

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Defense Request

to Depose
LTC [REDACTED].W., [REDACTED] [REDACTED]

4 March 2008

1. Timeliness: This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the military judge's email order of 21 February 2008.

2. Relief Requested: The defense respectfully requests that this Military Commission order the deposition of Lieutenant Colonel ("LTC") [REDACTED].W., [REDACTED] [REDACTED]

3. Overview: Once charges are referred, the military judge may deny a deposition request only for "good cause." Due to exceptional circumstances, it is in the interest of justice that the defense take LTC W's deposition. He is a material witness for trial counsel in the case against Omar Khadr ("Mr. Khadr"). He compiled the only official records produced by the government that are close in time to CONOP AYUBKHEIL (the name of the operation involving the events of 27 July 2002), which recount the events leading to the death of Sergeant First Class ("SFC") Christopher Speer, USA, SF and the wounding and capture of Mr. Khadr. LTC W prepared at least two reports – one dated 27 July 2002 and the other dated 28 July 2002. The reports contain inconsistent statements regarding which enemy combatant allegedly threw the grenade that killed Sgt Speer. At some point, LTC W altered the document dated 28 July 2002, creating room to inculcate Mr. Khadr in the attack on SFC Speer. It is essential, therefore, for defense counsel to depose LTC W in order to ascertain the circumstances surrounding his composing these records, the witnesses upon whom LTC W relied in doing so, to whom he communicated the narrative he constructed as well as the circumstances that prompted him to alter the original 28 July report so as to shift the blame for SFC Speer's death to Mr. Khadr.

4. Burdens of Proof and Persuasion: "[T]he military judge may order that a deposition be taken on request of a party." R.M.C. 702(b). "A deposition may be ordered whenever, after swearing of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at a military commission." R.M.C. 702(a). As the requesting party, the defense carries the burden of establishing that a deposition is warranted. Pursuant to R.M.C. 702(c)(3)(A) the military judge may only deny a request for deposition "for good cause, e.g., to protect classified information, sources, methods and means of acquiring intelligence, subject to review by the military judge." The discussion to this rule further provides that "Good cause for denial includes: failure to state a proper ground for taking a deposition; failure to show the probable relevance of the witness' testimony, or that the witness' testimony would be unnecessary. The fact that a witness will be available for trial is good cause for the denial in the absence of unusual circumstances, such as

when the government has improperly impeded defense access to a witness.” R.M.C. 702(c)(3)(A), discussion.

5. Facts:

a. LTC W was the on-scene commander for CONOP AYUBKHEIL, during which Mr. Khadr was captured. *See* CITF Report of Investigative Activity, 17 Mar 04 at 1, 4 [hereinafter RIA of 17 Mar 04] (Attachment B to D022, Defense Reply in Support of Motion to Dismiss Due to Lack of Jurisdiction (Child Soldier)); After Action Report, 27 Jul 02 at 1 [hereinafter AAR] (Attachment A). It was during CONOP AUBKHEIL that SFC Speer received wounds allegedly from an exploded grenade, from which he died on 6 August 2002. *See* RIA of 17 Mar 04 at 5.

b. LTC W drafted an After Action Report dated 27 July 2002, describing the conduct of the troops under his command that day and events that allegedly occurred during the four-hour firefight on the compound where Mr. Khadr was captured. ARR. This report stated that “one badly wounded enemy soldier still had enough fight left in him to throw a grenade. The grenade seriously wounded the [redacted in defense copy] medic. Another [redacted in defense copy] shooter shot the enemy soldier, however, he did not die. *Id.* at 00766-000586.

c. LTC W drafted a memorandum on the operation he and his troops engaged in that day to identify and capture suspected bomb maker “[REDACTED]”. Memo re Operation to Positively Identify and Capture Suspected Bomb Maker in the Vicinity of Khost, Afghanistan of 28 Jul 07, 00766-001766-70 [hereinafter Original Memorandum] (Attachment B). The Original Memorandum described the conduct of CONOP AYUBKHEIL in detail and contained a passage describing the death of SFC Speer that stated, in relevant part, “One badly wounded enemy was able to throw a grenade, which seriously wounded ‘Chris’, before the enemy was *killed* by another [redacted in defense copy] assaulter. Four enemy soldiers, 3 KIA and 1 WIA, with severe injuries, were found in a corner between two partially remaining walls. This is the location from which the grenade was thrown.” *Id.* at 00766-001768 (emphasis added).

d. Sometime after the drafting of the Original Memorandum, LTC W altered the Memorandum on the Operation to Positively Identify and Capture Suspected Bomb Maker [“[REDACTED]”] in the Vicinity of Khost Afghanistan, but did not change the date of the memorandum. Memo re Operation to Positively Identify and Capture Suspected Bomb Maker in the Vicinity of Khost, Afghanistan of 28 Jul 07, 00766-001653-57 [hereinafter Altered Memorandum] (The government’s label for the file produced in discovery is “W[] - Updated 28 July 2002 Memorandum - to counsel.pdf”) (Attachment C). The Altered Memorandum described the conduct of CONOP AYUBKHEIL in terms identical to the Original Memorandum except for the passage describing the death of SFC Speer, which was changed to read, “One badly wounded enemy was able to throw a grenade, which seriously wounded ‘Chris’, before the enemy was *engaged* by another [redacted in defense copy] assaulter. Four enemy soldiers, 3 KIA and 1 WIA, with severe injuries, were found in a corner between two partially remaining walls. This is the location from which the grenade was thrown.” *Id.* at 00766-007655 (emphasis added).

e. During the period surrounding the 8 November 2007 arraignment of Mr. Khadr, defense counsel requested to interview LTC W. Trial counsel informed defense counsel that

LTC W would not speak to defense counsel.

6. Argument

a. The Defense Has a Right to Depose Material Witnesses Pretrial Absent Good Cause for Denying the Deposition Where the Deposition is in the Interest of Justice

(1) R.M.C. 702(a) provides that “A deposition may be ordered whenever, after swearing of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at a military commission.” To obtain a deposition, the requesting party must provide the following:

- (A) The name and address of the person whose deposition is requested, or, if the name of the person is unknown, a description of the office or position of the person;
- (B) A statement of the matters on which the person is to be examined;
- (C) A statement of the reasons for taking the deposition; and
- (D) Whether an oral or written deposition is requested.

R.M.C. 702(c)(2).

(2) The defense right to interview a material witness is “unconditional.” *United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980). R.M.C. 701(j) provides that each “party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence.” It has been held that it is reversible error to prevent the defense from interviewing a material witness before trial. *United States v. Chestnut*, 2 M.J. 84 (C.M.A. 1976). “[B]road discovery contributes substantially to the truthfinding process and to the efficiency with which it functions. It is essential to the administration of military justice; because assembling the military judge, counsel, members, accused, and witnesses is frequently costly and time consuming, clarification or resolution of matters before trial is essential.” *United States v. Eshalomi*, 23 M.J. 12 (C.M.A. 1986). Accordingly, the military judge may only deny pre-trial depositions for “good cause.” When a witness is shown to have both information relevant to the defense “and he refuses to talk to defense counsel, there usually will be lacking any ‘good cause’ to forbid his deposition.” *Killebrew*, 9 M.J. at 161.

b. Showing Required Under R.M.C. 702(a)

(1) With respect to R.M.C. 702(c)(2)(A), defense counsel seeks to depose LTC W. The defense is unaware of his address, but has reason to believe the prosecution knows where LTC W can be contacted.

(2) With respect to R.M.C. 702(c)(2)(B), defense counsel would like to clarify the substance of and the facts surrounding statements contained in the discovery and referenced in

this request. LTC W was a company commander for CONOP AYUBKHEIL, during which Mr. Khadr is alleged to have unlawfully participated in combat that led to the death of SFC Speer. As company commander, LTC W had access to all of the relevant actors and witnesses to the events. The account he provided of the events leading to Mr. Khadr's wounding and capture, as well as to the death of SFC Speer, was not taken from his own observations but from those of eyewitnesses to the firefight. It is unknown which eyewitnesses his reports are based on as they are not listed. Furthermore, of all the evidence provided by trial counsel, LTC W's statements from 2002 are the closest in time to the actual events. The deposition will therefore cover the dates and times LTC W composed his statements, with whom he spoke in reconstructing his version of the events, to whom he communicated his version, and the circumstances surrounding his subsequent alteration of the 28 July Memorandum.

(3) With respect to R.M.C. 702(c)(2)(B), defense counsel requires a deposition in order to clarify a number of outstanding questions that cannot be resolved at trial.

(i) First, the defense seeks to clarify the dates on which the various statements from 2002 were generated. The Memoranda and the After Action Report all bear a date either on the day of the assault, 27 July 2002, or the day after, 28 July 2002. Given the events that occurred on the 27th and the length of the reports, it is not at all clear that these documents were actually generated on those dates. At some point the Altered Memorandum was substituted for the Original Memorandum, yet there is no indication of the date this occurred.

