MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD; WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH; RAMZI BINALSHIBH; ALI ABDUL AZIZ ALI; MUSTAFA AHMED AL HAWSAWI	AE 227A **Government Response** To Defense Motion To Compel the Prosecution to Allow the Defense to Receive and Share Unclassified, Un-redacted, Discovery with Mr. Hawsawi 10 October 2013

1. Timeliness

This Response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c(1).

2. Relief Sought

The Defense requested relief of allowing Mr. Hawsawi to view the unclassified discovery referenced in the Defense motion is moot as the Prosecution will provide defense counsel with "unclassified/releasable to the detainee" versions of the 24 disciplinary reports noticed by counsel. *See* AE227, Attachment B. The portion of the Defense motion to compel the Prosecution to provide the Defense with unredacted copies of the unclassified discovery should be denied, as the redacted information is not material to the preparation of the defense.

3. Burden of proof

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

4. Facts

Since the pre-referral stage of these proceedings, counsel for Mr. Hawsawi and other Defense teams have continually requested discovery of detainee records maintained by Joint Task Force-Guantanamo Bay (JTF-GTMO).

On 5 September 2013, the Prosecution provided the Defense with discovery that included 24 redacted incident reports regarding Mr. Hawsawi marked "Unclassified//FOUO Not Releasable to Detainee or Public." The 24 incident reports detail events involving Mr. Hawsawi that occurred at the Guantanamo Bay Detention Facility between 21 January 2007 and 10 March 2012.

On 26 September 2013, counsel for Mr. Hawsawi filed a subsequent discovery request seeking, among other information, detainee records maintained by JTF-GTMO.

On 26 September 2013, counsel for Mr. Hawsawi filed the instant motion to compel the Prosecution to allow the Defense to share the 24 unclassified disciplinary reports with Mr. Hawsawi and to provide the Defense with unredacted copies of the unclassified discovery.

5. Law and Argument

I. The Defense Motion to Compel the Commission to Permit Mr. Hawsawi to View the Referenced Unclassified Discovery is Moot Where the Prosecution Will Provide Defense Counsel with "Unclassified/Releasable to the Detainee" Versions of the Subject Reports

The Prosecution intends to provide counsel for Mr. Hawsawi with copies of the unclassified incident reports (contained in Attachment B) that are authorized for release to Mr. Hawsawi. As such, the portion of the Defense motion requesting the Prosecution to allow the sharing of the unclassified reports should be considered moot.

II. There is No Due Process Violation in Redacting Information That is Not Material to the Preparation of the Defense

As an initial matter, the Defense is not entitled to receive unredacted incident reports where the redacted information has been determined by the Prosecution to not be relevant and material to the preparation of the defense. *See* R.M.C. 701(c). The Defense's argument for this information is based on the premise that the Government cannot withhold evidence that it may use to seek a death sentence, claiming the information contained in the incident reports may be used to "convict" the Accused or to "influence the sentencing decision." *See* AE227 at 3.[1] However, contrary to the Defense claims, the Prosecution does not currently intend to affirmatively introduce evidence of these disciplinary infractions in its case-in-chief or in any pre-sentencing case; a pre-sentencing case that will instead focus on the deaths of 2,976 people, the impact those deaths had on their loved ones, and the aggravating factors previously noticed to the Defense pursuant to R.M.C. 1004. If, for some reason, unforeseen at this time, the Prosecution decides to present these reports as part of its case, the Prosecution will provide the requisite notice as early as possible, as well as any currently redacted information that may be material to the preparation of the Defense to contest such evidence.[2]

An accused has a right to discovery of certain materials but the scope of this right and the government's attendant discovery obligations are not without limit. For example, upon request, the government must permit the defense to inspect and copy documents in the government's possession, but only if the documents meet the requirements of R.M.C. 701. *See* R.M.C. 701; *see also United States v. Yunis,* 867 F.2d 617 (D.C. Cir. 1989). Due process requires the government to disclose evidence favorable to the accused, but only when the evidence is "material" to guilt or punishment, *Brady v Maryland,* 373 U.S. 83, 87 (1963), or may be used to

[1] To the contrary, the Prosecution provided detainee records, to include the subject disciplinary reports, in response to the discovery requested by counsel for Mr. Hawsawi and other Accused.

[2] Once a trial scheduling order is entered in this case, the Military Judge will no doubt include deadlines for the exchange of witness lists. At that time, the Defense would have ample time and opportunity to interview the respective witness.

impeach the credibility of government witnesses, *Giglio v. United States,* 405 U.S. 150, 154 (1972). As acknowledged by the Defense in its pleading, R.M.C. 701(c)(1) provides the defense counsel an opportunity to examine books, papers, documents, photographs, tangible objects, buildings, or places 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. *See* R.M.C. 701(c)(1). As discussed *supra*, the Prosecution does not currently intend to present this evidence.

The redacted portions of the 24-referenced reports contain information that is classified[3] and/or information that is not material to the preparation of the defense. This information includes: force protection measures implemented by JTF-GTMO; internal protocols such as numerical categories of offenses and disciplinary levels; specific locations within the detention facility; and identifying information for JTF-GTMO personnel who observed and reported the individual incidents. In accordance with Protective Order #2, ". . . sensitive discovery materials are to be provided to the Defense, and used by the Defense, solely for the purpose of allowing the Accused to prepare their defense . . ." *Id*. At this time, without notice from the Prosecution that it intends to introduce evidence of disciplinary infractions, this force protection information is neither relevant nor material to the preparation of the defense and therefore, is not being provided to the Defense.

6. <u>Conclusion</u>

The Prosecution will provide defense counsel with "unclassified/releasable to the detainee" versions of the 24 disciplinary reports noticed by counsel for Mr. Hawsawi in Attachment B of the Defense motion. The remaining requested relief should be denied, as the redacted information contained in the unclassified reports is neither relevant nor material to the preparation of the defense.

[3] It should be further noted that counsel for Mustafa al Hawsawi has not yet signed the MOU for the receipt of classified information.

7. Oral Argument

The Prosecution does not request oral argument; however, if the Defense has an opportunity to present oral argument, the Prosecution requests the opportunity to be heard.

8. Witnesses and Evidence

The Prosecution does not rely on any witnesses or evidence to support this motion.

9. Additional Information

The Prosecution has no additional information.

10. Attachments

A. Certificate of Service, dated 10 October 2013.

Respectfully submitted,

//s//

Kiersten J. Korczynski
LT, JAGC, USN
Assistant Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 10th day of October 2013, I filed AE 227A, the Government's Response to Defense Motion to Compel the Defense Share Unclassified, Un-redacted, Discovery with Mr. Hawsawi with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

_____//s//_____
Kiersten Korczynski
LT, JAGC, USN
Assistant Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions