

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY**

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

AE360(WBA)

**Defense Motion** to Compel Discovery Related  
to Audio and Video Messages to Family

Date Filed: 14 May 2015

**1. Timeliness:** This motion is timely filed.

**2. Relief Sought:**

Mr. bin 'Atash requests that the Commission compel discovery of the material requested in Attachment B. Alternatively, Mr. bin 'Atash requests that the Commission direct the Prosecution to provide the materials requested in Attachment B to the Commission for *in camera* review.

**3. Overview:**

Mr. bin 'Atash was detained on 29 April 2003 in Karachi, Pakistan, rendered to a variety of "black sites" operated by the CIA for a period of 3 ½ years, and brutally tortured at those black sites. On September 2006, Mr. bin 'Atash was rendered to Guantanamo Bay, Cuba and imprisoned in a secret prison where he has since been held. During all times from 2003 until the present, Mr. bin 'Atash has been denied virtually all contact with his family, either in-person, by telephone or by videoconference. Such denial by the United States constitutes a violation of applicable international and domestic law.

On 7 December 2014, in an effort to communicate with his family members in Saudi Arabia, Mr. bin 'Atash recorded a short, JTF-GTMO-sanctioned video message to be screened to members of his family. On 9 January 2015, the U.S. Government, for unknown reasons, refused to screen Mr. bin 'Atash's video message. On 27 January 2015, Mr. bin 'Atash served the Prosecution with a discovery request for copies of all audio and video messages from Mr. bin 'Atash to his family from 1 December 2014 to present. Mr. bin 'Atash additionally requested documentation and communications pertaining to the video messages, including the refusal to screen the 7 December 2014 message. On 28 January 2015, within twenty-four hours of receiving Mr. bin 'Atash's discovery request, without conducting any search for or review of the requested materials, the Prosecution summarily denied the discovery request. The Prosecution, despite having not searched for or reviewed the requested materials, concluded that Mr. bin 'Atash's video messages were "self-serving" and had "absolutely nothing to do with this case."

In this instance, the Prosecution failed to satisfy both its procedural and substantive obligations with respect to disclosure and discovery. Procedurally, the Prosecution cannot remain willfully ignorant of materials within the custody of the U.S. Government requested by Mr. bin 'Atash in discovery. The Prosecution has an obligation of "due diligence" which, in the case of potential *Brady* materials, provides the Prosecution with an affirmative responsibility to "learn of any favorable evidence known to the others acting on the government's behalf in the case..." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). The scope of due diligence specifically extends to materials "designated in a defense discovery request, that involv[es] a specified type of information within a specified entity." *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999) (citation omitted). Here, Mr. bin 'Atash identified particularized information in his

discovery request, and the Prosecution had, at minimum, an obligation to review the information prior to summarily denying Mr. bin 'Atash's request.

Had the Prosecution conducted minimal due diligence, it would have discovered that the information requested by Mr. bin 'Atash is material to the preparation of the defense, potentially exculpatory, and also (with regard to Mr. bin 'Atash's own statements) subject to mandatory disclosure pursuant to M.C.R.E. 304(c)(1). Mr. bin 'Atash has both a constitutional and statutory right to be free from unlawful pretrial punishment, and where JTF-GTMO imposes "arbitrary or purposeless" restrictions upon Mr. bin 'Atash, the Commission may infer that the restrictions amount to impermissible punishment. *Bell v. Wolfish*, 441 U.S. 520, 538 (1979). The information requested in discovery in the instant case, including the 7 December 2014 video and related communications, is material to a potential challenge to JTF-GTMO's arbitrary action, as well as to larger challenges concerning Mr. bin 'Atash's overall conditions of confinement (and the resulting impact upon Mr. bin 'Atash's ability to assist meaningfully in the preparation of his own defense). The information requested in discovery is similarly material to an examination of Mr. bin 'Atash's right under the First Amendment and under international humanitarian law to communicate and maintain meaningful relationships with his family members. In addition to potential future litigation, these issues are already the subject of several existing motions, including AE321(WBA), Mr. bin 'Atash's motion to compel telephonic access to his family members. In AE321B(GOV), the Prosecution utilizes the availability of video messages as a shield to defend against the defense request for telephonic access, and as such the Prosecution cannot now claim that video messages have "absolutely nothing to do with this case."

