

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID
MUHAMMAD SALIH MUBARAK BIN
'ATTASH, RAMZI BIN AL SHIBH, ALI
ABDUL-AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

AE112R (AAA)

Mr. al Baluchi's Motion
For *In Camera* Review of
Un-redacted Versions of AE112 K, L, and M

6 May 2016

- 1. Timeliness:** This motion is timely filed.
- 2. Relief Requested:** The defense respectfully requests that the military commission issue an order compelling the government to file un-redacted versions of AE112K, AE112L, and AE112M for *in camera* judicial review.
- 3. Overview:** The three documents in question – AE112K, AE112L, and AE112M – have been at the center of ongoing litigation regarding the government's nondisclosure of evidence to which Mr. al Baluchi is constitutionally entitled. On 26 February 2016, the government represented in court that it would provide the military commission with completely un-redacted versions of the three documents for judicial review. As far as Mr. al Baluchi can tell, the government has not done so, and the military commission should compel the government to file the un-redacted documents with the military commission for *in camera* review. This filing will allow Mr. al Baluchi to address the favorable nature of the information under the redactions in an appropriate argument and/or pleading.
- 4. Burden of Proof and Persuasion:** The burden of persuasion on this motion rests with the defense.

5. Facts:

a. On 6 September 2012, the defense requested all documents and information relating to White House and Department of Justice consideration of the Central Intelligence Agency Rendition, Detention, and Interrogation Program.¹

b. On 11 October 2012, the government denied the request, stating that it intended to produce some but not all of the requested documents.²

c. On 27 December 2012, the defense filed AE112 Motion to Compel Discovery Related to White House and DOJ Consideration of the CIA Rendition, Detention and Interrogation Program.

d. On 10 January 2013, the government filed AE112A Government's Response to Motion to Compel Discovery Related to White House and DOJ Consideration of the CIA Rendition, Detention and Interrogation Program.

e. On 22 January 2013, the defense filed AE112C Reply to Government's Response to Motion to Compel Discovery Related to White House and DOJ Consideration of the CIA Rendition, Detention and Interrogation Program.

f. On 11 December 2015, the defense argued AE112, but the government did not, stating that it intended to file a motion to consolidate RDI-related discovery.³

g. On 5 February 2016, the government provided, via NIPR email, three Department of Justice Office of Legal Counsel memoranda responsive to AE112.⁴ The government explained its production of these three OLC memoranda as follows:

¹ AE112 Motion to Compel Discovery Related to White House and DOJ Consideration of the CIA Rendition, Detention and Interrogation Program, Attachments B and C.

² AE112, Attachment D.

³ Unofficial/Unauthenticated Transcript of 11 December 2015 at 10062-1028.

2. The Prosecution reviewed the documents in full, unredacted form and found that two of the attached documents contained information under the redactions that were arguably non-cumulative, relevant and helpful to the Defense. Those two documents are hereby provided with the relevant information, however redactions remain over information the Prosecution has deemed not discoverable under R.M.C. 701. (Bates numbers are MEA-MEM-A-0000001-26 and MEA-MEM-A-000000172-211).

3. The Prosecution also attaches an additional letter Bates Stamped MEA-MEM-0000370-383 which it found to be arguably non-cumulative, relevant and helpful to the Defense. It too has redactions of information not discoverable under R.M.C. 701, but fewer redactions than the publicly releasable version of the same document.

h. Beginning on 5 February 2016, consistent with its professional and constitutional obligations to provide zealous and effective assistance of counsel to its client, the defense team for Mr. al Baluchi reviewed, researched, and prepared for additional arguments and motions using MEA-MEM-A-00000001 to 26, MEA-MEM-A-00000172 to 211, and MEA-MEM-00000370 to 383. The al Baluchi defense team prepared a redbox version of the memoranda comparing the public, FOIA redactions to the government's *Brady* redactions. The al Baluchi team also provided a copy of the memoranda to Katherine Newell, a Military Commissions Defense Organization subject matter expert (SME),⁵ under the terms of Protective Order #2.⁶

i. At a closed 505(h) hearing on 19 February 2016, counsel for Mr. al Baluchi introduced the redbox version of the three documents into the record as AE112K, AE112L, and AE112M.