(ii) Second, the defense seeks to determine which individuals LTC W spoke with and when he spoke with them about the events recounted in the Memorandum and the After Action Report. LTC W was not himself an eyewitness, nor was he inside the compound during the relevant events. When read together, the first two versions of the event exculpate Mr. Khadr. They state that the person who threw the grenade was alive on the 27th, but had died by the 28th. These reports appear to refer to the other enemy combatant who initially survived the firefight. *See* CITF Report of Investigative Activity, 17 Mar 04 at 2 (Attachment B to D022 Reply in Support of Defense Motion to Dismiss for Lack of Jurisdiction (Child Soldier)) (stating that someone other than Mr. Khadr was alive when the grenade that allegedly killed Sgt Speer was thrown). The altered report, however, does not state whether the person who allegedly threw the grenade lived or died, opening the door for accusations that Mr. Khadr threw the grenade. Identifying the individuals who contributed to LTC W's initial exculpatory reports is essential for the defense to adequately prepare its case for trial. Should it not learn this information until the government has put on its case-in-chief, it will likely be necessary for the defense to request a continuance to attempt to speak to the witnesses on whom LTC W relied.

(iii) Third, the defense seeks to clarify the circumstances that prompted LTC W to alter his original 28 July memorandum that indicated that the enemy fighter responsible for throwing the grenade that killed SFC Speer was killed in action. There is no indication on the face of the document itself as to what prompted LTC W to change the word "killed" to the more general "engaged." There is also no indication why LTC W chose to alter his previous statement, passing it off as an original, when he could have simply filed a supplementary statement or amendment if he later thought his previous account was materially inaccurate.

(iv) Fourth, the defense seeks to clarify the communications LTC W had before and after the documents were generated and to whom and on what dates his accounts of what transpired were transmitted. It appears likely that at some point his reconstruction of the events was passed to individuals responsible for interrogating Mr. Khadr as Mr. Khadr was accused of killing a U.S. soldier when he became conscious in the tent hospital at Bagram about a week after the firefight.¹ See Khadr Affidavit, 22 Feb 08, ¶ 9 (Attachment H to Def. Mot. to Compel Discovery (Sgt [REDACTED]) filed 4 Mar 08). It is therefore essential to know who received LTC W's statements, which statements they received and on what dates, in order to account for inconsistencies in Mr. Khadr's interrogation reports.

(v) Fifth, the defense seeks to clarify the source of inconsistencies between LTC W's version of events and that of OC-1, who by all accounts was the principal eyewitness and agent in the events surrounding Mr. Khadr's wounding and capture.² LTC W's Memoranda describe only one enemy fighter having survived the bombardment, yet OC-1 reported two: Mr. Khadr, who was hors du combat leaning against a wall, and another individual, who actively engaged the SF team upon their entry into the compound. CITF Report of Investigative Activity, 17 Mar 04 at 2 (Attachment B to D022 Reply in Support of Defense Motion to Dismiss for Lack of Jurisdiction (Child Soldier)). LTC W's reports also fail to indicate that there was any hostile enemy fire upon the SF team entering the compound, which was central to OC-1's version of events insofar as it provided him the justification for directing fire at wounded enemies. RIA of 17 Mar 04 at 1-2. It is essential for the defense to ascertain whether OC-1 was one of the sources

¹ Mr. Khadr's account of being told that he killed a U.S. soldier upon becoming conscious is confirmed by interrogation reports that repeatedly refer, not to Mr. Khadr confessing to killing a U.S. soldier, but being *told* by interrogators that he had done so. See, e.g., RIA of 23 Nov 02 at 2, 00766-000964 (after the firefight, "Khadr was told . . . his actions resulted in one US soldier being killed") (Attachment D); Interim Interrogation Report 6-034-0374-03 at 00766-000206 (Khadr "was told he killed a U.S. Soldier") (Attachment E); Interim Interrogation Report R-6-034-0258-03 at 00766-000194 (after the firefight, Khadr "was told he killed a U.S. soldier") (Attachment F).

² Yet another version of events leading up to the capture of Mr. Khadr comes from the diary of a U.S. Army officer who witnesses the events at issue near the end of the firefight. The officer confirms that there were two individuals alive in the compound after a hand grenade was allegedly thrown. Officer Diary at 00766-001377 (Attachment G). But in contrast to the scene described by OC-1, the officer describes the death of the first combatant as follows: "I remember looking over my right shoulder and seeing [redacted by government] just waste the guy who was still alive. He was shooting him with controlled pairs . . ." *Id.* Going on to describe Mr. Khadr's capture, the officer states that "PV2 R[] had his sites right on him point blank. I was about to tap R[] on his back to tell him to kill him [Khadr] but the SF guys stopped us and told us not to." Officer Diary at 00766-001380. The officer's candid admissions in his diary about the circumstances under which the first combatant was killed and under which Mr. Khadr was captured (rather than executed) suggest that participants in the firefight may have possessed motive to fabricate parts of their accounts. It is therefore all the more essential that the defense be able to depose LTC W, who presumably spoke to these individuals at the scene or shortly thereafter in the course of compiling his reports, if the defense is to have any hope of reconstructing the events of that day.

upon which LTC W relied in drafting his version of events, both for the purpose of potentially impeaching OC-1 at trial or for ascertaining why LTC W failed to incorporate OC-1's account into the After Action Report and Memoranda.

(4) With respect to R.M.C. 702(c)(2)(B), defense counsel requests an oral deposition.

c. A Deposition of LTC W is in the Interests of Justice Because It is Essential for the Defense to Adequately Prepare for Trial

(i) As stated in paragraph 5e, *supra*, the defense sought and was refused an opportunity to interview LTC W.

(ii) LTC W's knowledge of the sources, dates and circumstances of his 2002 statements is essential for the preparation of a defense and his refusal to speak to defense counsel before trial cannot be adequately remedied by his testimony at trial. LTC W was not a witness to the events at issue inside the compound, but he authored the only official account the defense has been provided that is close in time to the events. It is essential for the defense to ascertain, prior to trial, the names of and accounts given by the eyewitnesses upon whom LTC W himself relied in creating his story. It is equally important to know to whom his story was circulated, since Mr. Khadr's confessions appear to have been the product of interrogations that proceeded from the scenario, now known to be contradictory and inaccurate, that LTC W provided. Without that information, the defense will not be able to construct a coherent timeline of the relevant events nor know which witnesses are material and necessary for trial.

(iii) Furthermore, because of changes to the rules limiting hearsay, trial counsel can admit LTC W's statements without ever calling him to testify. *See* R.M.C. 802. Absent a guarantee from the Secretary of Defense that LTC W will not be deployed and will be available for testimony at trial, deposing him now may be the only opportunity the defense will have to preserve material and potentially exculpatory evidence for trial.

(iv) LTC W was acting as a military officer and an employee of the U.S. government. The documents he generated in 2002 were done in his official capacity and related to his conduct and the conduct of those he supervised in a military operation. His refusal to divulge information to the defense pertaining to available witnesses, their communications with him and their communications with one another, all of which may be of an exculpatory nature, directly and improperly interferes with the defense's ability to access witnesses and prepare an adequate defense.

d. Conclusion

(1) It is in the interest of justice to grant the defense's request to depose LTC W. The first two reports he prepared exculpated Mr. Khadr, but the second report was altered and possibly backdated, making room for accusations that Mr. Khadr threw a grenade resulting in Sgt Speer's death. LTC W's reconstruction of events has been a cornerstone of trial counsel's theory of this case. Without an opportunity to depose LTC W, defense counsel will be prevented from

ascertaining who the most relevant witnesses are as well as who/what prompted LTC W to alter his story to inculcate Mr. Khadr.

7. **Oral Argument:** The defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h), which provides that “Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions.” Oral argument will allow for thorough consideration of the issues raised by this motion.

8. **Witnesses and Evidence:** The defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the Prosecution’s response raise issues requiring rebuttal testimony. The defense relies on the following as evidence:

Attachments A through G

CITF Report of Investigative Activity, 17 Mar 04 (Attachment B to D022 Reply in Support of Defense Motion to Dismiss for Lack of Jurisdiction (Child Soldier))

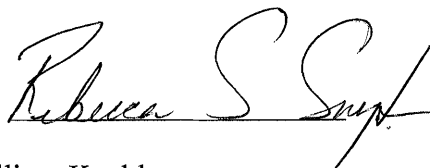
Khadr Affidavit, 22 Feb 08 (Attachment H to Def. Mot. to Compel Discovery (Sgt [REDACTED]) filed 4 Mar 08) as evidence

9. **Certificate of Conference:** The defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

10. **Additional Information:** In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

11. Attachments:

- A. After Action Report, 27 Jul 02
- B. Memo re Operation to Positively Identify and Capture Suspected Bomb Maker in the Vicinity of Khost, Afghanistan of 28 Jul 07 (Original)
- C. Memo re Operation to Positively Identify and Capture Suspected Bomb Maker in the Vicinity of Khost, Afghanistan of 28 Jul 07 (Altered)
- D. Report of Investigative Activity of 23 Nov 02
- E. Interim Interrogation Report 6-034-0374-03
- F. Interim Interrogation Report 6-034-0258-03
- G. Officer Diary Excerpt

By: 

William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel