

DAVID M. HICKS,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

) IN THE COURT OF MILITARY
) COMMISSION REVIEW
)
) C.M.C.R. Case No. 13-004
)
) Tried at Guantanamo Bay, Cuba
) on 26 & 30 March 2007
) before a Military Commission
) convened by Hon. Susan J. Crawford
)
)
) Presiding Military Judge
) Colonel Ralph H. Kohlmann, USMC
)

**TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY
COMMISSION REVIEW**

CONDITIONAL MOTION TO ATTACH

If the Court grants David M. Hicks' Motion to Attach, Appellee United States submits this Conditional Motion to Attach, and respectfully requests that this Court consider the enclosed August 2004 Naval Criminal Investigative Service ("NCIS") Report of Interview of David M. Hicks. If the Court denies Hicks' Motion to Attach, the United States does not move to attach the Report of Interview.

Hicks seeks to attach two affidavits in which Hicks alleges he was mistreated while in U.S. Custody, including at Guantanamo Bay, Cuba. The allegations in those affidavits are outside the record of trial, and therefore carry far less weight than the detailed providence inquiry by the Military Judge on the record and under oath, as well as the Pretrial Agreement and waiver form that Hicks signed, both of which were the subject of inquiry by the Military Judge on the record. "Solemn declarations in open court carry a strong presumption of verity." Brief of the United States on the Court's Lack of Authority to Hear This Case at 17 (citing *Blackledge v. Allison*, 431 U.S. 63 (1977)).

The United States conditionally moves to attach this Report of Interview, which calls into question the trustworthiness and credibility of the allegations contained in the Hicks and Dratel affidavits.

In 2004, Hicks claimed he had been mistreated while in U.S. custody. In response, the NCIS conducted an investigation of his allegations. On August 5, 2004, Hicks was interviewed by NCIS agents, in the presence of his defense counsel, Major Michael D. Mori, USMC. Report of Interview at 1.

Hicks' statements during that interview undermine the trustworthiness and credibility of the affidavits Hicks has submitted in this case. During the August 2004 interview, Hicks alleged he had been subject to physical abuse in Afghanistan in the period after his arrest in 2001, but denied any mistreatment at Guantanamo Bay, Cuba. *Id.* at 4. Hicks stated "he was not physically abused while at Camp X-Ray" and that "he was not physically abused while at Camp Delta." *Id.* Hicks also stated that, "with the exception of being slapped in the back of the head upon arrival, he has not been physically abused since arriving in Cuba." *Id.*

Hicks alleges he arrived at Guantanamo Bay, Cuba, in January 2002. Dratel Aff. ¶ 13. At the time of his interview by the NCIS in August 2004, therefore, Hicks had been at Guantanamo Bay, Cuba, for two years and seven months. Hicks describes that time period in approximately ¶¶ 81-193 of his affidavit. Those paragraphs contain allegations of mistreatment while at Guantanamo Bay, Cuba. Hicks Aff. ¶¶ 81-193.

Hicks had no reason to report some mistreatment but not other mistreatment during his interview by the NCIS in August 2004, given that the interview was prompted by Hicks' own allegations. If the allegations in his affidavit regarding mistreatment at Guantanamo Bay, Cuba, before August 2004 are accurate, one would expect him to have described those same allegations—or at least not affirmatively denied any mistreatment at Guantanamo Bay—in August 2004 during his interview with the NCIS. That he did not do so undermines the trustworthiness of the affidavits he now seeks to attach.

Accordingly, the Court should not credit the Hicks and Dratel affidavits that are the subject of Hicks' Motion to Attach.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by electronic mail to Baher Azmy, J. Wells Dixon, Shayana D. Kadidal, Susan Hu, and Joseph Margulies, civilian appellate defense counsel, and Samuel T. Morison and Capt Justin Swick, detailed appellate defense counsel, on December 19, 2013.



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INVESTIGATIVE ACTION

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V/HICKS, DAVID MICHAEL/CIVILIAN
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RESULTS OF INTERVIEW V/HICKS

On 05AUG04, V/HICKS was interviewed at Camp Echo, Joint Task Force Guantanamo Bay (JTF-GTMO), reference allegations of abuse while in U.S. custody. Present during the interview were V/HICKS, Major Michael D. MORI, USMC, Defense Counsel, [REDACTED] Participating Agent (PA), and Reporting Agent (RA).

RA and PA identified themselves to V/HICKS and explained to him the reason for the interview. V/HICKS was asked to relate any information he had reference his physical abuse while in U.S. custody. The interview commenced at 1400 and ended at 1530. V/HICKS was very cooperative and forthcoming and provided the following:

According to V/HICKS, he recalls being arrested/detained by Northern Alliance troops in Afghanistan in DEC 2001. He was taken to Mazar-a-Shariff and claims this is where he was first interrogated by what he referred to as "Americans". V/HICKS was asked how he knew they were "Americans" and stated he assumed they were Americans because of their uniforms and the way in which they spoke English.

