



DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

7 Mar 2011

MEMORANDUM THRU Mr. Michael Chapman, Legal Advisor to the Convening Authority, Office of the Convening Authority, Office of Military Commissions

FOR VADM Bruce MacDonald, JAGC, USN (Ret.) Convening Authority, Office of the Convening Authority, Office of Military Commissions

SUBJ: PETITION FOR CLEMENCY UNDER RMC 1105 *ico* UNITED STATES *v.* OMAR KHADR

1. **Results of Trial.** At a Military Commission, pursuant to a pretrial agreement, Omar Khadr pled guilty to all charges and specifications. The military commission panel sentenced Omar Khadr to be confined for 40 years. Pursuant to the pretrial agreement, Omar Khadr's approved sentence of confinement may not exceed eight (8) years.
2. **Requested Relief.** On Omar Khadr's behalf, the Defense respectfully requests that you approve a sentence of confinement for four (4) years as opposed to the eight (8) year sentence limitation in the pretrial agreement.
3. **Factors to be Considered.** The requested relief is appropriate for the following reasons:

a. **Improper Expert Testimony**

You should grant Omar Khadr clemency because the Government knowingly offered and relied on Dr. Welner's unscientific opinions to intimidate the sentencing panel. Additionally, Omar Khadr deserves clemency because the Government stated that they had the Convening Authority's approval to withdraw from the pretrial agreement if the Defense filed a *Daubert* motion challenging Dr. Welner's testimony, or objected orally to his testimony. By doing so, the Government wrongly shielded Dr. Welner's testimony from the standards of admissibility clearly defined by the Supreme Court and the Military Commission Rules of Evidence.

Dr. Welner's opinion regarding Omar Khadr's risk of recidivism was designed solely to inflame and mislead the jury. Clearly this tactic was effective as evidenced by the sentencing panel adjudging a sentence of 15 years more than recommended by the Prosecution. The Government should not be rewarded for using wholly unscientific scare tactics, cloaked with the imprimatur of scientific expertise, coupled with threats designed to keep such opinions from being subjected to the requirements and scrutiny of *Daubert* and the Military Commission Rules of Evidence.

A few days before trial, in Guantanamo Bay, Cuba, the defense interviewed Dr. Welner for four hours over two days.¹ During that interview, the defense first learned that Dr. Welner proposed to testify that Omar Khadr was at high risk to recidivate as a violent extremist. During the interview, Dr. Welner did not have any representative samples or statistics on which to make his sweeping conclusions about Omar's particular status.

After completing the first day of the two-day interview of Dr. Welner, the defense contacted Dr. Marc Sageman² to ascertain whether Dr. Welner's proposed testimony and conclusions were scientifically

¹ Dr. Welner would not meet with the defense for more than four hours because that was all the time the Government had agreed to pay him to meet with the defense.

² Dr. Sageman's CV is attached.

supported, let alone sound.³ During the phone call Dr. Sageman stated, "Doctor Welner's proposed testimony and conclusions are not valid." Dr. Sageman went on to say, "Dr. Welner does not have a baseline to make anything more than a guess; Dr. Welner's sample size is Omar Khadr." Doctor Welner's speculation regarding the likelihood of recidivism, let alone that Omar Khadr is a "high risk" does not meet the standard of admissible evidence required by *Daubert* or the Military Commission Rules of Evidence.

Doctor Sageman is a well-respected, unbiased expert. Unlike Dr. Welner, he is not paid by a party to this case, nor does he have any bias, for or against, Omar Khadr.⁴ Following graduation from Harvard University, Dr. Sageman earned an M.D. and a Ph.D. in sociology from New York University. In 1984, after completing a tour as a Flight Surgeon in the U.S. Navy, he joined the Central Intelligence Agency. Dr. Sageman spent a year on the Afghan Task Force and then went to Islamabad from 1987 to 1989, where he ran the U.S. unilateral programs with the Afghan Mujahedin. After serving for two more years in New York, Dr. Sageman resigned from the agency to return to medicine. Since his completion of a residency in psychiatry at the University of Pennsylvania hospital, Dr. Sageman has been in the private practice of forensic and clinical psychiatry.

After 9/11, Dr. Sageman started collecting biographical material on about 400 al Qaeda terrorists, to test the validity of the conventional wisdom on terrorism. This research has been published as *Understanding Terror Networks* (University of Pennsylvania Press, 2004). He testified before both the 9/11 Commission in the United States and the Beslan Commission in Russia. As an expert on al Qaeda and related terrorist organizations, Dr. Sageman has consulted with various branches of the U.S. government, including the National Security Council, the Department of Defense, the Combatant Commanders, the National Laboratories, the Department of Homeland Security, various agencies in the U.S. Intelligence Community, and various law enforcement agencies.

Upon learning what Dr. Welner intended to testify about and, more importantly, that there was not a scientific basis for his testimony, Dr. Sageman agreed to rearrange his schedule⁵ so he could testify via telephone at a *Daubert* hearing. Dr. Sageman agreed to testify *pro bono*. The Defense immediately notified the Prosecution of our intention to file a *Daubert* motion to exclude Dr. Welner's testimony, that Dr. Sageman would testify telephonically, a synopsis of Dr. Sageman's testimony, and provided the Prosecution contact information for Dr. Sageman.⁶

A short time later, the Government informed the Defense that they had consulted with the Convening Authority and, if the Defense filed a *Daubert* motion, the Government had the Convening Authority's permission to withdraw, and would in fact seek to withdraw, from the pretrial agreement. Faced with the immediate prospect of the Government withdrawing from the pretrial agreement and with no time to make any further record, the Defense was compelled to offer that it would simply object orally to the absence of foundation for Dr. Welner's testimony. The Prosecution argued that such an objection would inevitably lead the military judge to call for a *Daubert* hearing, and asserted that if the defense objected orally to Dr. Welner's testimony, the Government would withdraw from the pretrial agreement. Faced with the Government's compulsion to hide facts from the members and the risk of losing Mr. Khadr's chance for resolution, the Defense was forced to agree to neither make a *Daubert* motion nor object orally.

³ The Defense spent the majority of preparation time before trial preparing to cross exam Dr. Welner regarding false confessions. However, upon agreeing to terms on the Pretrial agreement, Dr. Welner's testimony focused on Omar Khadr's "future dangerousness."

⁴ During the telephone conversation Dr. Sageman explained that no expert would be qualified to testify about Omar Khadr's "future dangerousness."

⁵ Dr. Sageman was scheduled to brief General Casey at the Pentagon.

⁶ With regard to waiving motions, the Pretrial agreement is silent. The intent of both parties was to waive all motions that may be waived.

The Defense approached the Government one more time, hoping that the interests of justice might prevail; we suggested that if the Government did not call Dr. Welner, the Defense would not call Dr. Xenakis and Dr. Porterfield.⁷ After an hour, the Government rejected that offer.

As the attached letter from Dr. Sageman more fully explains, Dr. Welner's testimony lacks a scientific basis. Even the military judge, Colonel Parrish, stated, in feedback to the defense following trial, that Dr. Welner would have been as likely to be accurate if he used a Ouija board.⁸

The goal of military commissions presumably is not to strong-arm an accused into pleas at any cost to justice. The tactics the Government employed here, unfortunately, strongly suggest otherwise. The abject disregard for a fair vetting of the facts before qualified military members undermines the entire military commissions system. The manipulation that occurred can be corrected, however, with a grant of clemency.

Omar Khadr entered into a pretrial agreement, agreed to plead guilty, and he agreed to a favorable limitation on confinement. However, because the Government used Dr. Welner's testimony, the defense was strong-armed into not objecting to this testimony. It is evident that the members relied on Dr. Welner's testimony. Therefore, it is in the best interests of justice to reduce Omar Khadr's sentence. The United States is supposed to stand for justice and fairness. This is your opportunity to state very clearly that you do not approve, endorse, or condone the prosecutors' actions. It is respectfully submitted that your remedy is a sentence reduction. This is what justice demands.

As the defense stated in its opening statement during the merits, and the Government affirmed in their sentencing argument, "The world is watching." The world, indeed, *is* watching. What they see will depend on your actions, and whether you ratify the use of this type of unreliable evidence and the kind of manipulation employed which allowed this evidence to escape scrutiny. The prosecutor in this case asked the panel to deter others who are contemplating similar offenses; the defense respectfully requests that you send a strong message to future prosecutors contemplating similar tactics. This message is sent by reducing Omar Khadr's sentence.

b. Rehabilitative Progress

On 31 Oct 2010, Omar Khadr was sentenced to confinement by a military commission. Immediately upon announcement of sentence, Omar Khadr was moved from the communal living conditions of Camp IV to the maximum security conditions of Camp V. The defense concedes that the government had the right to change Omar confinement conditions when his status changed from internee to sentenced detainee. Many people would likely become bitter, having been held eight years before trial only to see the conditions of their confinement worsen after taking responsibility for their actions. Despite the harsh Camp V conditions, Omar Khadr remains positive, focused and engaged.

