By John Ryan

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Guantanamo Naval Base, Cuba – Lawyers for the Sept. 11 defendants this week asked a military judge to order the government to produce psychological records of the CIA personnel who conducted or witnessed abusive interrogations at overseas black sites.

David Nevin, a lawyer for accused 9/11 plot mastermind Khalid Shaikh Mohammad, said Monday afternoon that the defense was entitled to learn how the interrogations “harmed the people who conducted the torture” as an additional way to show the severity of the treatment. The more extreme the torture, Nevin argued, the more likely his client was experiencing its aftereffects during subsequent interrogations by the FBI that the prosecution seeks to use at trial.

A lawyer for Walid bin Attash, Anisha Gupta, described the discovery provided by the

government on the former CIA program as "sanitized" and "emotionally devoid." She told the judge, Air Force Col. Matthew McCall, that her team has only been able to interview three of the 80 potential CIA witnesses it requested from government. Still, she added, each "teared up or openly wept" during the interviews.

"We've learned about those scars," Gupta said.

As part of the same motion, defense teams are seeking records associated with the military's "Survival, Evasion, Resistance and Escape," or SERE, training program, including information surrounding the Department of Defense's decision to stop using waterboarding in the trainings due to its negative effects on participants. James Mitchell and Bruce Jessen, the two contract psychologists who developed the CIA interrogation program, based its techniques from the SERE program, which is used by the military to train personnel on facing hostile environments. Mitchell and Jessen personally waterboarded Mohammad dozens of times.

Army Maj. Neville Dastoor, one of the prosecutors, called the defense motion "remarkable" and overly broad.

"The accused are not entitled to an unending, separate trial on the [CIA] program," Dastoor said.

Dastoor argued by video transmission from the military commissions' remote hearing room in Virginia, which was recently established as an extension of the Guantanamo courtroom. He told McCall that his predecessor judges on the case already approved the discovery provided to the defense on the CIA program, which includes some 23,000 pages of documents that he said are sufficient to show the "intensity" of the black site interrogations.

Nevin countered that the discovery provided is a tiny fraction of the six-million-plus documents underlying the Senate's report on the CIA program, which remains classified and off limits to defense teams.

"It's a drop in the bucket," Nevin said.

McCall is presiding over just his second pretrial session in the case, which dates to the May 2012 arraignment. The September session was the first in which he presided – and the first to take place since February 2020 due to complications created by the pandemic. The judge quickly gained a sense of the animosity and finger-pointing between the two sides of the courtroom over the discovery process.

“I get some of the frustration from both sides,” McCall said last Wednesday, during the first week of a planned three-week session.

Prosecutors last week accused the five defense teams of filing endless discovery motions to delay progress on the case, which does not yet have a trial date more than 20 years after the attacks. Defense lawyers, in turn, blamed the government for dragging out the discovery process to cover-up CIA misdeeds as well as to obscure the FBI’s role in the overseas interrogation program.

Disputes over evidence of FBI-CIA coordination on interrogations have consumed much of this session. The proceedings have returned their focus to what is proving the most important word of the pretrial phase: attenuation. In this historic case, the largest in U.S. history, the word encapsulates the extent to which incriminating statements elicited by the FBI from the five defendants in 2007 on Guantanamo Bay are sufficiently separated – or attenuated – from the prior abusive interrogations they suffered at CIA black sites. Prosecutors have called the FBI statements their most critical evidence. Defense teams have filed motions to have them suppressed.

In suppression hearings prior to the start of the pandemic, witness testimony and evidence established that FBI agents participated in the CIA interrogations between 2002 and 2006 by sending in questions for CIA personnel to ask detainees. These FBI agents also had access to CIA databases with information from the black sites prior to interrogating the defendants on Guantanamo Bay in January 2007.

Defense lawyers contend any attenuation is undercut by the severity of past torture as well as the level of cooperation between the CIA and FBI. Last week, lawyers also pointed out that the FBI agents had to take their notes in the January 2007 sessions on CIA laptops and submit them to the CIA for review. The lawyers referred to the Senate’s summary report of the CIA

program that stated that the CIA had “operational control” of the Camp 7 detention facility on Guantanamo Bay where the defendants were held after arriving from the black sites.

