

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY**

UNITED STATES OF AMERICA

v.

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

AE 227B (MAH)

Defense Reply

To Government Response to Defense Motion
to Compel the Prosecution to Allow the
Defense to Receive and Share Unclassified,
Un-redacted, Discovery with Mr. Hawsawi

Filed: 17 October 2013

1. **Timeliness:** This reply is timely filed.
2. **Overview:** The Prosecution continues to unnecessarily delay these legal proceeding by not complying with their discovery obligations in this capital case. In AE 227 the Defense sought the simple relief of sharing twenty-four (24) unclassified, non-sensitive, discovery documents with Mr. Hawsawi, and to receive un-redacted copies of the documents. Instead of simply granting the Defense request, the Prosecution now claims it will provide a different version of these documents for the Defense to share with Mr. Hawsawi at an undisclosed date,¹ takes the indefensible position that such critical information as the identity of Mr. Hawsawi's accusers and details regarding his alleged disciplinary infractions during pretrial confinement are not material to the preparation of his defense because the Prosecution does not currently intend on using the information at trial,² and then claims for the first time that the documents contain classified information and unclassified "sensitive discovery materials,"³ even though the documents in

¹ See AE 227A at 1-2.

² See *id.* at 3.

³ See *id.* at 4.

question are marked unclassified and do not bear any “sensitive discovery materials” markings.⁴ Mr. Hawsawi must be allowed the opportunity to review these documents and explain or rebut the allegations raised in the documents with his Defense Counsel. Therefore, the limitations on sharing this unclassified discovery with Mr. Hawsawi, and the Prosecution’s redaction of critical information from the reports themselves, violates Mr. Hawsawi’s statutory and 5th and 6th Amendment rights to due process, to prepare and present a defense, to confront his accusers, and to receive the effective assistance of counsel.

3. Law and Argument:

a. The Prosecution’s concept of its discovery obligation is in direct contravention of the Military Commissions Act, the Rules for Military Commissions, and the U.S. Constitution.

R.M.C. 701(j) establishes: “Each party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence.” In passing the Military Commissions Act (MCA) of 2009, Congress mandated this process.⁵ Demonstrating materiality in an Article III court “is not a heavy burden,” and “evidence is material as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.”⁶ With regards to an accused’s own statements, the burden is arguably even less than the material standard, as “the production of a defendant’s statements has become practically a matter of right even without a showing of materiality.”⁷

In clear violation of this established law, the Prosecution takes three distinct positions in its

⁴ See Protective Order #2 at 3 (requiring any material not to be disseminated to the Accused to be clearly marked “sensitive discovery materials”).

⁵ See 10 U.S.C. § 949j (“The opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the Constitution.”).

⁶ See *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993).

⁷ See *United States v. Yunis*, 867 F.2d 617, 621-22 (D.C. Cir. 1989).

Response. The Prosecution first claims that it will provide, at an undisclosed date, a substituted version of the documents for the Defense to share with Mr. Hawsawi.⁸ However, the only rules authorizing the Prosecution to provide the Defense with substitutions are the privilege provisions of M.C.R.E. 505 and 506, which allows the Prosecution to provide judicially approved substitutions after they have invoked one of these two evidentiary privileges. The Prosecution has invoked neither evidentiary privilege in their response, which begs the question of under what legal authority are they proposing to provide Mr. Hawsawi with substitutions for discovery that they already provided to the Defense? In fact, there is no such legal authority, and the Defense should be permitted to show the documents to Mr. Hawsawi in the same format in which they were originally provided to the Defense.

The Prosecution next claims that critical information redacted from the documents, such as the identity of Mr. Hawsawi's accusers, statements allegedly made by Mr. Hawsawi, statements allegedly made by the accusers to Mr. Hawsawi, and details regarding disciplinary infractions he received, is not material to the preparation of his defense, because "the Prosecution does not currently intend to present this evidence."⁹ This argument demonstrates a clear misunderstanding on the part of the Prosecution of their discovery obligations under R.M.C. 701. R.M.C. 701 provides that the Government shall permit the Defense to examine documents that are under the control of the government and material to the preparation of the Defense *or* intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.¹⁰ The fact that the Prosecution does not currently intend on using the documents at trial does not make them non-material to the preparation of the Defense, and does not relieve them of their discovery obligation. These reports indicate that an undisclosed person made allegations against Mr.

⁸ See AE 227A at 1-2.

⁹ See AE 227A at 3-4.

¹⁰ See R.M.C. 701 (*emphasis added*).

Hawsawi, recorded statements allegedly spoken by, and actions allegedly taken by, Mr. Hawsawi, and as a consequence, Mr. Hawsawi allegedly received some type of disciplinary infraction. It is clearly material to Mr. Hawsawi's Defense to investigate these claims, confront the accusers, and determine what subsequent motions need to be filed and how the information affects Mr. Hawsawi's defense strategy and case in mitigation. Mr. Hawsawi must be allowed the opportunity to review these documents and explain or rebut the allegations raised in the documents with his Defense Counsel.

Finally, the Prosecution claims for the first time that the redacted portions of the documents contain classified information and unclassified "sensitive discovery materials."¹¹ If this is the case, there are established procedures that the Prosecution can follow under M.C.R.E. 505, M.C.R.E. 506, and Protective Orders #1 and #2 to ensure Mr. Hawsawi's statutory and 5th and 6th Amendment rights to due process, to prepare and present a defense, to confront his accusers, and to receive the effective assistance of counsel are not violated. The Prosecution has not elected to follow these procedures. Therefore, Mr. Hawsawi continues to seek an Order from this Commission permitting him to view the 24 reports, and directing the Prosecution to provide the Defense with un-redacted copies of these reports.

4. **Attachments:**

- A. Certificate of Service.

//s//
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Detailed Defense Counsel
Detailed Learned Counsel for Mr. Hawsawi

¹¹ See AE 227A at 4.

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