**MILITARY COMMISSIONS TRIAL JUDICIARY**
**GUANTANAMO BAY**

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| UNITED STATES OF AMERICA<br><br>v.<br><br>KHALID SHAIKH MOHAMMAD,<br>WALID MUHAMMAD SALIH<br>MUBARAK BIN 'ATTASH,<br>RAMZI BIN AL SHAIBH,<br>AMMAR AL BALUCHI<br>("ALI ABDUL AZIZ ALI"),<br>MUSTAFA AHMED ADAM<br>AL HAWSAWI | **AE 333(MAH)**<br><br>**Defense Motion**<br>to Compel Discovery<br><br>Filed: 15 December 2014 |

1. **Timeliness:** This motion is timely filed pursuant to the Trial Judiciary Rules of Court, Rule 3.7(b).

2. **Relief sought:** The Defense moves this Commission to compel the Prosecution to produce un-redacted copies of the following documents:

   a. Copies of all reports stemming from the [redacted] use of force on Mr. al Hawsawi. This request should include, but not be limited to, all DIMS entries, incident reports, witness statements, preliminary inquiries, 15-6 or Command Investigations, medical reports, and scars and marks reports;

   b. The identities or pseudonyms of the guard force personnel that were involved in Mr. al Hawsawi's take down;

   c. Personnel or service records of members involved in the use of force including training all training records associated with their duties and responsibilities at this detention facility as well as previous training received to carry out detention facility duties;

d. Copies of all video, photographic, and audio recordings of the use of force;

e. Copies of all video, photographic, and audio recordings of Mr. al Hawsawi's medical examination and treatment following the use of force;

f. The ability to examine, document, and photograph [redacted]

3. **Overview:** On [redacted], Mustafa al Hawsawi was the victim of excessive use of force [redacted] at Camp VII, exacerbating his medical condition and resulting in injuries to Mr. al Hawsawi. Mr. al Hawsawi was subsequently stripped of medical devices and medication necessary for the treatment of ongoing medical conditions, and a number of his legal files and documents were isolated as to be inaccessible to Mr. al Hawsawi. The Defense respectfully requests that the Military Judge order the Prosecution to produce the requested documents and witnesses. These documents are material to the resolution of emergency motion AE 332(MAH).

4. **Burden of proof:** As the moving party, the Defense bears the burden of demonstrating by a preponderance of the evidence that the requested relief is warranted.[1]

5. **Facts:**

a. [redacted] Mustafa al Hawsawi was the victim of excessive use of force [redacted] at Camp VII where Mr. al Hawsawi has been detained for the past eight years.

b. [redacted]

c. [redacted]

[1] R.C.M. 905(c)(1); R.C.M. 905(c)(2).

[redacted]

d. On 10 December 2014, Counsel requested that the Commander Joint Task Force Guantanamo initiate an immediate inquiry and hold those personnel responsible accountable. *See.* Attach B

e. On 11 December 2014, RDML Kyle Cozad, Commander Joint Task Force Guantanamo replied via e-mail that "I take any allegation seriously, and will give yours appropriate attention."

f. On 13 December 2014, Assistant Prosecutor, Mr. Robert Swann stated that "this has already been investigated."

6. **Discussion:**

a. The Rules for Military Commissions and Case Law Compel Production of these Documents and Witnesses

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 open process.[2] The MCA further provides that "[t]he 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."[3] R.M.C. 701(c)(1) provides that the Prosecution *shall* permit the defense counsel to examine any books, paper, documents, photographs, tangible objects, buildings, or places so long as they are: (1) under the control of the Prosecution, and (2) material to the preparation of the defense or intended for use by the trial

[2] *See* 10 U.S.C. § 949j.
[3] *Id.*

counsel as evidence in the prosecution case-in-chief at trial.[4] In *United States v. Lloyd*, the D.C. Circuit reiterated the existing discovery principle that demonstrating materiality in an Article III court "is not a heavy burden," and that "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.' "[5]

Documents material to the preparation of the defense are not limited to exculpatory evidence,[6] as the "language and spirit of the Rule [Fed. R. Crim. Pro. 16] are designed to provide to a criminal defendant, in the interests of fairness, the widest possible opportunity to inspect and receive such materials in the possession of the Prosecution as may aid him in presenting his side of the case."[7] The scope of materiality is also not limited to admissible evidence alone, as documents and information that are not admissible may nonetheless lead to other admissible information and evidence.[8] Additionally, the scope of materiality is not limited to information that is favorable to the Defense, but also includes information that is unfavorable, as "a defendant in possession of such evidence may alter the quantum of proof in his favor in several ways: by preparing a strategy to confront the damaging evidence at trial; by conducting an investigation to attempt to discredit that evidence; or by not presenting a defense which is undercut by such evidence."[9]

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[4] R.M.C. 701(c)(1) (emphasis added)
[5] *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1998), quoting *United States v. George,* 786 F.Supp. 56, 58 (D.D.C.1992).
[6] *United States v. Marshall*, 132 F.3d 63, 67 (D.C. Cir. 1998); *United States v. Libby*, 429 F. Supp. 2d 1, 7 (D.D.C. 2006).
[7] *United States v. Poindexter*, 727 F. Supp. 1470, 1473 (D.D.C. 1989).
[8] *See Lloyd,* 992 F.2d at 351 (finding materiality "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.")
[9] *Marshall*, 132 F.3d at 68.

b. The information requested is relevant and material to AE 332(MAH).

