

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY**

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD,  
WALID MUHAMMAD SALIH MUBARAK  
BIN 'ATTASH,  
RAMZI BIN AL SHAIBAH, AMAR AL  
BALUCHI ("ALI ABDUL AZIZ ALI"),  
MUSTAFA AHMED ADAM  
AL HAWSAWI

**AE080**

**Joint Defense Motion  
To Preserve Evidence of Any Existing  
Detention Facility**

**13 September 2012**

1. **Timeliness:** This motion is timely filed.
2. **Relief Sought:** The defendants request an order directing the government to preserve any existing evidence of any overseas detention facility used to imprison any of the defendants or potential witnesses in this case, including maintaining any structure or fixture in its current state.
3. **Burden of Proof:** Under the Rules for Military Commissions, the government must disclose to the defense all known exculpatory evidence.<sup>1</sup> Independent of that duty, under the Due Process Clause, the government is obligated to turn over or make available to the defense all exculpatory evidence relevant to both findings and sentence,<sup>2</sup> for both direct<sup>3</sup> and impeachment<sup>4</sup> purposes. Because any evidence which may exist is under the control of the government, the burden is on the government to demonstrate why it should not be required to preserve any evidence which may exist.

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<sup>1</sup> See R.M.C. 701 (e).

<sup>2</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>3</sup> *Id.*

<sup>4</sup> *Giglio v. United States*, 405 U.S. 150, 154 (1972).

4. **Overview:** The accused were detained and interrogated by the government over a period of years. Given the realities of this case, it is certain that what occurred during that detention will be at issue at the pre-trial, trial and (if necessary) sentencing phases of these proceedings. Also given those realities, it is virtually certain that the conditions under which they were held will be exculpatory. *Brady v. Maryland*<sup>5</sup> requires the government to disclose to the defense all exculpatory evidence in its possession or control. That obligation cannot be met unless any evidence relating to a detention facility is preserved. Moreover, preservation is particularly crucial here because the cases are capital. The Supreme Court has long held that in capital cases, the defense is entitled to introduce the broadest possible range of evidence that may mitigate a sentence from death to less than death. It is clear, based solely on unclassified information in the public domain, that the conditions under which the accused were detained will be highly significant to the defense sentencing case.

5. **Facts:**

a. After their captures, the defendants were detained and interrogated in the Central Intelligence Agency (CIA) program.

b. In 2009, then-Central Intelligence Agency (CIA) Director Leon Panetta publicly announced that, "CIA no longer operates detention facilities or black sites and has proposed a plan to decommission the remaining sites."<sup>6</sup>

c. In response to this announcement, Mr. bin al Shibh filed a motion to preserve any evidence related to a detention facility.<sup>7</sup>

d. The Government answered that it would maintain the status quo, as of the date of the defense motion for preservation.<sup>8</sup>

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<sup>5</sup> 373 U.S. 83, 87 (1963).

<sup>6</sup> Attachment B.

<sup>7</sup> See *United States v. Mohammad, et al.*, D-108 (Jun. 25, 2009).

6. **Law and Argument:**

**A. The military commission must order preservation of any evidence relating to a detention facility because the defense has a right to examine exculpatory or helpful evidence.**

Rule for Military Commission 701 provides:

(c) *Examination of documents, tangible objects, reports.* After service of charges, upon a request of the defense, the Government shall permit the defense counsel to examine the following materials:

(1) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

RMC 701(c).

The rule also states that the Government shall disclose to the defense all known exculpatory evidence.<sup>9</sup> That duty is constitutional as well.<sup>10</sup> Accordingly, the government is obligated to preserve such evidence so that it can be disclosed.<sup>11</sup> That obligation extends both to direct evidence<sup>12</sup> and to impeachment evidence.<sup>13</sup>

There is no question in the context of these cases that *all* of the conditions at a detention site are relevant, material, and exculpatory for the defense – from the size of any cells, the temperature in any cells, and any surrounding lighting or sound to the texture of any floors and

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<sup>8</sup> See *United States v. Mohammed, et al.*, Government Response D-108C (Jul. 2, 2009).

<sup>9</sup> See RMC 701(e).

<sup>10</sup> See *Brady*, 373 U.S. at 87 (finding that the suppression of material exculpatory evidence violates a defendant's due process rights, irrespective of the good faith or bad faith of the prosecution).

<sup>11</sup> *United States v. Beckstead*, 500 F.3d 1154, 1158 n.4 (10<sup>th</sup> Cir. 2007); see *California v. Trombetta*, 67 U.S. 479, 489 (1984).

<sup>12</sup> *Brady*, 373 U.S. at 87.

<sup>13</sup> *Giglio v. United States*, 405 U.S. 150, 154 (1972).

walls, and more – and thus must be turned over. Under *Brady* and its progeny, the standard on appeal is that where a trial fails to “result[] in a verdict worthy of confidence”<sup>14</sup> – that is, where there is a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different”<sup>15</sup> – the verdict must be overturned. No finding of guilt in this case, and above all no sentence of death, will meet that test unless evidence relating to any detention facility is preserved.

Indeed, failure to preserve black site evidence risks the government’s entire case against the accused. In other cases involving a post-verdict evaluation of the damage to the defense after the evidence had already been destroyed, appeals courts have held that the only remedy is dismissal of all charges even where the evidence was far less exculpatory than the evidence at issue here.<sup>16</sup> In these cases, the fact that the defense had put the government on notice that it believed the evidence was exculpatory prior to its destruction weighed heavily in the courts’ decision that the government had acted in bad faith.<sup>17</sup> Here the accused have informed not only the government but this commission of the highly exculpatory nature of all evidence related to a black site, a claim that is anything but speculative based on information in the public domain alone. Destruction of this evidence under these circumstances would be a clear violation of the defendants’ constitutional and statutory rights.

