when that person is a minor. *See* Matthew B. Johnson & Ronald C. Hunt, The Psycholegal Interface in Juvenile Assessment of Miranda, 18 Am. J. Forensic Psychol. 17, 24 (2000); Gerald P. Koocher, *Different Lenses: Psycho-legal Perspectives on Children's Rights*, 16 Nova L. Rev. 711, 716 (1992); Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3, 16 (1997); Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not*

[7] The defendants in *Haley* and *Reck* alleged police brutality, but there was conflicting evidence. The Supreme Court set the allegations to the side and, nevertheless, found the confessions inadmissible. *See Haley v. Ohio*, 332 U.S. 596, 597-598 (1948); *Reck v. Pate*, 367 U.S. 433, 440 (1961).

Committed: The Influence of Age and Suggestibility, 27 L. & Hum. Behav. 141, 151 (2003); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 944 (2004).

4. Scientific research supports the strong judicial determination that children are less able to withstand and more likely to lie under police pressure. The Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (2005) pointed to three psychological differences between juveniles and adults that make it unconstitutional to apply the death penalty to minors. These same differences also explain why courts are reluctant to endorse or encourage the use of harsh interrogation techniques against minors.

a) First, juveniles do not have the same capacity for mature reasoning, risk assessment and impulse control as adults. Therefore, "impetuous and ill-considered actions and decisions" are "more understandable among the young." *Id.* at 569.[8] The human brain does not settle into its mature, adult form until after the adolescent years have passed and a person has entered young adulthood. *See, e.g.,* Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861, 861 (1999) (study of 145 children and adolescents scanned up to five times over approximately 10 years); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8177 (2004). These differences in cognitive capabilities mean young people are less able to make sound legal decisions and to protect their own interests. *See* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L & HUM. BEHAV. 333 (2003) (studying more than 1,300 adolescents and young adults, and finding juveniles' psychosocial immaturity and heightened compliance with authority reflected in decisions to make a confession, consult with counsel, and accept a plea offer). To ensure that the state does not take advantage of these vulnerabilities, courts must be especially protective of juveniles when deciding whether to admit coerced statements.

b) Second, and most important here, "juveniles are more vulnerable or susceptible to negative influences and outside pressures. . . . This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment." *Roper*, 543 U.S. at 569; *see also Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage."). The tendency to lie under pressure is much more pronounced in children. Children are more *compliant* than adults; they tend to go along with instructions without actually accepting the premises. Matthew B. Johnson & Ronald C. Hunt, *The Psycholegal Interface in Juvenile Assessment of Miranda*, 18

[8] *See also Bellotti v. Baird*, 443 U.S. 622, 640 (1979) ("[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to avoid choices that could be detrimental to them," as well as "the ability to make fully informed choices that take account of both immediate and long-range consequences."); *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) ("The State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely."); *Parham v. J.R.*, 442 U.S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions. . . .")

AM. J. FORENSIC Psychol. 17, 24 (2000). Their low social status *vis-a-vis* their adult interrogators, societal expectations that they respect authority, and their naiveté in believing that police officers would not deceive them, also may make them more likely to comply with the demands of their interrogators. *See* Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents,* 32 HOFSTRA L. REV. 463 (2004); *see also* Gerald Robin, *Juvenile Interrogation and Confessions,* 10 J. POL. SCI. & ADMIN. 224, 225 (1982). Furthermore, children are more *prone to suggestion* than adults; not only are they more likely to change their story under pressure, but stressful situations may actually change their own perceptions and memories of an event. *See* Johnson & Hunt at 29; Gerald P. Koocher, *Different Lenses: Psycho-legal Perspectives on Children's Rights*, 16 NOVA L. Rev. 711, 716 (1992); Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & L. 3, 16 (1997).

c) Finally, the "third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Roper*, 543 U.S. at 570 (*citing* E. Erikson, IDENTITY: YOUTH AND CRISIS (1968)). Not only should coercive interrogations of children be avoided because they are less capable of resisting such coercion, but also because that treatment is more likely to cause them severe and lasting harm. Bessel A. van der Kolk et al., *Dissociation, Affect Dysregulation & Somatization: The Complex Nature of Adaptation to Trauma*, 153 AM. J. OF PSYCHIATRY 83 (1995)

Here, there can be little question that Mr. Khadr's statements are the product of coercion. He was injured. His interrogators used violence against him. His medical treatment was dependent on his interrogation schedule. He was a child soldier, who was even more susceptible to an adult influence than a juvenile. Thus, Mr. Khadr's statements are not reliable.

e. Admission of Mr. Khadr's statements does not serve the interests of justice.