In AE 332(MAH), Defense Emergency Motion for Appropriate Medical Intervention and Return of Legal Files, the defense requested that the commission take immediate action following a [redacted] incident in which Mr. al Hawsawi was roughly taken down [redacted] in the High Value Detainee Facility. This event has exacerbated chronic severe medical conditions which require immediate attention. Additionally, following this clear case of excessive force, Mr. al Hawsawi's legal bins were segregated and Mr. al Hawsawi was moved to an isolation cell where previously approved medical devices and medication were unavailable. This latest episode is another in a series of troubling actions by the Camp Commander which signal an escalation of force and use of methods and techniques prohibited by the Geneva Conventions and by well-established domestic principles of detention. The materials requested are necessary and material to the defense as Mr. al Hawsawi's legal team must be in a position to assess what led to this assault, seek accountability and determine whether Mr. al Hawsawi has received appropriate medical treatment.

7. **Request for oral argument:** Defense requests the Commission address this issue in court on 16 December 2014 and requests oral argument.

8. **Conference with opposing counsel**: The Prosecution responds as follows:

- will provide copies of every report generated regarding the [redacted] incident once they go through the declassification/redaction process, which will make the request moot.
- will not provide identities and names of guard force personnel but will provide identifying numbers soon.
- objects to providing personnel records for those guards involved.
- believes that Request for video of [redacted] incident is moot, as no video exists.

- believes that Request to [redacted] is moot, as AE 108 grants a visit to the facility.

9. **Attachments:**

A. Certificate of service;

B. Letter to Commander Joint Task Force Guantanamo Bay.

//s//
SEAN M. GLEASON
LtCol, USMC
Detailed Defense Counsel for
Mr. al Hawsawi

//s//
WALTER B. RUIZ
Learned Defense Counsel for
Mr. al Hawsawi

//s//
JENNIFER N. WILLIAMS
LTC, JA, USAR
Detailed Defense Counsel for
Mr. al Hawsawi

# A

## CERTIFICATE OF SERVICE

I certify that on 15 December 2014, I caused to be hand delivered and electronically filed **AE 333(MAH), Defense Motion to Compel Discovery,** with the Clerk of the Court and caused a copy to be served on all counsel of record by e-mail.

//s//
WALTER B. RUIZ
Learned Counsel for Mr. Hawsawi

# B

10 December 2014

From: Walter B. Ruiz, Learned Counsel for Mustafa al Hawsawi
To: Commander, Joint Task Force-Guantanamo

Subj: Excessive Use of Force by Guard Force

It has come to our attention that [redacted] Mustafa al Hawsawi was the victim of excessive use of force [redacted] at Camp VII where Mr. al Hawsawi has been detained for the past eight years. We are extremely distressed by what appears to be an improper escalation and use of force against a [redacted] suffers from numerous documented debilitating and chronic ailments, [redacted]. We request that you conduct and immediate inquiry into this matter and hold those responsible accountable.

Based on the information we possess, the members of the guard force who engaged in this excessive use of force [redacted] and no video of this incident was recorded [redacted] which raises questions regarding the adequacy of their training on the escalation and proper use of force.

While we understand that there may be circumstances that can lead to an escalation of physical force in a detention facility, the facts and circumstances surrounding this incident do not support such a conclusion. Mr. al Hawsawi is 46 years old, [redacted]

[redacted]

As troubling as this entire episode is, rather than seek proper accountability, the Camp Commander has enacted measures which violate the Geneva Convention against Mr. al Hawsawi. As a punishment for this incident, Mr. al Hawsawi has been stripped of necessary medical care, to include medical devices and medication necessary for the treatment of ongoing medical conditions. [redacted] floor with only a thin green mat despite his array of medical ailments [redacted] These conditions are contributing to Mr al Hawsawi's deteriorating health and are degrading his ability to effectively engage with counsel and participate in his defense. As you are well aware, detainees under the control of a detaining power must be provided with necessary medical care. Deliberate indifference to his medical care is not only

illegal under domestic U.S. law, but is also a grave violation of the Geneva Convention and tantamount to a war crime.

As an additional punishment, the Camp Commander has ordered that Mr. al Hawsawi not have access to his much needed attorney client privileged materials and other case related materials necessary for the preparation of his defense. This action is a violation of Judge Pohl's standing military commission's communication order.

Joint Task Force Guantanamo's Mission statement pledges to conduct safe, humane, legal and transparent care and custody of detainees. I ask you to affirm that commitment by conducting an independent inquiry into not only the assault on Mr. al Hawsawi, but also into the punishment awarded to Mr. al Hawsawi by his Camp Commander, which violate domestic and international law. Additionally, I ask that Mr. al Hawsawi's medical devices, medication, and legal documents be immediately returned to him.

We appreciate your attention to this matter and look forward to your reply.

//s//
SEAN M. GLEASON
LtCol, USMC
Detailed Defense Counsel for
Mr. al Hawsawi

//s//
WALTER B. RUIZ
Learned Defense Counsel for
Mr. al Hawsawi

//s//
JENNIFER N. WILLIAMS
LTC, JA, USAR
Detailed Defense Counsel for
Mr. al Hawsawi

Copy to:
Commander, Joint Detention Group