During V/HICKS' approximate two-week detention at Mazar-a-Shariff he was interrogated twice. During the first interrogation, five "American soldiers" were in a small room with him. They were wearing black uniforms and some of the soldiers had bandoliers across their chests. One individual was described as a young looking white male that wore glasses. This individual stood in front of V/HICKS and asked questions. Another one of the five stood to the side of V/HICKS, with the remaining three positioned behind him. V/HICKS could not provide any more detail about these five "American soldiers". V/HICKS stated he was in the room with them for 15 to 20 minutes and during this time, one of the individuals behind him smacked (open hand slap) him in the back of his head a half dozen times. The smacks were hard, but not enough to knock him unconscious. This is the only time he was interrogated or mistreated at this location.

V/HICKS was then moved to what he described as a Northern Alliance run police station in Mazar-a-Shariff. This is the site of the second interrogation. V/HICKS stated two individuals interrogated him. The first was an American he knew as [REDACTED]. [REDACTED] was described as a white male, approximately 30 years old, blond hair, average build and tall. The second interrogator was described as a short, fat guy. During this second interrogation, the short, fat guy had V/HICKS look out the window of the room he was in and his

EXHIBIT (3)

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interrogator pointed out an individual with a shotgun. The short guy told V/HICKS the shotgun was for him if he made any sudden moves. Also while being interrogated by these two individuals, the short fat guy pointed a handgun at V/HICKS in "threatening manner". V/HICKS was not sure if these men were in the military or civilians, but according to V/HICKS, they were definitely American. V/HICKS did not know if these two incidences were scare tactics. During these interrogations, the Americans discussed with him an option of becoming an American prisoner vice staying a prisoner of the Northern Alliance and V/HICKS agreed to be an American prisoner.

After his approximate two-week stay at Mazar-a-Shariff V/HICKS was blindfolded, hooded and handcuffed and put in a van and driven 10 to 15 minutes to an airport. He was taken out of the van next to a helicopter. Though blindfolded, V/HICKS could feel the rotation of the helicopter blades and smell the engine exhaust. As he was standing next to the helicopter, someone kicked his feet out from under him. V/HICKS was unable to brace his fall because he was handcuffed and fell on his face on the tarmac. Then someone grabbed the back of his head and pushed his head into the concrete. He was then picked up by several individuals and thrown into the helicopter. He was secured to the floor of the helicopter with a cargo type strap and plastic straps, in addition to the handcuffs, (possibly flex cuffs) were placed very tightly around his hands. V/HICKS stated he was then tended to medically and the helicopter lifted off. V/HICKS estimated the flight was a couple of hours. The flight was very difficult for V/HICKS, as he was in an uncomfortable position and the plastic straps cut off the circulation to his hands. V/HICKS asked his captors to loosen the straps, but they would not.

The helicopter landed at an unknown location and V/HICKS assumed he was then put on a military aircraft. V/HICKS thinks it was an American C-130 because of the sounds and smells of the aircraft. V/HICKS admitted there was no way he could be sure because he was still blindfolded and hooded. The plane flew for a few hours and landed. He was taken into an office at this unknown location where American soldiers guarded him. His guards talked to him in English and one referred to him as a POW. V/HICKS stated he was not physically abused on the American aircraft. After a short period of time, V/HICKS was then put on another aircraft.

V/HICKS stated this aircraft was similar to the first in sound and smell, and this flight lasted for a couple of hours. V/HICKS estimated this entire trip took approximately 14 hours. V/HICKS stated after this flight, he was removed from the aircraft and placed in what he describe as a shed. He was in the shed for 5 to 10 minutes and his hood and blindfold were removed. He could see

American soldiers dressed in desert camouflage uniforms carrying M-16 rifles. After his short stay in the shed he was blindfolded, hooded and walked a short distance to a pier and boarded the USS [REDACTED]. He was taken below the deck and put into what he described as the "brig". V/HICKS knew he was on the [REDACTED] because he could hear the announcements over the loudspeaker system and saw the name of the

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ship in numerous places, i.e. coffee cups, hats etc. V/HICKS stated he was not mistreated or abused while on board the USS [REDACTED]

After a "couple of days", V/HICKS was then flown by helicopter to the USS [REDACTED] and placed in the brig there. V/HICKS was hooded and blindfolded during this transfer. He was able to figure out his new location based on seeing the name of the ship on various items. V/HICKS stated he was not abused or mistreated on the USS [REDACTED]

According to V/HICKS, there were other detainees on the [REDACTED] including John Walker LINDH. In January 2002, V/HICKS stated he and five other detainees were flown by helicopter to an unknown location. V/HICKS stated he was not abused or mistreated on the helicopter flight. V/HICKS and the other detainees were blindfolded, handcuffed and hooded the entire time. They landed and were taken to a large hangar like location and held there for approximately 10 hours. They were forced to kneel in a half-circle. During these 10 hours, individuals he believed to be American soldiers, verbally harassed the detainees. One unidentified individual mentioned he was a New Yorker and another called V/HICKS a "kangaroo fucker". During this ten-hour period, V/HICKS stated an unidentified individual nudged him with the butt of a gun in the back of his head and then hit him very hard with the butt of the gun. V/HICKS stated the blow was sufficient enough to knock him forward, but not enough to cause him to lose consciousness.