⁴ Attachment B.

⁵ Ms. Newell has already provided a declaration to the military commission in AE112, found at AE112F Defense Notice of Exhibits, Attachments B and C.

⁶ AE014H.

j. Over the weekend of 20-21 February 2016, SME Ms. Newell spent over twenty hours analyzing the redbox versions of the memoranda.⁷ In consultation with defense teams, Ms. Newell prepared three documents, each analyzing one of the three memoranda, which were distributed to all defense teams. Counsel for Mr. al Baluchi carefully reviewed Ms. Newell's analyses, provided feedback to Ms. Newell, and used the analyses to prepare for oral argument.

k. On 23 February 2016, counsel for Mr. al Baluchi substituted a redbox version with the redactions numbered, and relied on the analyses of the three memoranda to argue the individual redactions in AE112K, AE112L, and AE112M.⁸ The military commission was satisfied after counsel argued eleven of the 150 redactions in AE112K, AE112L, and AE112K, and stated:⁹

MJ [COL POHL]: Okay. If we need to, I will give you an opportunity to go through all 150 after I hear from the government, but I don't really think I need to hear that right now. I understand your point.

LDC [MR. CONNELL]: Right.

MJ [COL POHL]: Your point made. If you had to, you would have a justification for each one of these specifically more so than specifically the ----

l. On the same day, counsel for Mr. al Baluchi suggested treating AE112K, AE112L, and AE112M as a "test case" for the government's unilateral redaction process:¹⁰

⁷ Unofficial/Unauthenticated Transcript of 23 February 2016 at 10903. Consistent with the position in AE362B(AAA) Mr. al Baluchi's Response to Scheduling Order, all members of Mr. al Baluchi's defense team had a twenty-four hour period of rest and recuperation over the 20-21 February 2016 weekend. Ms. Newell is not a member of Mr. al Baluchi's defense team, and Mr. al Baluchi's counsel has no authority over her work schedule.

⁸ T. 23 FEB 2016 at 10864-901. The government has made six redactions in the publicly available transcript.

⁹ *Id.* at 10903.

¹⁰ *Id.* at 10937-38.

The government is operating at a document level and puts a burden on us, I suppose -- a burden that I do not relish because it is so much work -- but a burden to do the eaches. And so I have a proposal that I'll call the bluff and let us brief why we think that each of these redactions is discoverable and accept the documents in camera and review them. It's not millions of documents, it's only 150 redactions in, you know, 20 or 30 pages, and let's see who is right.

MJ [COL POHL]: Okay. Okay.

LDC [MR. CONNELL]: Thank you.

MJ [COL POHL]: We'll use this as a test case for going forward.

LDC [MR. CONNELL]: Yeah. That's right.

m. On 24 February 2016, the government moved to seal AE112K, AE112L, and AE112M as potentially classified:¹¹

TC [MR. GROHARING]: Yes, Judge, thank you. Your Honor, the government would move -- moves to seal Exhibits 112K, L, and M. We have been advised that those exhibits may contain classified information. That matter is under review right now. We would ask that those exhibits be sealed and treated as classified. We expect to have additional guidance regarding the exhibits at some point later today.

¹¹ Unofficial/Unauthenticated Transcript of 24 February 2016 at 11093-94.

Counsel for Mr. al Baluchi objected to the sealing of AE112L and AE112M (which did not, as far as he knew, contain any classified information), as well as the anticipated redaction of the public transcript.¹² Counsel for Mr. al Baluchi also requested permission to discuss the matter with the Chief Defense Counsel, which the military commission deferred.¹³

n. On 26 February 2016, the government stated to the military commission:

¹² *Id.* at 11098-99.

¹³ *Id.* at 11099-101.

CP [BG MARTINS]: Your Honor, this is just a brief notice in connection with the military commission's expectation of reviewing government discovery under the rubric of 397 and the underlying motions. I want to notify the commission that the prosecution has coordinated as necessary to provide the military judge the unredacted OLC memos. These are the memos Mr. Connell is seeking. We will do that in conjunction with requests for substitutions under M.C.R.E. 505(f), and this will be as to categories C and E of the ten-category construct as well as other categories within that construct.