In addition to pretrial litigation, the discovery requested in the instant case is also material to the preparation of Mr. bin 'Atash's case in mitigation, and, in a capital case, *Brady*

material includes evidence in mitigation “in that it may justify a sentence of life imprisonment as opposed to death.” *United States v. Feliciano*, 998 F. Supp. 166, 170 (D. Conn. 1998). Mr. bin ‘Atash’s audio and video messages to family are valuable evidence of Mr. bin ‘Atash’s adaptability to prolonged confinement, as well as Mr. bin ‘Atash’s rehabilitative potential and future value. Such evidence of a capital defendant’s “well-behaved and peaceful adjustment to life in prison” is “by its nature relevant to the sentencing determination.” *Skipper v. South Carolina*, 476 U.S. 1, 6 (1986). Such evidence is also crucial to rebut the Prosecution’s evidence in aggravation concerning Mr. bin ‘Atash’s alleged transgressions in confinement and to provide the panel with a different and more sympathetic picture of Mr. bin ‘Atash. Additionally, the information requested in the defense discovery request is important to an examination of Mr. bin ‘Atash’s ability to prepare a case in mitigation, as denial of all meaningful contact with Mr. bin ‘Atash’s family fosters mistrust and suspicion amongst individuals already disinclined to participate in this Military Commission, inhibiting counsel’s ability to interact with the bin ‘Atash family and the defense’s ability to develop and convey a complete picture of Mr. bin ‘Atash’s background and upbringing.

For these reasons, and those set forth in the instant motion, the Commission should compel discovery of the information requested in Attachment B. In the alternative, and at a minimum, the Commission should conduct an *in camera* examination of the requested materials.

#### **4. Burdens of Proof:**

The defense bears the burden of persuasion. The standard of proof is a preponderance of the evidence. R.M.C. 905(c)(1).

#### **5. Facts:**

A. Mr. bin 'Atash was detained on 29 April 2003, and he has been held continuously since that date. While in the custody of the United States, Mr. bin 'Atash was rendered to a variety of "black sites," where, over the course of more than three years, he was brutally tortured and subjected to all manner of cruel, inhuman, and degrading treatment. On [REDACTED] September 2006, Mr. bin 'Atash was rendered to Guantanamo Bay, Cuba and imprisoned in a secret prison where he has since been held. Since his capture, Mr. bin 'Atash has not been permitted any real-time telephonic or in-person access to his family members.

B. In the Fall of 2014, the Department of Defense and the International Committee of the Red Cross (ICRC) implemented a "video message" program for Mr. bin 'Atash and the other detainees housed in Camp 7. Each detainee was to be permitted one short, non-contemporaneous, non-interactive video message every three months. Each detainee was to be permitted to designate up to five viewers. *See generally* AE321(WBA) at 4-5.

C. In the Fall of 2014, Mr. bin 'Atash was offered an initial opportunity to participate in the video message program. However, Mr. bin 'Atash withdrew his participation after being informed, approximately one hour prior to the taping of his video message, that both his father and his brother would be denied access to his video message. *See generally* AE321C(WBA) at 11-12.

D. In December 2014, Mr. bin 'Atash was again offered an opportunity to participate in the video message program. On or about 7 December 2014, Mr. bin 'Atash recorded a video message to be screened to his family by the ICRC. However, on or about 9 January 2015, Mr. bin 'Atash was informed by the U.S. Government that his video message would not be released to his family. The United States Government offered no explanation for its refusal to release Mr. bin 'Atash's ICRC video message.

E. On 27 January 2015, Mr. bin 'Atash served the Prosecution with a discovery request pertaining to ICRC audio and video messages. Attachment B. Mr. bin 'Atash requested that the Prosecution provide in discovery "a copy of all video or audio messages to Mr. bin 'Atash's family, in any format, recorded by Mr. bin 'Atash for the period 1 December 2014 to present." Mr. bin 'Atash additionally requested "any documentation and any communication...related to audio or video messages from Mr. bin 'Atash to his family, for the period 1 December 2014 to present," to include documentation concerning the U.S. Government's refusal to deliver Mr. bin 'Atash's 7 December 2014 recording.

F. On 28 January 2015, within twenty-four hours of Mr. bin 'Atash's discovery request, the Prosecution summarily denied the request in total. Attachment C. The Prosecution stated that it had "no obligation to review, search for, or disclose self-serving ICRC recordings made by [Mr. bin 'Atash] to his family." The Prosecution further indicated that "[w]hatever decisions were made regarding whether or not to release the video message, and who made those decisions and why, has absolutely nothing to do with this case." The Prosecution indicated that it had conducted and would conduct no search for responsive materials in order to determine the materials' discoverability.

## **6. Law and Argument:**

### **A. Discovery Standard**

The Prosecution has both constitutional and statutory disclosure and discovery obligations. Under the Military Commissions Act of 2009, the Prosecution must permit the defense to examine information within the possession, custody, or control of the Government that is "material to the preparation of the defense." R.M.C. 701(c)(1). Materiality is a low threshold well below evidentiary relevance; 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.” *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (internal quotation marks and citation omitted); *see also United States v. Libby*, 429 F. Supp. 2d 1, 7 (D.D.C. 2006); *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004) (the scope of materiality is broad and is “not focused solely upon evidence known to be admissible at trial” but includes evidence used in formulating defense strategy); *United States v. George*, 786 F. Supp. 56, 58 (D.D.C. 1992) (demonstrating materiality is “not a heavy burden”). Material evidence includes negative or inculpatory evidence because it is “just as important to the preparation of a defense to know its potential pitfalls as it is to know its strengths.” *United States v. Marshall*, 132 F.3d 63, 67 (D.C. Cir. 1998).

*Brady v. Maryland*, 373 U.S. 83, 87 (1963) imposes additional obligations on the Prosecution, requiring the Prosecution to disclose, with or without a defense request, “evidence favorable to an accused” that is “material either to guilt or to punishment.” *See also* 10 U.S.C. § 949j(b)(1)-(4) (expanding upon *Brady* and requiring disclosure of exculpatory evidence that tends to negate guilt, reduce the degree of guilt, impeach a prosecution witness, or mitigate a sentence). In a capital case, *Brady* material includes evidence in mitigation “in that it may justify a sentence of life imprisonment as opposed to death.” *United States v. Feliciano*, 998 F. Supp. 166, 170 (D. Conn. 1998); *see also United States v. Beckford*, 962 F. Supp. 804, 811 (E.D. Va. 1997) (holding that evidence relevant to a statutory mitigating factor is “favorable” evidence pertaining to punishment under the *Brady* standard).

In this case, the Prosecution unsurprisingly failed in its disclosure and discovery obligations because the Prosecution failed even to conduct the requisite search for and examination of the materials requested in Attachment B. Within twenty-four hours of Mr. bin

'Atash's discovery request, the Prosecution provided a tersely-worded final response to the defense, indicating that the Prosecution would not so much as *search for* Mr. bin 'Atash's ICRC audio and video recordings (insensitively described as "self-serving" by the Prosecution) and other associated materials.

The Prosecution's purposeful refusal to search for and learn of material and potentially exculpatory information, after receiving a specific defense request, was in error. The Rules for Military Commissions require the Prosecution to exercise "due diligence" in complying with its discovery obligations. R.M.C. 701(c)(1). Due diligence includes a "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case..." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *see also United States v. Simmons*, 38 M.J. 376, 381 (C.M.A. 1993) ("[t]rial counsel must exercise due diligence in discovering [materials] not only in his possession but also in the possession, control, or custody of other 'military authorities' and make them available for inspection."). The scope of due diligence with respect to the files of other military authorities specifically encompasses "other files, *as designated in a defense discovery request*, that involved a specified type of information within a specified entity." *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999) (citation omitted).