**B. The government’s obligation to preserve any evidence of a detention facility is heightened because of the potential sentence at stake in this case.**

Evidence of any black site is at least as exculpatory to any sentencing decision by the panel, should such a decision becomes necessary. The *Brady* rule applies to sentencing evidence

<sup>14</sup> *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

<sup>15</sup> *United States v. Bagley*, 473 U.S. 667, 682 (1985)..

<sup>16</sup> *See, e.g., United States v. Bohl*, 25 F.3d 904, 914 (10<sup>th</sup> Cir. 1994); *United States v. Cooper*, 983 F.2d 928, 933 (9<sup>th</sup> Cir. 1993).

<sup>17</sup> *Bohl*, 25 F.3d at 911; *Cooper*, 983 F.2d at 931.

generally,<sup>18</sup> but has additional constitutional force in capital cases. The Supreme Court has repeatedly held that to achieve the heightened degree of reliability required in death penalty cases, a sentencing panel must be allowed to consider any mitigating circumstances in determining whether a death sentence should be imposed.<sup>19</sup> This rule also applies in the court-martial setting: “The accused has unlimited opportunity to present mitigating and extenuating evidence.”<sup>20</sup>

Indeed, defense counsel is constitutionally obligated to perform a mitigation investigation sufficient to establish the amount and value of potentially mitigating evidence; failure to do so constitutes ineffective assistance of counsel under the Sixth Amendment.<sup>21</sup> Destruction of any existing evidence of a black site would patently interfere with that constitutional duty.

In sum, by destroying any evidence of a black site, the government would make a constitutionally adequate trial impossible in this case, and destroy any confidence in the verdicts along with them. The motion should be granted.

7. **Conference:** On 12 September 2012, counsel for Mr. al Baluchi requested the position of the government on this motion. The government did not respond. On 13 September 2012, counsel for Mr. al Baluchi again requested the position of the government on this motion. The government did not respond.

8. **Request for Oral Argument:** Oral argument is requested.

9. **Request for Witnesses and Evidence:** None.

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<sup>18</sup> *Brady*, 373 U.S. at 87.

<sup>19</sup> See *Skipper v. South Carolina*, 476 U.S. 1, 8-9(1995) (reversing death sentence where jury was precluded from considering defendant’s conduct while in custody awaiting trial); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (finding that jury may consider “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death”).

<sup>20</sup> *United States v. Matthews*, 16 M.J. 354, 378 (1983).

<sup>21</sup> *Wiggins v. Smith*, 539 U.S. 510, 533-534 (2003).

10. **Additional Information:** None.

11. **Attachments:**

A. Certificate of Service.

B. Message from the Director: Interrogation Policy and Contracts (9 April 2009).

Very respectfully,

//s//

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Counsel for Mr. al Baluchi

//s//

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**CERTIFICATE OF SERVICE**

I certify that on the 13th day of September, 2012, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by e-mail.

*//s//*

JAMES G. CONNELL, III,

*Learned Counsel*



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## Message from the Director: Interrogation Policy and Contracts

**Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on the CIA's Interrogation Policy and Contracts**

**April 9, 2009**

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As you know, there is continuing media and congressional interest in reviewing past rendition, detention, and interrogation activities that took place dating back to 2002. I have also been asked about contract interrogators and detention facilities. Today, I sent a letter to our Congressional oversight committees outlining the Agency's current policy regarding interrogation of captured terrorists, including the policy on the use of contractors in the process.

- CIA's aggressive global pursuit of al-Qaida and its affiliates continues undiminished. Agency officers are working tirelessly—and successfully—to disrupt operations in strict accord with the President's Executive Order of January 22, 2009, concerning detention and interrogation.
- CIA officers, whose knowledge of terrorist organizations is second to none, will continue to conduct debriefings using a dialog style of questioning that is fully consistent with the interrogation approaches authorized and listed in the Army Field Manual. CIA officers do not tolerate, and will continue to promptly report, any inappropriate behavior or allegations of abuse. That holds true whether a suspect is in the custody of an American partner or a foreign liaison service.
- Under the Executive Order, the CIA does not employ any of the enhanced interrogation techniques that were authorized by the Department of Justice from 2002 to 2009.
- No CIA contractors will conduct interrogations.
- CIA no longer operates detention facilities or black sites and has proposed a plan to decommission the remaining sites. I have directed our Agency personnel to take charge of the decommissioning process and have further directed that the contracts for site security be promptly terminated. It is estimated that our taking over site security will result in savings of up to \$4 million.
- CIA retains the authority to detain individuals on a short-term transitory basis. None have occurred since I have become Director. We anticipate that we would quickly turn over any person in our custody to U.S. military authorities or to their country of jurisdiction, depending on the situation.

CIA's focus will remain where the American people expect it to be—on the mission of protecting the country today and into the future. We will do that even as we cooperate with Congressional reviews of past interrogation practices. Officers who act on guidance from the Department of Justice—or acted on such guidance previously—should not be investigated, let alone punished. This is what fairness and wisdom require.

CIA will continue to honor the law as we defend the United States as we have done since the beginning of this program. That is what the men and women of this Agency demand. Together, we can, and will, do no less. Thank you for your service and dedication to protecting this nation.

Finally, let me take this opportunity to wish you and your families a Happy Easter and Passover.

Leon E. Panetta

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