Omar has remained positive, focused, and engaged because he has immersed himself in a rigorous educational training program since 31 Oct 2011. Dr. Arlette Zinck and several other professors from King's University College in Alberta, Canada, have developed an education plan for Omar Khadr designed to prepare him to enter college immediately upon his release from confinement.⁹ The plan consists of intensive study in English, Math, Geography, and Science. It includes reading, analyzing and discussing novels, poetry and short stories, high school level mathematics, Canadian geography, philosophy, ethics,

⁷ Neither Dr. Xenakis nor Dr. Porterfield testified for the defense.

⁸ There is no question that based, on his comment, Colonel Parrish should have objected, *sua sponte*, to Dr. Welner's testimony

⁹ Prior to his capture, Omar Khadr only completed the eighth grade.

and astronomy. These subjects are designed to allow Omar to pursue his dream of attending college and becoming a productive member of society.

Since 31 Oct 2011, working with professors at King's University College, Omar's defense team has implemented this education plan by teaching each subject to Omar. As of the date of this request, counsel have met with Omar on 10 visits, providing Omar with home-schooling type teaching instructions, and providing Omar with over 200 hours of learning from these formalized teaching sessions. During each study session, Omar has been completely focused on his studies and has demonstrated his thirst for knowledge. He accepts both praise and critiques with an amazing amount of insight, thoughtfulness and humility. Omar's studies continue when the defense team departs Guantanamo Bay, Cuba. He is provided homework and due dates for his assignments. The homework includes reading selected novels, completing written assignments and taking tests. Despite the inherent hurdles of completing assignments while in Camp V, Omar always completes his assignments on time.

The military defense team will continue with Omar's education plan until the day he leaves for Canada. Dr. Zinck is committed to assisting Omar with his education in Camp V and when he returns to Canada. Omar will continue to have educational and emotional support in Canada. Omar is very thankful, respectful, and remains positive toward his entire defense team.

Helen Keller once said, "[o]ptimism is the faith that leads to achievement, nothing can be done without hope and confidence." Omar is optimistic about his future. He wants to go to college and become a productive member of society. He has the hope and confidence necessary to make those things happen. He continues to take tangible steps to make his dreams a reality. It is difficult to convey Omar's optimism, hope and confidence with the written word. However, consider the following quote from Omar, "I want to go to college and learn medicine so I can help people. I know it will be hard but I want to make sure to thank the people who have helped me and believed in me by being a good person."

Because Omar has remained positive and is taking concrete steps toward becoming a productive member of society, we respectfully request that you reward his actions.

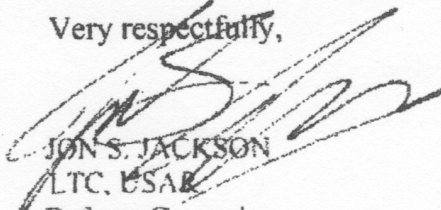
c. Additional Matters

Omar Khadr requests that you consider the following additional items before approving the findings and sentence in his case: letter from the United Nations, letter from Professor David Crane, letter from Dr. Arlette Zinck, and letter from Dr. Michael Ferber. (Enclosures 4-7)

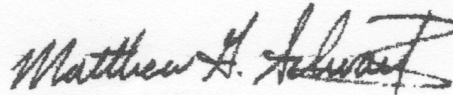
As the attached letters indicate, the world is watching. The story of Omar Khadr is yet to be completed. When future generations write your chapter of the Omar Khadr story, let them say that while you did not condone Omar Khadr's actions in Khost, Afghanistan, in 2002, you also did not condone the use of Dr. Welner's improper testimony. Based on the foregoing, we respectfully request that you approve a sentence of four years.

4. Point of Contact. The undersigned may be contacted regarding this memorandum at [redacted] or via e-mail at [redacted]

Very respectfully,



JON S. JACKSON
LTC, USAF
Defense Counsel



MATTHEW G. SCHWARTZ
Major, USAF
Defense Counsel

Encls.

1. Dr. Marc Sageman Letter - 15 January 2011
 2. Appendix A to Dr. Sageman's Letter
 3. CV of Dr. Marc Sageman
 4. Letter from Under-Secretary-General Radhika Coomaraswamy
 5. Letter from Professor David Crane
 6. Letter from Dr. Arlette Zinck
 7. Letter from Dr. Michael Ferber
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