The Prosecution asserts that Mr. bin 'Atash failed to "cite to any specific theory of relevance that would reasonably warrant production of the requested information." Attachment C at 2. However, Mr. bin 'Atash is not required to provide the Prosecution with a "specific theory of relevance" in order to trigger the Prosecution's discovery or *Brady* obligations. The information requested in Attachment B is material to the preparation of the defense (as well as potentially exculpatory) in a number of different respects, including an examination of the



unlawfulness of Mr. bin 'Atash's conditions of confinement (the subject of several existing motions), as well as the preparation of Mr. bin 'Atash's case in mitigation.

### **B. Conditions of Confinement**

As Mr. al Baluchi recently explained, Mr. bin 'Atash enjoys a “nested set of protections” against unlawful conditions of confinement “based on his detention proper, his detention by the Department of Defense, his detention at Guantanamo Bay, his detention under the law of war, and – most narrowly – the war crimes charges pending against him.” AE254PPP(AAA) at 1-2. As a pretrial detainee under domestic law, Mr. bin 'Atash has a constitutional and statutory right to be treated in a humane manner, and he may not be “punished prior to an adjudication of guilt in accordance with due process of law.” *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *see also City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (due process rights of pretrial detainees are “at least as great as the Eighth Amendment protections available to a convicted prisoner.”); *Hill v. Nicodemus*, 979 F.2d 987, 991 (4th Cir. 1992) (“[w]hile a convicted prisoner is entitled to protection only against ‘cruel and unusual’ punishment, a pretrial detainee, not yet found guilty of any crime, may not be subjected to punishment of any description.”); *see also* 10 U.S.C. § 949s (prohibiting cruel or unusual punishment, either adjudged or “inflicted,” for any person subject to trial by military commissions). Where conditions or restrictions imposed incident to pretrial confinement are “arbitrary or purposeless,” a “court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.” *Bell*, 441 U.S. at 538. “[I]nquiry into whether given conditions constitute ‘punishment’ must [] consider the totality of circumstances within an institution.” *Hubbard v. Taylor*, 399 F.3d 150, 160 (3d Cir. 2005).

In this case, counsel have reason to believe that the refusal to deliver Mr. bin 'Atash's 7 December 2014 video, in the context of Mr. bin 'Atash's years of enforced isolation from his family, was arbitrary and purposeless and may have amounted to unauthorized pretrial punishment (whether or not the denial was intended as punishment). However, Mr. bin 'Atash cannot appropriately assess the arbitrariness of the Government's action until his counsel are able to view both the 7 December 2014 video message and any communications concerning the refusal to screen the message for Mr. bin 'Atash's family. Additionally, Mr. bin 'Atash intends to mount future challenges to his overall conditions of confinement, considering the "totality of circumstances" within Camp 7 (including isolation from family) and the concomitant impact on his ability to prepare an effective defense, and the audio and video messages and accompanying communications at issue in Attachment B are material to Mr. bin 'Atash's preparation on this issue.

In addition to his Fifth Amendment right to be free from unlawful pretrial punishment, Mr. bin 'Atash also has additional constitutional rights implicated in the video message program. In particular, Mr. bin 'Atash has a First Amendment right to communicate with friends and family. *See, e.g., Washington v. Reno*, 35 F.3d 1093, 1100 (6th Cir. 1994) ("persons incarcerated in penal institutions retain their First Amendment rights to communicate with family and friends..."); *Morgan v. LaVallee*, 526 F.2d 221, 225 (2d Cir. 1975) (noting that a "prison inmate's rights to communicate with family and friends are essentially First Amendment rights" and that restrictions are impermissible where they "materially impede the inmate's ability to communicate with the outside world..."). Regulations and practices that impinge upon Mr. bin 'Atash's rights will only be valid if such regulations are "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). In this instance, Mr. bin 'Atash

cannot assess the dimensions, strengths, and weaknesses of a potential First Amendment challenge until his counsel have access to the materials requested in Attachment B. Only by reviewing these materials will counsel be able to determine whether the refusal to deliver Mr. bin 'Atash's video message to his family was reasonably related to a legitimate penological interest.