1. Coerced statements are not only inadmissible because they are unreliable, but also because they are inconsistent with a basic respect for fundamental human dignity, justice and the rule of law:

> The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.

Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944).

2. Reliance on tainted evidence is "constitutionally obnoxious" even if the statements obtained by such methods are probative, or can be "independently established as true." *Rochin v. California*, 342 U.S. 165, 173 (1952). The rationale for the constitutional

prohibition on coerced but accurate statements is that reliance on such evidence is abhorrent to our system of justice:

> [O]urs is an accusatorial and not an inquisitorial system – a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.

Rogers v. Richmond, 365 U.S. 534, 540-41 (1961); *see also Rochin*, 342 U.S. at 173 (use of evidence obtained by coercive methods offends basic notions of "decency" and would "afford the brutality the cloak of law"). For that reason, federal courts may not consider the accuracy of a statement when determining whether it is involuntary and therefore inadmissible under the Fifth or Fourteenth Amendment. *See Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961).

3. The FBI recognized these concerns when observing the interrogation program at Guantanamo Bay and concluded that military interrogators "were being encouraged at times to use aggressive interrogation tactics in [Guantanamo] which are of questionable effectiveness and subject to uncertain interpretation based on law and regulation." Memorandum from CIRG Behavioral Analysis Unit to Counterterrorism General Council in Miami, "265A-MM-C99102May 30, 2003.[9] The memorandum also states that "[n]ot only are these tactics at odds with legally permissible interviewing techniques used by U.S. law enforcement agencies in the United States, but they are being employed by personnel in Guantanamo who have little, if any, experience eliciting information for judicial purposes. *Id.*

4. Further, the Supreme Court of Canada has already determined that the treatment and interrogation "violates the principles of fundamental justice." (Attachment A at 21). The Court elaborated:

> Interrogation of a youth, to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.

Id.

Accordingly, admission of Mr. Khadr's statements does not comport with the interest of justice and this Commission should deny the government's use of the statements.

III. MR. KHADR'S STATEMENTS ARE INADMISSIBLE AS FRUIT OF THE POISONOUS TREE.

a. All statements made by Mr. Khadr subsequent to any statement he made in response to coercive interrogation must also be suppressed because any future statement would have been made in the shadow of that coercion.

b. In *United States v. Bayer*, 331 U.S. 532 (1947), the Supreme Court determined that if a statement is held inadmissible, later statements are inadmissible as well. *Id.* at 540. Justice

[9] http://www.aclu.org/projects/foiasearch/pdf/DOJFBI003524.pdf

Jackson characterized the potential conflicts that may arise from inadmissible confessions as letting "the cat out of the bag":

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. *Bayer,* 331 U.S. at 540.

c. In *Missouri v. Seibert*, 542 U.S. 600 (2004), the Supreme Court analyzed a police officer's strategy of deliberately withholding *Miranda* warnings until after a suspect confessed, and then had the suspect repeat the confession after a *Miranda* warning. The Court held that prior illegally obtained statements tainted future statements notwithstanding the *Miranda* warning. *Id.* at 604. The issue was whether the new warnings could provide the suspect with a real choice about giving a new statement:

> For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment. *Id.* at 612.

d. In order for the second statement to be admissible, the prosecution must show facts "sufficient to insulate the [subsequent] statement from the effect of all that went before." *Clewis v. Texas*, 386 U.S. 707, 710 (1967). If the later confessions are part of "one continuous process" of interrogation or if it merely fills in and perfects the early confession, then the later confessions are inadmissible. *Leyra v. Denno*, 347 U.S. 556, 561 (1954).

e. Justice Brennan recognized that it may be impossible to insulate the later confessions from the first: "One of the factors that can vitiate the voluntariness of a subsequent confession is the hopeless feeling of an accused that he has nothing to lose by repeating his confession, even where the circumstances that rendered his first confession illegal have been removed." *Oregon v. Elstad*, 470 U.S. 298, 325 (1985) (dissenting opinion). Justice Harlan reasoned similarly, stating that the prosecution had "the burden of proving not only that the later confession was not itself the product of improper threats or promises or coercive conditions, but also that it was not directly produced by the existence of the earlier confession." *Darwin v. Connecticut*, 391 U.S. 346, 350-51 (1968) (concurring in part and dissenting in part).

f. When deciding whether a statement is the fruit of the poisonous tree, this Commission should consider all the factual circumstances surrounding the confession. "The question whether a confession is the product of a free will . . . must be answered on the facts of each case. No single fact is dispositive." *Brown v. Illinois*, 422 U.S. 590, 603 (1975). The Court listed several factors to be considered when determining admissibility of a statement subsequent to coercion, including: "the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and particularly, the purpose and flagrancy of the official misconduct." *Id.*at 604. Military courts have relied upon these factors when deciding whether confessions should be

admitted. *See United States v. Khamsouk*, 57 M.J. 282 (C.A.A.F. 2002); *United States v. Conklin*, 63 M.J. 333 (C.A.A.F. 2006).

g. Following the line of analysis used in *Brown v. Illinois*, *supra*, not only the original, but also subsequent, statements made by Mr. Khadr must be suppressed. Mr. Khadr had a legitimate fear of the results if he was interrogated again or changed his statement, as demonstrated by the fact that an interrogator pulled his hair and spat in his face after he told the Canadians that his prior statements had been coerced and untrue. (Khadr Affidavit at ¶ 50).

1. First, the temporal proximity of the arrest and confessions is inevitably very close, since Mr. Khadr is still detained. The interrogations of Mr. Khadr began immediately after he regained consciousness in Bagram following his capture. (Khadr Affidavit at ¶ 7). They continued thereafter in a constant, coordinated system of interrogation and detention designed to break down his will to resist and obtain the statements interrogators wanted. Because of this continuous system of interrogation, no confession can be separated from the arrest and interrogation which began his detention.

2. Second, intervening circumstances between Mr. Khadr's arrest and statements all support suppressing the statements. As a captured child soldier, Mr. Khadr was short shackled, threatened with rape, confined in a very cold cell, denied medical treatment , and was held by pressure points thus causing extreme pain, among a number of other forms of ill-treatment. Further, Mr. Khadr was consistently denied access to any form of help or reassurance, such as consular visits or an attorney, apparently in order to increase the psychological pressure on him. In short, Mr. Khadr was never freed from the effects of the coercion he suffered after his capture, thereby rendering all future statements involuntary.

3. Third, there was official misconduct sufficient to destroy voluntariness because of its flagrancy and impermissible purpose. In *Brooks v. Florida*, 389 U.S. 413, 415 (1967), the Supreme Court condemned confining a prisoner naked, for two weeks, with only twelve ounces of soup and eight ounces of water for daily sustenance, a hole in the corner for sanitation, and no friendly human contact as a "shocking display of barbarism." In comparison, Mr. Khadr, a child of only 15, was threatened with rape and asphyxiation, violent dogs, forced labor, and repeated humiliation.

4. Moreover, this ill-treatment was inflicted for a purpose that was impermissible, namely eliciting incriminating statements from Mr. Khadr. *See, e.g.*, U.S. Const. amend. V (prohibiting treatment whereby a defendant would "be compelled in any criminal case to be a witness against himself"); *Blackburn v. State of Alabama*, 361 U.S. 199, 205 ("[T]he Fourteenth Amendment is grievously breached when an involuntary confession is obtained by state officers and introduced into evidence in a criminal prosecution which culminates in a conviction."); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, entered into force June 26, 1987 (stating that it is impermissible to obtain a confession from a torture victim). Extracting confessions by these means must be considered an impermissible purpose "because declarations procured by torture are not premises from which a civilized forum will infer guilt." *Lyons v.*

State of Oklahoma, 322 U.S. 596, 605 (1944). Accordingyly, this Commission must exclude Mr. Khadr's statements as fruit from the poisonous tree.

f. **Conclusion:** For the foregoing reasons, the Defense respectfully requests that this Commission exclude the aforementioned statements the Prosecution intends to admit.

6. Witnesses and Evidence: The Defense requests an oral argument and an evidentiary hearing pursuant to R.M.C. 905(h). The Defense reserves the right (and intends) to offer additional information in support of this motion at a hearing currently scheduled to commence on April 28, 2010. The Defense anticipates calling several witnesses and experts to support this motion.

7. Certificate of Conference: The Defense has conferred with the Prosecution regarding the requested relief for the initial motion of D-094. The Prosecution objected then to the requested relief. Since the filing of the initial motion, the Prosecution has filed an opposition motion and indicated that it will call witnesses to support the admission of the contested statements. Thus, there is no reason to believe that the Prosecution joins the Defense in requesting the relief sought in this supplemental motion.

Dated: March 8, 2010

/s/

BARRY COBURN
KOBIE FLOWERS
Defense Counsel for Omar Khadr
Coburn & Coffman PLLC
[redacted]

UNITED STATES OF AMERICA **v.** **OMAR AHMED KHADR** **a/k/a "Akhbar Farhad"** **a/k/a "Akhbar Farnad"** **a/k/a "Ahmed Muhammed Khali"**	**D0094** **GOVERNMENT'S SUPPLEMENTAL FILING** **To the Defense Motion for Appropriate Relief** **8 March 2010**

1. Timeliness: This response is filed within the time frame established by the Military Judge's 4 January 2010 Scheduling Order.

2. Relief Sought: The Government respectfully submits that the Defense's motion to suppress statements of the accused should be denied.

3. Overview: The Government stands ready to defend each and every piece of evidence in the Government's case – including all admissions of the accused that the government intends to offer in its case-in-chief – and is prepared to call witnesses in support thereof. The Military Commissions Act of 2009 (hereinafter 2009 MCA) established new standards for admissibility of statements during trials by military commission. Specifically, the 2009 MCA excludes statements obtained by torture or cruel, inhuman, or degrading treatment and requires a determination of voluntariness to be made by the Military Judge in order to admit a statement of an accused. In the present case, the accused has not made any allegations or presented any evidence to suggest that any particular statement of his was involuntary. Assuming the Defense presents evidence sufficient to shift the burden to the Government to establish any statements were voluntary, the Military Judge need only consider evidence related to the circumstances surrounding particular statements of the accused and determine whether the totality of circumstances renders the statement reliable and possessing sufficient probative value; and that the statement was voluntarily given.[1] The evidence at the hearing will conclusively establish that the accused's statements that will be offered at trial were voluntary and, under the totality of the circumstances, are reliable and probative.

4. Burden of Proof: The Defense has moved to suppress all statements by the accused that the Government intends to offer at trial. The Military Commission Rules of Evidence ("MCREs") in effect at the time of the Defense filing provided "[t]he military judge may require the defense to specify, to the extent practicable, the grounds upon which the defense moves to suppress or object to evidence." MCRE 304(e)(3).[2] The Government reiterates its previous

[1] 10 U.S.C. §948r.

[2] The Government notes that at the time of this filing, a revised Manual for Military Commissions incorporating the changes made by the 2009 MCA had not yet been issued by the Secretary of Defense 2009 MCA. The Government expects arevised manual to be issued in the very near future. The Prosecution respectfully requests the

request for the Military Judge to so order here. In its initial motion, the Defense made only generalized complaints about government memos and policies, historic case studies, psychological research, general references to interview practices not specifically related to the accused, reports related to detainees other thanthe accused, and a general statement by the accused regarding his treatment that is not specifically linked to any particular statement made by the accused. Given that the Defense has not specified a single statement to a government interviewer that is even allegedly "involuntary," it is difficult for the Government to respond to the Defense's sweeping and uncorroborated allegations. Instead, the MCREs in effect at the time of the Defense filing (and likely to remain in effect) require that the accused first come forward with *specific* statements and *specific* factual allegations that render those statements involuntary. Only after the accused has made such a specific "appropriate" showing does the burden shift to the Government to demonstrate the admissibility of his heretofore unspecified statements.

5. Facts____:

a. The 2009 MCA became law on 28 October 2009, amending the Military Commissions Act of 2006 (hereinafter MCA 2006), including the provisions regarding the admissibility of statements by an accused. See 10 U.S.C. §948r.

b. The 2009 MCA established a new standard for the admission into evidence of statements by an accused. Firs, it specifically excluded any "statement obtained by the use of torture or by cruel, inhuman, or degrading treatment." 10 U.S.C. § 948r(a).

c. The 2009 MCA also amended the standard of admissibility for "other" statements by an accused, providing: "A statement of the accused may be admitted in evidence in a military commission under this chapter only if the military judge finds (1) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (2) that (A) 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 (B) the statement was voluntarily given." 10 U.S.C. § 948r(c).

d. The 2009 MCA further provides that,"[i]n determining . . . whether a statement was voluntarily given, the military judge shall consider the totality of the circumstances, including, as appropriate, the following: (1) The details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities. (2) The characteristics of the accused, such as military training, age, and education level. (3) 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." 10 U.S.C. § 948r(d).

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right to supplement this filing as necessary to the extent that any changes to the Manual for Military Commissions impact this filing.

6. Discussion :

No statement of the accused that the government seeks to admit was obtained by torture or cruel, inhuman, or degrading treatment.

a. The accused was not tortured; nor subjected to cruel, inhuman, or degrading treatment. The Government reiterates its objection to the vague and non-specific nature of the Defense filing and more specifically, to the affidavit of the accused. The Defense has failed to identify any specific statement by the accused that was obtained through the use of torture or cruel, inhuman, or degrading treatment of the accused. Moreover, the only evidence the Defense has offered suggesting the accused was subjected to what the Defense defines as torture, cruel, inhuman, or degrading treatment comes from a self-serving affidavit that was prepared by the previous defense counsel in this case and signed by the accused.[3] None of the allegations in the affidavit relate to interviews in which the accused made statements that the Government seeks to offer. Any alleged mistreatment of the accused (or other detainees for that matter) not related to the specific interviews where the accused made the admissions the Government seeks to offer is therefore irrelevant to determining the admissibility of the statements being offered by the Government in this case.

b. "Torture" is defined as an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions) upon another person within the actor's custody or physical control. "Severe mental pain or suffering" is defined as the prolonged mental harm caused by or resulting from:

> (1) the intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (2) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (3) the threat of imminent death; or
>
> (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.[4]

[3] The Government has filed a separate motion to suppress the affidavit of the accused.

[4] 18 U.S.C. § 2340(2)(A)-(D). Although the Secretary of Defense had not issued the Manual for Military Commissions as of the date of this filing, this standard was contained in MCRE 304(b), and the Government expects the same standard to apply in the revised Manual for Military Commissions.

c. In glossing the meaning of these terms, it is helpful to look at other sources, such as the Convention Against Torture (CAT).[5] At Senate hearings considering CAT ratification, the executive branch stated that "[t]orture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct" inflicting "excruciating and agonizing physical pain."[6] Agreeing with this view, the Senate committee report stated that "[f]or an act to be 'torture,' it must be an extreme form of cruel and inhuman treatment, causing severe pain and suffering."[7] Indeed, the Senate further explained that "[t]he term 'torture,' in the United States and [in] international usage, is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain."[8] In a civil case brought under the Torture Victims Protection Act (TVPA),[9] the D.C. Circuit Court of Appeals ruled that "only acts of a certain gravity shall be considered to constitute torture" and that the "more intense, lasting, or heinous the agony, the more likely it is to be torture."[10] In another TVPA case, the D.C. Circuit noted the requirement that the treatment be "unusually cruel or sufficiently extreme and outrageous." to constitute torture.[11] The previous motion to suppress did not challenge the view that, under U.S. law, and as understood by the Senate, torture constitutes a "deliberate and calculated act of an extremely cruel and inhuman nature."[12]

d. The 2009 MCA defines cruel, inhuman, or degrading treatment using the standard set forth in the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd) which provides "that the term cruel, inhuman, and degrading treatment or punishment means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eight, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declaration and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

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[5] The United States signed the CAT on April 18, 1988 and subject to specific declaration, reservations and understanding, the Senate ratified the Convention on October 21, 1994. See SEN. EXEC. RPT., 101-30, *Resolution of Advice and Consent to Ratification*, (1990).

[6] Deputy Assistant Attorney General Mark Richard, *Convention Against Torture: Hearing Before the Senate Comm. On Foreign Relations*, 101st Cong. 16 (1990).

[7] *See* S. Exec. Rep. No. 101-30 at 6.

[8] *See* S. Exec. Rep. No. 101-30 at 6.

[9] The Torture Victims Protection Act codified at 28 U.S.C. § 1350, authorizes civil remedies for victims of torture. The definition of torture largely tracts the definition of torture relevant to military commission and likewise requires severe pain or suffering.

[10] *Price v. Socialist People's Libyan Arab Jamahiirya*, 294 F.3d 82, 92-3 (D.C. Cir. 2002).

[11] *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230, 234 (D.C. Cir. 2003) (reversing lower court opinion finding torture).

[12] *See* S. Treaty Doc. No. 100-20 at 4-5.

e. Whether treatment constitutes "cruel and unusual" treatment is assessed using a two-prong test.[13] First, it must be determined whether the individual who has been mistreated was denied "the minimal civilized measures of life's necessities."[14] This standard may change over time to reflect evolving societal standards of decency.[15] Secondly, the offending individual must have a "sufficiently culpable state of mind,"[16] indicating that the infliction of pain was "wanton"[17] or, in the context of general prison conditions, reflected "deliberate indifference to inmate health or safety."[18]

f. The Supreme Court has emphasized that "as a practical matter it is never easy to prove a negative." *Bartnicki v. Vopper*, 532 U.S. 514, 552 (2001) (internal quotation marks and citation omitted). Although it is not necessary to determine whether conduct other than that related to specific statements of the accused the Government intends to offer amounts to torture, cruel or inhuman, and degrading treatment, the Government is prepared to present testimony regarding treatment of the accused while detained at Bagram and Guantanamo Bay, that rebuts his allegations of abuse. The Government will call medical professionals, intelligence interrogators and law enforcement agents, all of whom deny the allegations of mistreatment contained in the accused's affidavit.

g. In this case, the difficulty of proving that the accused was never tortured nor subjected to cruel, inhuman, or degrading treatment is compounded by the fact that the accused himself does not allege or identify a single one of his specific statements that was given as a result of torture or cruel, inhuman, and degrading treatment. Rather, he makes only generalized allegations of mistreatment, never once linking these claims to a particular statement the Government intends to offer during its case-in-chief, or to any investigator.

The statements of the accused were voluntary and under the totality of the circumstances reliable and possessing sufficient probative value.

h. If the Military Judge determines that the Defense has made a sufficient showing to shift the burden to the Government, the Government is prepared to prove at the hearing that the accused statements were voluntary and under the totality of the circumstances reliable and possessing sufficient probative value. The current record in this case and the Government's evidence will overwhelmingly prove that Khadr's statements are voluntary, and that their admissibility is in the interests of justice. As such, they are plainly admissible under the 2009 MCA.

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[13] See *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

[14] *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

[15] Id at 346.

[16] *Wilson v. Seiter*, 501 U.S. 294, 297 (1991).

[17] Id.

[18] *Farmer*, 511 U.S. at 834 (citing Wilson, 501 U.S. at 302-303).

i. In determining whether a statement was voluntary, the military judge shall consider the totality of the circumstances, including, as appropriate, the following:

"(1) The details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities;

(2) The characteristics of the accused, such as military training, age, and education level;

(3) 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."

10 U.S.C. § 948(d).

j. The Government will demonstrate that the accused's statements were taken in various detention settings by a variety of trained interviewers attempting to obtain accurate, reliable information from the accused. The testimony of the agents will show that interviews with the accused were conversational in nature, that the accused provided narrative responses to open-ended questions, and that the accused was under no obligation to answer any of the questions he was asked.

k. In addition to the statements of the accused, the Government will offer evidence that corroborates the statements of the accused. The Military Judge has previously admitted AE 188, a videotape of the accused making and planting improvised explosive devices. The facts as evidenced by the video, which depicts the accused manufacturing explosive devices and then planting them with the intent to kill U.S. Forces and equipment, are corroborative of the the accused's detailed statements. Among other things, the videotape shows the accused willfully and intentionally engaging in acts that support the charges against him and these images are fully supportive of his later admissions to interviewers. Moreover, statements made by family members of the accused corroborate the accused statements in significant respects.

7. Oral Argument: The Government does not believe oral argument is necessary to deny the Defense's motion because the Defense has not yet met its initial burden with regard to challenging any specific and clearly identified statement as the product of torture or cruel, inhuman, or degrading treatment. If the Military Judge denies the Government request to dismiss without oral argument, the Government will be prepared for oral argument and will have witnesses present at the hearing to address the Defense's motion to suppress.

8. Witnesses: Again, the Government does not believe witness testimony from the Government is necessary until a preliminary finding that the Defense has met its initial burden with regard to any specific and clearly identified statement. If the Military Judge determines the Defense motion raises allegations sufficient enough to shift the burden to the Government, the Government will be prepared to call the following witnesses[19]:

[19] The Government intends to file a request to call Mr. Finley and Special Agent Fehmel via VTC, consistent with the Manual for Military Commissions.

a. Interrogator #2
b. Interrogator #11
c. [redacted]
d.
e.
f.
g.
h.
i.
j.
k.

9. Evidence: The Government will present the following evidence that corroborates statements made by the accused: [20]

a. 13 July 2004 deposition testimony of [redacted]
b. Videotape and Transcripts of statements made by [redacted] and [redacted] when interviewed for Frontline "Son of al Qaeda" video.
c. AE 188

10. Additional Information: The Government respectfully requests the opportunity to supplement this filing no later than one week following the 28 April 2010 hearing. The Government believes all parties, particularly the Military Judge, would benefit from a detailed analysis of testimony presented at the upcoming hearing. A detailed record will permit the parties to apply the relevant law and aid the Military Judge in making his determination on this important issue.

11. Submitted by:

//s//
Jeffrey D. Groharing Christopher A. Eason
U.S. Department of Justice Captain, U.S. Air Force
Prosecutor Assistant Prosecutor

John F. Murphy
Captain, U.S. Navy
Chief Prosecutor

[20] The Government may offer additional evidence after reviewing the Defense supplemental filing.

UNITED STATES OF AMERICA	**D094**
v.	**Government Notice of Additional Witnesses and Information**
OMAR AHMED KHADR **a/k/a "Akhbar Farhad"** **a/k/a "Akhbar Farnad"** **a/k/a "Ahmed Muhammed Khali"**	**29 March 2010**

1. Timeliness. This response is filed within the timeframes established by the Military Judge's 4 January 2010 Scheduling Order.

2. Relief Requested. The Government respectfully submits notice of additional witnesses the Government intends to call during the suppression hearing and additional information below for the Military Judge's consideration. The Government does not believe any response to the Defense supplemental is necessary; however, again requests the opportunity to submit a brief to the court at an appropriate time after evidence has been introduced at the suppression hearing. A detailed record will permit the parties to apply the relevant law to the evidence presented during the suppression hearing and aid the Military Judge in making his determination on this important issue.

3. Discussion.

A. Additional Government Witnesses

In addition to the witnesses previously listed in the Government's supplemental filing submitted on March 8, 2010, the Government intends to call the following witnesses at the suppression hearing:

(1) [redacted] is an Army Criminal Investigation Division Agent who was assigned to [redacted] will testify regarding his interactions with the accused at the [redacted] authored three "Agent's Information Reports," documenting his interviews with Khadr. The subject reports have previously been provided to the Defense.

(2) [redacted] was the [redacted]. She will testify regarding her personal interactions with the accused while providing him medical care.

(3) [redacted] was a [redacted] He will testify regarding his personal interaction with the accused and the policies in effect at the facility.

The Government may call additional witnesses as necessary to address any matters raised by possible defense witnesses at the suppression hearing.

B. Notice of Information learned during a recent Government Interview

During a recent interview conducted by the Government, a military interrogator (previously identified as interrogator #1) indicated that he told the accused a fictitious story about a person who had been sent from Afghanistan to prison in the United States and was subsequently raped. The interrogator then told Khadr that if he did not cooperate, he could end up in prison in the United States. The Government provided notice of these statements to the Defense shortly after the interview. The Government notes that we have previously taken the position that the accused's allegations of mistreatment are false and uncorroborated. The Government's previous references to the uncorroborated nature of the accused affidavit are hereby amended to reflect the information recently disclosed to the Government.

4. Respectfully Submitted.

//s//
Jeffrey D. Groharing Christopher A. Eason
U.S. Department of Justice Captain, U.S. Air Force
Prosecutor Assistant Prosecutor

John F. Murphy
Captain, U.S. Navy
Chief Prosecutor