MJ [COL POHL]: Just so I am clear, we are talking about, I believe, 112K, L and M, and I don't have them sitting in front of me, and so you are going to give me totally unredacted ----

CP [BG MARTINS]: You will see the unredacted ones as part of our submissions with regard to the ten-category construct, the appropriate ones. They will be the among the original documents containing information we will be seeking a substituted form for.

MJ [COL POHL]: When can I expect to have those?

CP [BG MARTINS]: We are going to be laboring to try to do the first of those as early as the 22nd of March, but it will be before 30 September.

6. Law and Argument:

On 26 February 2016, the government represented in an open hearing that it would provide the complete, un-redacted versions of AE112K, AE112L, and AE112M for *in camera* review by the military commission. Upon information and belief, the government has not provided the documents, and opposes Mr. al Baluchi's motion to require it to honor its commitment. Once the government has provided the documents, Mr. al Baluchi intends to argue why the redacted information is favorable to the defense in a test case for the government's unilateral redactions.

The documents in question undeniably contain information that is favorable to the defense. The government has provided the documents to the defense, even in redacted form, because that is true. The government has undertaken multiple rounds of review of these documents. Each review has led to the redaction – or un-redaction – of new information in the documents. For example, in its letter dated 5 February 2016, the government noted that, upon further review, it found discoverable material underneath redactions it had previously provided to the defense. Given the inherently partial nature of trial counsel's role as an advocate, given trial counsel's limited ability to fully comprehend what may be material or helpful to the defense, and given the incontrovertible need for total compliance with the constitutional rights guaranteed to capital defendants, these documents must be reviewed in full form by the Commission. The hard information underlying the blackouts on these pages never changes; however, the subjective analysis unilaterally taken by the prosecution to determine what is material, relevant, and possibly helpful to the defense clearly does. The government has even claimed the authority to make unreviewable decisions to withhold information because it considers the information

“cumulative” to some other information they have not yet produced. The need for judicial intervention could not be more compelling.

Mr. al Baluchi maintains, consistent with counsel’s arguments before the Commission in February 2016, that the documents in question contain favorable information that has not been disclosed by the government. The redacted material contains some true, substantive information favorable to the defense, including witness information. But perhaps more important, the redacted information reveals falsehoods, distortions, and bad-faith assertions that “raise[] opportunities to attack . . . the thoroughness and even the good faith of the investigation.”¹⁴ The more often agents of the government repeat false, distorted, or incredible claims, the greater the damage to the government’s case. Because there is a linear relationship between the number of times the CIA, White House, and Department of Justice advance or rely on false or misleading information and the credibility of the government’s witnesses and policies, such information can never be “cumulative” in the statutory sense.

Under MCRE 505(f), the military commission, not the government, authorizes withholding or deletions. The government claims that the FOIA redactions in AE112 K, L, and M plus 138 words fulfill its constitutional and statutory responsibilities to provide favorable evidence to the defense. The military commission should require the government to produce the

¹⁴ *Kyles v. Whitley*, 514 U.S. 419, 445 (1995); see also, e.g., *United States v. Trevino*, 89 F.3d 187, 189 (4th Cir. 1996) (“‘Favorable’ evidence includes not only that evidence tending to exculpate the accused, but also any evidence adversely affecting the credibility of the government’s witnesses.”); *United States v. Bowen*, 799 F.2d 593, 613 (10th Cir. 1986) (“A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation.”); *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (concluding that withheld *Brady* evidence “carried within it the potential . . . for the . . . discrediting . . . of the police methods employed in assembling the case.”).

unredacted memoranda, as the government claimed it would, to test the veracity of this claim *in camera*.

7. **Oral Argument:** The Defense requests oral argument in connection with this motion.
8. **Witnesses:** None.
9. **Conference with Opposing Counsel:** The defense has conferred with the government.

The government objects to the proposed relief.

10. **List of Attachments:**

- A. Certificate of Service;
- B. Letter from Government dated 5 February 2016.

Very respectfully,

//s//
JAMES G. CONNELL, III
Detailed Learned Counsel

Counsel for Mr. al Baluchi

//s//
STERLING R. THOMAS
Lt Col, USAF
Detailed Military Defense Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 6th day of May, 2016, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//

JAMES G. CONNELL, III

Learned Counsel

Attachment B