Dozens of times last week, defense teams claimed that prosecutors have not complied with an October 2019 order by one of McCall’s predecessors, Air Force Col. Shane Cohen, that directed the government to produce all documents “that reasonably tend to show cooperation between the CIA, FBI and Department of Defense in the effort to obtain statements from” the five defendants.

Outside court, James Connell, the lead lawyer for Ammar al Baluchi, told reporters that the government’s failure to comply with the order led to the flurry of motions to compel discovery that dominates the docket for this session.

The prosecution believes it already has satisfied its obligations by providing the defense teams with the communications that FBI agents sent to the CIA at the black sites seeking information from the detainees. Prosecutors have said they provided the communications to avoid additional litigation without conceding that the defense teams were entitled to the evidence. They contend that the defendants participated in the early 2007 sessions voluntarily. They also say that the defendants were told they would not be returned to CIA custody.

On Friday, prosecutor Clay Trivett characterized the latest defense discovery motions as “unnecessary and superfluous” because the FBI agents in 2007 did not rely on the earlier CIA interrogations when questioning the defendants. He said the FBI had conducted the majority of its investigation relating to the five defendants prior to their captures in 2002 and 2003.

“The FBI agents who were interviewing the accused in Guantanamo in 2007 could have known every single thing that the accused said in the [CIA] program,” Trivett said. “And under the law, if they still had an independent source of knowledge to ask the question, it's completely permissible.”

He said the standard for voluntariness should be if the defendants perceived the 2007 sessions as coercive.

“If the answer is no, then the statement is voluntary,” Trivett said.

In arguments that continued Monday, Gary Sowards, Mohammad’s lead defense lawyer, said that Trivett’s narrow interpretation of voluntariness was “contrary to the law.” He said the early 2007 statements were the “direct product of torture” as part of an “ongoing CIA-FBI project.”

He described the FBI’s promise not to return the defendants to CIA custody as “chilling.” Sowards explained that, during Mohammad’s three-plus years in CIA custody, his captors repeatedly told him that he would go back to the “hard times” of severe torture if he was not cooperative with interrogations. As a result, Sowards said, a detainee would likely hear such a promise by the FBI as a “coded dog-whistle” admonition to say what his interrogators wanted to hear.

In addition to hearing oral arguments, this session was anticipated to resume the suppression hearings with testimony by three FBI agents who interrogated defendants on Guantanamo Bay in early 2007. Multiple defense teams objected due to the pending discovery motions. McCall decided to delay the testimony to a future hearing; a two-week session is scheduled for mid-January.

The Oct. 29 sentencing of Majid Khan , an admitted courier for al Qaeda, has been cited by both sides as part of the discovery battles. Seven of the eight military officers who served as jurors in that case recommended clemency based on Khan’s past abuse by the CIA and the denial of basic due process rights prior to the start of his case. They did so after hearing Khan read a statement about his experiences at CIA black sites and early years at Guantanamo Bay.

In their arguments Monday, lawyers in the 9/11 case said they were seeking the CIA psychological records to support their suppression case, as well as for motions to have the case dismissed for outrageous government conduct and to mitigate against the death penalty if the defendants are found guilty.

Gupta told McCall that the clemency letter suggests the extent of past treatment and government misconduct “weighs heavily on the sentencer.” Dastoor countered that the Khan sentencing proves the defense teams already have what they need to fashion a similar type of

narrative for their clients.

About the author: *John Ryan (john@lawdragon.com) is a co-founder and the Editor-in-Chief of Lawdragon Inc., where he oversees all web and magazine content and provides regular coverage of the military commissions at Guantanamo Bay . When he’s not at GTMO, John is based in Brooklyn. He has covered complex legal issues for 20 years and has won multiple awards for his journalism, including a New York Press Club Award in Journalism for his coverage of the Sept. 11 case. View our staff page .*