As part of Mr. bin 'Atash's "nested set of protections" with regard to his conditions of confinement, Mr. bin 'Atash also benefits from protection under international humanitarian law, including both customary and treaty law. At minimum, Mr. bin 'Atash is guaranteed the protection of Common Article 3 of the Geneva Conventions, the various norms of customary international law applicable to non-international armed conflicts, as well as those protections that the United States has specifically agreed to apply in its treatment of Mr. bin 'Atash and his fellow detainees.<sup>1</sup> *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 629 (2006); DoDD 2310.01E, DoD Detainee Program (19 August 2014) at ¶ 3(a) (incorporating by reference, *inter alia*, Articles 4-6 of the Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol II)). Each of these sources of international law vests Mr. bin 'Atash with various rights regarding communication with and meaningful access to members of his family. For example, it is a precept of customary international law that persons deprived of liberty in non-international armed conflict "be allowed to receive visits from family members to the degree practicable." ICRC, Customary IHL Database, Rule 126, available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule126](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule126). The United States has expanded upon this protection, defining "humane treatment" to include "appropriate contacts with the outside world," including

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<sup>1</sup> Mr. bin 'Atash should properly be classified as a prisoner of war and protected by the Third Geneva Convention until otherwise classified by a competent tribunal, and a competent tribunal may ultimately classify Mr. bin 'Atash as a civilian internee subject to the protections of the Fourth Geneva Convention. *See generally* AE254VV(AAA) at 3 n.3; AE119(MAH); AE119(WBA). However, even absent an appropriate status determination by a competent tribunal, Common Article 3 provides baseline protections sufficient to trigger discovery of the material sought in the instant motion.

“exchange of letters, phone calls, and video teleconferences with immediate family or next of kin, as well as family visits.” DoDD 2310.01E at ¶ 3(b)(1)(b).

In the complete absence of any real-time form of communication or any family visits, counsel must examine the adequacy of video messages and other similar modes of communication in order to determine whether the United States is complying with international law, treating Mr. bin ‘Atash humanely and with respect for his personal dignity as required under Common Article 3, and treating Mr. bin ‘Atash in a manner that allows him to remain engaged, competent, and willing and able to assist his counsel in preparing a defense. Mr. bin ‘Atash cannot know the complete dimensions of international law challenges, or accurately assess the merits of such challenges, until his counsel are provided with the discovery requested in Attachment B.

Notably, in addition to future challenges grounded in both domestic and international law, the requested discovery is also material to the defense’s preparation on several existing motions pertaining to conditions of confinement. *See, e.g.*, AE321(WBA) (Defense Motion to Permit Telephonic Access With Family Members); AE321(AAA Sup) (requesting in-person visits in addition to telephonic access); AE303(MAH) (Defense Motion for Appropriate Relief to Require Confinement Conditions that Comply with International Humanitarian Law Standards); *see also* AE303(KSM WBA RBS AAA) at 1-2 (declining joinder to AE303(MAH), noting that while the “principles articulated in AE303 are sound...the government has not yet produced all the relevant discovery.”). These motions do more than simply explore Mr. bin ‘Atash’s confinement conditions in a vacuum; instead, they draw a direct and immediate nexus to the Commission. *See, e.g.*, AE321C at 9 (“the ‘nexus’ is obvious where an accused is punished incident to pretrial confinement which has been imposed, at least in part, [to] ‘ensure [his]

presence for trial.”) (quoting *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005)); *Id.* at 11 (“[w]here Mr. bin ‘Atash is not permitted to have meaningful interaction with his family members, the Government’s actions engender a sense of hopelessness that causes Mr. bin ‘Atash to withdraw from interaction with his counsel.”). In defense against Mr. bin ‘Atash’s challenges, the Prosecution has specifically pointed to the availability of video messages and alternative modes of communication as a means of “ensuring that [Mr. bin ‘Atash’s] family connections can be maintained.” AE321B(GOV) at 8. Having specifically used the availability of video messages as a shield against Mr. bin ‘Atash’s existing and unresolved claims, the Prosecution is ill-positioned to now claim that video messages have “absolutely nothing to do with this case.” Attachment C at 2.

### **C. Mitigation**

In a capital case, relevant evidence in mitigation includes “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.” *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *see also* American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty cases (“ABA Guidelines”), 31 Hofstra L. Rev. 913, 1055 (2003) (counsel have “continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution’s case in aggravation.”). As noted *supra*, the Prosecution’s failure to disclose evidence material to the preparation of the defense’s case in mitigation does not only constitute a violation of R.M.C. 701; it likely also constitutes a *Brady* violation. *Beckford*, 962 F.Supp. at 811; *Feliciano*, 988 F. Supp. at 170.

Evidence of a capital defendant’s behavior in confinement is admissible in mitigation. *See, e.g., Skipper v. South Carolina*, 476 U.S. 1, 6 (1986) (“a defendant’s disposition to make a

well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination.”); *Ayers v. Belmontes*, 549 U.S. 7, 15 (2006) (“postcrime rehabilitation” and “likelihood of future good conduct” are “circumstance[s] tending to make a defendant less deserving of the death penalty.”). Mr. bin ‘Atash’s audio and video messages to family are valuable evidence of Mr. bin ‘Atash’s behavior in and adaptability to prolonged periods of confinement, and Mr. bin ‘Atash’s ability to carry on meaningful relationship with family members over great distances and despite great obstacles is significant evidence of rehabilitative potential and future worth. Additionally, the Prosecution in recent days has provided the defense with significant quantities of discovery indicating its intent to use evidence of Mr. bin ‘Atash’s alleged transgressions while in confinement as aggravation on sentencing. Mr. bin ‘Atash is entitled to evidence, such as that requested in Attachment B, necessary to rebut the Prosecution’s characterization and provide the panel with a different and more sympathetic picture of Mr. bin ‘Atash’s life in confinement. For these reasons, the information requested in Attachment B is material to the preparation of the defense and must be disclosed.

In addition to actual use in Mr. bin ‘Atash’s case in mitigation, the information requested in Attachment B is also critical to an examination of Mr. bin ‘Atash’s ability to prepare an effective mitigation case. Any successful mitigation investigation must include interaction with an accused’s family members. *See, e.g., Johnson v. Bell*, 344 F.3d 567, 576 (6th Cir. 2006) (counsel ineffective where counsel “should have delved deeper into Petitioner’s past family, social, and psychological history.”); *Mason v. Mitchell*, 543 F.3d 766, 776 (6th Cir. 2008) (counsel ineffective where counsel “inexplicably failed to conduct his own independent investigation and interview members of [the defendant’s] family regarding the circumstances of

his childhood and background.”); *see also* ABA Guidelines, 31 Hofstra L. Rev. at 1055-56 (mitigation case must include “[w]itnesses familiar with and evidence relating to the client’s life and development...that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client’s life, or would otherwise support a sentence less than death.”). Any interaction with Mr. bin ‘Atash’s family members must be done in a thoughtful, careful, and calculated manner that encourages the family to participate in Mr. bin ‘Atash’s defense, rather than in a manner that alienates the family and discourages future participation. *See* Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 Hofstra L. Rev. 677, 682 (2008) (“[m]itigation specialists must be able to identify, locate, and interview relevant persons in a culturally competent manner that produces confidential, relevant and reliable information.”). Where family members are naturally suspicious of and disinclined to participate in this Military Commission, lines of communication with Mr. bin ‘Atash (even regarding seemingly-mundane and unrelated topics of interest) can establish trust and confidence and can open the family to direct interaction with defense counsel. Conversely, where the Government arbitrarily cuts lines of communication, defense counsel lose trust and the ability to interact with Mr. bin ‘Atash’s family. The requested discovery is material to an examination of this dynamic and whether the development of a case in mitigation is being impermissibly impeded by the Government’s obstruction of communications between Mr. bin ‘Atash and his family.

**D. M.C.R.E. 304(c)(1)**

In addition to being material and potentially exculpatory, discovery in this instance is required because Mr. bin ‘Atash has a virtually-unqualified right to obtain his own statements

that are in the possession of the Government. Under M.C.R.E. 304(c)(1), the Prosecution “shall disclose to the defense the contents of all relevant statements, oral, written, or recorded, made or adopted by the accused, that are within the possession, custody or control of the Government...and are material to the preparation of the defense under R.M.C. 701...” This requirement is modeled after a similar requirement at courts-martial, but the military commissions rule imposes even greater discovery obligations on the Prosecution. *Compare* M.C.R.E. 304(c)(1) (requiring disclosure of statements “material to the preparation of the defense) *with* Mil. R. Evid. 304(d)(1) (requiring disclosure of “relevant” statements).

While M.C.R.E. 304(c)(1) requires disclosure prior to arraignment, the Rule also imposes upon the Prosecution a continuing duty to disclose the material statements of an accused. *See, e.g., United States v. Williams*, 20 M.J. 686, 687 n.1 (A.C.M.R. 1985) (noting that, for purposes of analysis under Mil. R. Evid. 304, “the fact that trial counsel learned about the statement at issue after appellant had been arraigned is irrelevant.”); *see also* R.M.C. 701(i) (“[i]f, before or during the military commission, a party discovers additional evidence or material previously requested or required to be produced, which is subject to discovery or inspection under this rule, that party shall promptly notify the other party or the military judge of the existence of the additional evidence or material.”). In this instance, audio and video messages from Mr. bin ‘Atash to his family, in the possession of the U.S. Government, are undoubtedly material and must be disclosed pursuant to M.C.R.E. 304(c)(1).

### **E. Conclusion**

The Prosecution summarily dismissed Mr. bin ‘Atash’s discovery request as “self-serving” and unrelated to the case without so much as conducting its constitutionally and statutorily-required due diligence by locating and reviewing the requested information. In



reality, the information requested in Attachment B is material to the defense's preparation for all phases of trial, is particularly significant in mitigation, and is required to be disclosed pursuant to M.C.R.E. 304(c)(1), R.M.C. 701, and *Brady*. The Commission should compel discovery of the information requested in Attachment B. Alternatively and at a minimum, the Commission should exercise its authority under R.M.C. 701(l)(1) to "specify the time, place and manner of making discovery" by requiring the Prosecution to provide the requested information directly to the Commission for *in camera* review.

**7. Oral Argument:** The defense requests oral argument.

**8. Witnesses:** Mr. bin 'Atash reserves the right to request production of witnesses on this motion at a later date.

**9. Conference with Opposing Counsel:** The Prosecution opposes the relief requested herein.

**10. Attachments:**

- A. Certificate of Service
- B. Discovery Request dtd 27 January 2015
- C. Prosecution Final Response dtd 28 January 2015

//s//  
CHERYL T. BORMANN  
Learned Counsel

//s//  
TODD M. SWENSEN  
Maj, USAF  
Defense Counsel

//s//  
MICHAEL A. SCHWARTZ  
Capt, USAF  
Defense Counsel

# Attachment A

**CERTIFICATE OF SERVICE**

I certify that on 14 May 2015, I electronically filed the attached **Defense Motion to Compel Discovery Related to Audio and Video Messages to Family** with the Trial Judiciary and served it on all counsel of record by e-mail.

*//s//*

CHERYL T. BORMANN  
Learned Counsel

# **Attachment B**



**DEPARTMENT OF DEFENSE  
OFFICE OF THE CHIEF DEFENSE COUNSEL  
1620 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1620**

OSD-OGC-OCDC

27 January 2015

MEMORANDUM FOR Office of the Chief Prosecutor, Office of Military Commissions

SUBJECT: Request for Discovery – Audio and Video Messages 1 December 2014 to Present

1. Pursuant to RMC 701, 10 U.S.C. § 949j, the Fifth, Sixth, and Eighth Amendments to the United States Constitution, and international law, Mr. bin ‘Atash requests that the Government provide the following information in discovery. Failure to provide the requested information will deny Mr. bin ‘Atash of his rights to the due process of law, to the effective assistance of counsel, a fair, speedy, and public trial, and to be free from cruel and unusual punishment.