V/HICKS also stated during this 10 hour period, unidentified individuals slapped him in the back of his head, placed boots on his shoulders and he could hear them laughing and joking around. V/HICKS could tell photos were being taken because he could see flashes underneath the blindfold and could hear his captors talking about taking pictures. V/HICKS recalled hearing a female voice asking if anyone wanted to have some extra fun with the detainees and a male voice said, no, because of the Geneva Convention. V/HICKS stated he was also kicked in the thighs several times and spat on during this time frame.

V/HICKS and the other detainees were then put back on the helicopter and returned to the [REDACTED]. Three days later, they were flown back to the same location. V/HICKS assumed he was in the same location

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based on the atmosphere and noises. He could tell there were now seven of them, because he could hear groans coming from the detainees as they were being hit. This session lasted for approximately 6 hours. During this session, V/HICKS was still blindfolded, hooded and handcuffed. He again kneeled down in the same manner and was verbally harassed. V/HICKS claims he was smacked, kicked and on one occasion punched with a fist in his right temple area.

After this second trip to the unknown location, V/HICKS was placed on an aircraft and flown to Kandahar, Afghanistan. The flight to Kandahar lasted approximately four hours. They stopped several times V/HICKS assumed to pick up detainees. V/HICKS stated he was not abused on this flight. V/HICKS stated he knew he was in Kandahar

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because one of the detainees told him. Also, the Red Cross (ICRC) visited him in and told him he was in Kandahar. When V/HICKS arrived in Kandahar, he stated he estimated he was one of 20-30 detainees on the aircraft. All of the detainees were made to lie down in the mud while "soldiers" walked across their backs. The detainees were roped together bicep to bicep. V/HICKS stated he thought he was the first one taken from the group and led to a shed and stripped naked. In the shed, V/HICKS recalls his picture being taken by several civilians. He was then given a set of blue overalls and led to a cell.

After some time, he was taken out of his cell and made to run to a medical tent. He was not blindfolded at this time, but was shackled hand and feet. Inside the tent he was again stripped naked. His head, armpits, and crotch were shaved and he was deloused. According to V/HICKS, a white piece of plastic was inserted in his "behind" during this process and some of the staff made jokes about this procedure. V/HICKS stated the shackles on his feet rubbed his ankles raw, but he was not abused during this process. After the medical checkup, he was given orange prison clothes and again was allowed to meet with the ICRC. V/HICKS allegedly told the ICRC about being abused. After his meeting with the ICRC, he was placed back in a cell.

Later the same night he was put on a plane and was told he was being flown to Cuba. V/HICKS stated this ride was very comfortable. He was allowed to eat and sleep. He was not abused or mistreated on the flight. V/HICKS stated just prior to arrival he received an injection in his thigh; he was not sure of the purpose of the injection. After being removed from the aircraft he was forced to kneel in an upright position and stare at the ground (even though he was hooded and blindfolded and wearing ear muffs). V/HICKS stated at this time, he was very disoriented and when he would try to lift his

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head, someone would slap him in the back of the head or push his head back down.

V/HICKS was taken to what he called Camp X-RAY and placed in an open-air cell. He stayed at X-Ray for two and a half months. V/HICKS stated he was not physically abused while at Camp X-Ray. From Camp X-Ray V/HICKS stated he was moved to what he called Camp Delta. Again, V/HICKS stated he was not physically abused while at Camp Delta.

V/HICKS stated with the exception of being slapped in the back of the head upon arrival, he has not been physically abused since arriving in Cuba.

V/HICKS stated he witnessed a Saudi detainee, being beaten by an Army guard while at Camp X-ray. V/HICKS stated the Saudi whose name is JUMMA was verbally harassing a guard by the name of [REDACTED] [REDACTED] was a member of the IRF (Initial Response Force) team and wore kneepads and IRF gear. This incident happened the day before V/HICKS was transferred from X-RAY to Camp Delta. According to V/HICKS, JUMMA

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was ordered to lie on his stomach in his cell. JUMMA lay down as ordered, however, continued to be "cheeky" toward [REDACTED] [REDACTED] became very angry, jumped up and came down with his knees on JUMMA's back. [REDACTED] then grabbed JUMMA by the head and slammed his face into the concrete 10 to 20 times. JUMMA was not moving. Other guards came in and began kicking JUMMA. Then [REDACTED] began punching JUMMA in the face. JUMMA was unconscious and not moving. Approximately 40 detainees witnessed this beating and the ICRC was made aware of the beating. JUMMA was picked up and carried unconscious from the cell. He was in the hospital for two weeks. JUMMA had a broken wrist and broken ribs from the beating.

At the end of the interview, V/HICKS was asked if he was physically abused aboard any US Navy ship, any US Navy aircraft, or any military aircraft, or while here at GTMO. The question was qualified with the exception of the slap when he first arrived at GTMO. V/HICKS stated, no.

REPORTED BY: [REDACTED]
OFFICE: NCISRA GUANTANAMO BAY, CUBA

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