

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY**

UNITED STATES OF AMERICA

AE 394(WBA)

v.

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

**Defense Motion to Compel Production of
Unredacted ICRC Letters (DR-235)**

Date Filed: 14 December 2015

1. Timeliness:

This filing is timely pursuant to Military Commissions Trial Judiciary Rule of Court 3.7(b) and Rule for Military Commissions (R.M.C.) 905.

2. Relief Sought:

Mr. bin 'Atash requests that the Commission compel the Government to produce unredacted copies of letters from family members sent to him through the International Committee of the Red Cross and Red Crescent ("ICRC"). The unredacted letters sent by his family are relevant and necessary for defense counsel to identify and develop witnesses and potential mitigation and assist Mr. bin 'Atash in his defense at trial and, if need be, sentencing.

3. Overview:

Mr. bin 'Atash respectfully requests that the Commission compel the Government to produce the unredacted letters identified in DR-235 as GUAN-2015-F00699, GUAN-2015-F00698, and GUAN-2015-F00058 (Attachment B at 1). The government asserts in its response that DR-235 failed to establish relevance and materiality because non-legal mail from a family

member to the defendant “is, by definition, not related to the legal proceedings” (Attachment C at 2). The government misunderstands that nature of mitigation and the value of letters from family members to the defendant. Mr. bin ‘Atash and defense counsel have limited contact with his family, who reside in Saudi Arabia. It is well-established that defense counsel need to identify and develop potential witnesses at trial and sentencing. Correspondence from the family to the defendant is an established avenue to accomplish this goal. The correspondence, therefore, is relevant and material to the defense.

4. Burden of Proof:

As the moving party, 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. Since arriving at JTF-GTMO in 2006, Mr. bin ‘Atash has corresponded with family members through the ICRC. From 2006 until July 2015 (around 9 years), none of those letters was redacted by the government.
- b. In July 2015, Mr. bin ‘Atash received three letters from his sister and brother that contained redactions: GUAN-2015-F00699, GUAN-2015-F00698, and GUAN-2015-F00058. (Attachment D). There was no explanation or justification provided to defense counsel for the redactions.
- c. Defense counsel filed DR-235 on 9 November 2015, requesting unredacted copies of the 3 letters be provided to Mr. bin ‘Atash or, at a minimum, that they be provided to defense counsel. (Attachment B).
- d. The government responded on 10 November 2015 and denied the request, asserting that there were rules regarding the public release of “non-legal

mail/materials from detainees” and that defense counsel had failed to show how letters from family members to Mr. bin ‘Atash, being non-legal, could be relevant and material to the defense. (Attachment C at 2).

6. Law and Argument:

- a. **Mr. bin ‘Atash has a right to obtain records and information that could lead to possible mitigation evidence under the Constitution and the applicable statute and rules that govern this proceeding.**

In any criminal trial, the defendant has a fundamental due process right to present a complete defense. See, e.g., United States v. Webb, 66 M.J. 89, 92 (C.A.A.F. 2008) (“[t]he due process clause of the Fifth Amendment guarantees that criminal defendants be afforded a meaningful opportunity to present a complete defense”), citing California v. Trombetta, 467 U.S. 479, 485 (1984). Inseparable from the right to present a complete defense is the right to obtain evidence to present such defense. See Washington v. Texas, 388 U.S. 14, 19 (1967) (guaranteeing production of witnesses and evidence under the Fifth Amendment); Taylor v. United States, 329 F.2d 384, 386 (5th Cir. 1964) (guaranteeing production of witnesses and evidence under the Sixth Amendment).

Not only is Mr. bin ‘Atash guaranteed the protections of the Fifth and Sixth Amendments to the U.S. Constitution to compel the production of evidence, but because this is a capital case, “the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a non-capital case.” Gilmore v. Taylor, 508 U.S. 333, 342 (1993). Because the penalty of death is qualitatively different than a sentence of imprisonment, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case, and this need affects every procedure at trial. See Simmons v. South Carolina,

512 U.S. 154, 172 (1994) (Souter, J., concurring); Beck v. Alabama, 447 U.S. 625, 638 (1980); Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

The Supreme Court has long recognized that “highly relevant --- if not essential --- to the selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.” Pepper v. United States, 562 U.S. 476, 480 (2011). In the federal system, Congress codified this principle at 18 U.S.C. § 3661, which provides that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States ” Where the death penalty is a potential punishment, the Court goes farther: “the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record 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) (emphasis added). Such well-established rules carry the “corollary inference that counsel should be seeking to investigate and develop any evidence which might mitigate against the appropriateness of the death penalty.” United States v. Witt, 72 M.J. 727, 757 (A.F. Ct. Crim. App. 2013) (emphasis added).

In the Military Commissions Act of 2009, Congress specifically and consciously recognized the importance of obtaining records and other documents to develop a robust factual record when it directed 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.” 10 U.S.C. § 949j. Under the Rules, Mr. bin ‘Atash is entitled to “production of evidence which is relevant, necessary and noncumulative.” R.M.C. 703(f)(1). That includes “[a]ny books, papers, documents, photographs, tangible objects . . .

which are with the possession, custody, control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and which are material to the preparation of the defense” R.M.C. 701(c)(1).

b. The production and examination of letters from the family is relevant and material to the defense because it may lead to evidence in mitigation.

In its response to DR-235, the government asserts that defense counsel failed to meet its “burden under R.M.C. 701 to establish relevance and materiality of redacted information existing in non-legal letters from the Accused’s siblings.” (Attachment C at 1). The government notes that it has legitimate penological and national security interests and that require rules regarding the public release of non-legal mail from detainees. Finally, the government concludes that, because non-legal mail is, by definition, not related to legal proceedings, there is no theory of relevance to support the disclosure of unredacted copies of non-legal mail from siblings to Mr. bin ‘Atash. (Attachment C at 1-2).

The government misunderstands the very nature of this request and its significance to the defense. There may be a legitimate penological and national security interest that require rules regarding the public release of non-legal mail from detainees, but DR-235 neither requests the public release of non-legal mail nor mail from a detainee. DR-235 requests the production of non-legal by a sibling of a detainee to be delivered to defense counsel. Furthermore, as explained above, correspondence by family members is one of only a few methods by which defense counsel may develop mitigation evidence. As the development of mitigation evidence is required in order to provide effective assistance of counsel, it is, by definition, relevant and material to the preparation of the defense. See R.M.C. 701(c)(1); 703(f)(1). Accordingly, this Commission must order the production of the unredacted letters identified in DR-235 to ensure

compliance with the Constitution and the MCA. See Pepper, 562 U.S. at 480; Witt, 72 M.J. at 757.

7. Oral Argument:

The Defense waives argument but is prepared to supplement this filing with additional information or present argument should the Commission require it.

8. Conference with Opposing Counsel: The Government did not respond to the conference request sent on 9 December 2015.

9. Attachments:

- A. Certificate of Service
- B. 9 November 2015 Request for Production of Letters (DR-235)
- C. 10 November 2015 Response by Government Declining to Produce Letters
- D. Redacted Letters Subject to DR-235

//s//
CHERYL T. BORMANN
Learned Counsel

//s//
EDWIN A. PERRY
Defense Counsel

//s//
MATTHEW H. SEEGER
MAJ, USA
Defense Counsel

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

Attachment A

CERTIFICATE OF SERVICE

I certify that on 14 December 2015, I electronically filed the attached **Defense Motion to Compel Production of Unredacted ICRC Letters (DR-235)** with the Trial Judiciary and all parties.

//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

09 November 2015

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

SUBJECT: Request for Discovery – Unredacted ICRC Letters

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 has been corresponding with family members through the International Committee of the Red Cross and Red Crescent (ICRC) since being moved to Guantanamo Bay Naval Station. For the first time, letters Mr. bin 'Atash' family sent through this process were redacted in July 2015. These redactions appear to be arbitrary.
3. In order to prove the arbitrary nature of JTF-GTMO's non-legal mail screening process, which denies Mr. bin 'Atash the ability to exercise his right to communicate with family members and, in turn, threatens his ability to participate in the preparation of his defense, Mr. bin 'Atash requests unredacted copies of these letters from his sister [REDACTED] and brother [REDACTED]. They are marked as:
 - a. GUAN-2015-F00699
 - b. GUAN-2015-F00698
 - c. GUAN-2015-F00058.
4. If the United States refuses to provide unredacted copies of these letters to Mr. bin 'Atash, at a minimum, unredacted copies of the letters should be provided to defense counsel.
5. Point of contact for this discovery request is MSgt [REDACTED]
[REDACTED]

OSD-OGC-OCDC

SUBJECT: Request for Discovery – Unredacted ICRC Letters

//s//

CHERYL T. BORMANN
Learned Counsel

//s//

EDWIN A. PERRY
Detailed Defense Counsel

//s//

MATTHEW H. SEEGER
MAJ, USA
Detailed Defense Counsel

//s//

MICHAEL A. SCHWARTZ
MAJ, USAF
Detailed 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

10 November 2015

MEMORANDUM FOR Defense Counsel for Mr. bin 'Attash

SUBJECT: Prosecution Final Response to 9 November 2015
Request for Discovery (DR-235-WBA)

1. The Prosecution received the Defense request for discovery on 9 November 2015. The Prosecution hereby responds to the Defense request, below, in bold:

2. The Defense asserts:

"Mr. bin 'Atash has been corresponding with family members through the International Committee of the Red Cross and Red Crescent (ICRC) since being moved to Guantanamo Bay Naval Station. For the first time, letters Mr. bin 'Atash's[sic] family sent through this process were redacted in July 2015. These redactions appear to be arbitrary."

3. The Defense requests: "In order to prove the arbitrary nature of JTF-GTMO's non-legal mail screening process, which denies Mr. bin 'Atash the ability to exercise his right to communicate with family members and, in turn, threatens his ability to participate in the preparation of his defense, Mr. bin 'Atash requests unredacted copies of these letters from his sister [REDACTED] and brother [REDACTED]"
They are marked as:

- a. GUAN-2015-F00699
- b. GUAN-2015-F00698
- c. GUAN-2015-F00058

Defense counsel's request fails to meet their burden under R.M.C. 701 to establish the relevance and materiality of redacted information existing in non-legal letters from the Accused's siblings.

Given the legitimate penological and national security interests involved in the detention of the Accused, JTF-

GTMO has appropriately established policies/procedures governing the introduction and authorized public release of non-legal mail/materials from detainees. Since non-legal mail is, by definition, not related to the legal proceedings, the Defense cannot cite to any specific theory of relevance that would reasonably warrant production of the unredacted copies of non-legal mail from siblings to the Accused, pursuant to R.M.C. 701. Therefore, the Prosecution respectfully declines to produce the requested material.

4. The Defense further requests: "If the United States refuses to provide unredacted copies of these letters to Mr. bin 'Atash, at a minimum, unredacted copies of the letters should be provided to defense counsel."

For the same reasons as set forth above, the Prosecution respectfully declines to produce the requested material. Under R.M.C 701, the Defense cannot cite to any specific theory of relevance that would reasonably warrant production of the unredacted copies of letters from siblings to defense counsel or the Accused.

Respectfully submitted,

//s//

Nicole A. Tate
Assistant Trial Counsel

Clay Trivett
Managing Deputy Trial Counsel

Attachment D