2. Mr. bin ‘Atash requests that the Prosecution produce the following books, papers, documents, photographs or tangible objects which are within the possession, custody, or control of the Government:

a. On or about 7 December 2014, Mr. bin ‘Atash recorded a video message to be screened for Mr. bin ‘Atash’s family by the International Committee of the Red Cross (ICRC). On or about 9 January 2015, Mr. bin ‘Atash was informed that his video message would not be released to his family. Provide a copy of all video or audio messages to Mr. bin ‘Atash’s family, in any format, recorded by Mr. bin ‘Atash for the period 1 December 2014 to present.

b. Provide any documentation and any communication, in any format, including but not limited to email, memoranda, reports, Standard Operating Procedures, or notes of oral communications, related to audio or video messages from Mr. bin ‘Atash to his family, for the period 1 December 2014 to present. This request includes but is not limited to documentation and communication with respect to Mr. bin ‘Atash’s video recorded on or about 7 December 2014, the decision to deny release of the video, and any alleged rules infractions by Mr. bin ‘Atash with respect to the video. This request encompasses but is not limited to communication and documentation generated by any component of the Department of Defense, including U.S. Southern Command, Joint Task Force-Guantanamo Bay, and the Office of the Chief Prosecutor. This request includes policies in effect during the subject period.

3. Point of contact for this discovery request is Mr. [REDACTED] at [REDACTED]

OSD-OGC-OCDC

SUBJECT: Request for Discovery – Audio and Video Messages 1 December 2014 to Present

//s//

CHERYL T. BORMANN  
Learned Counsel

//s//

JAMES E. HATCHER  
LCDR, USN  
Defense Counsel

//s//

MICHAEL A. SCHWARTZ  
Capt, USAF  
Defense Counsel

//s//

TODD M. SWENSEN  
Capt, USAF  
Defense Counsel

# Attachment C



OFFICE OF THE  
CHIEF PROSECUTOR

**DEPARTMENT OF DEFENSE**  
OFFICE OF THE CHIEF PROSECUTOR OF MILITARY COMMISSIONS  
1610 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1610

28 January 2015

MEMORANDUM FOR Defense Counsel for Mr. bin 'Attash

SUBJECT: Prosecution Final Response to 27 January 2015  
Request for Discovery (DR-200-WBA)

1. The Prosecution received the Defense request for discovery on 27 January 2015. The Prosecution hereby responds to the Defense request, as follows in bold.

2. The Defense requests that the Prosecution produce the following books, papers, documents, photographs or tangible objects which are within the possession, custody, or control of the Government:

a. On or about 7 December 2014, Mr. bin 'Atash recorded a video message to be screened for Mr. bin 'Atash's family by the International Committee of the Red Cross (ICRC). On or about 9 January 2015, Mr. bin 'Atash was informed that his video message would not be released to his family. Provide a copy of all video or audio messages to Mr. bin 'Atash's family, in any format, recorded by Mr. bin 'Atash for the period 1 December 2014 to present.

b. Provide any documentation and any communication, in any format, including but not limited to email, memoranda, reports, Standard Operating Procedures, or notes of oral communications, related to audio or video messages from Mr. bin 'Atash to his family, for the period 1 December 2014 to present. This request includes but is not limited to documentation and communication with respect to Mr. bin 'Atash's video recorded on or about 7 December 2014, the decision to deny release of the video, and any alleged rules infractions by Mr. bin 'Atash with respect to the video. This request encompasses but is not limited to communication and documentation generated by any component of the Department of Defense, including U.S. Southern Command, Joint Task Force-Guantanamo Bay, and the Office of the Chief Prosecutor. This request includes policies in effect during the subject period.



