

UNCLASSIFIED//FOR PUBLIC RELEASE
MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHAIKH MOHAMMAD; WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH; RAMZI BINALSHIBH; ALI ABDUL AZIZ ALI; MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>AE 404B (GOV)</p> <p>Government Response To Defense Motion to Compel Production of Evidence of Confinement Conditions at Camp Seven</p> <p>9 February 2016</p>
---	---

1. Timeliness

The Prosecution timely files this Response pursuant to Military Commissions Trial Judiciary Rule of Court (“R.C”) 3.7.

2. Relief Sought

The Prosecution respectfully requests the Commission deny the requested relief contained within AE 404 (AAA), the Defense Motion to Compel Production of Evidence of Confinement Conditions at Camp Seven, consistent with the Commission’s previous ruling in AE 254XXX.¹

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

On 31 May 2011 and 25 January 2012, pursuant to the Military Commissions Act of 2009 (“M.C.A.”), charges in connection with the 11 September 2001 attacks were sworn against

¹ As noted by the Defense, AE 404 (AAA) was previously filed as AE 254VV (AAA) and denied by the Commission in AE 254XXX. *See* 254XXX at 22. The Prosecution notes that while Defense counsel have slightly amended the instant filing, it is nearly identical in substance to that previously filed and denied.

Khalid Shaikh Mohammad, Walid Muhammad Salih Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi. These charges were referred jointly to this capital Military Commission on 4 April 2012. The Accused are each charged with Conspiracy, Attacking Civilians, Attacking Civilian Objects, Intentionally Causing Serious Bodily Injury, Murder in Violation of the Law of War, Destruction of Property in Violation of the Law of War, Hijacking an Aircraft, and Terrorism.

On 19 March 2014, Defense counsel for Mr. Ali submitted a discovery request to the Prosecution requesting the following information:

Any documents or information describing conditions of confinement at Camp 7, including but not limited to the following:

- (a) Blueprints, line drawings, architect's concept sketches, and/or as-built diagrams regarding the construction of the detainee areas of Camp 7;
- (b) Contracts regarding the construction of or the maintenance of the detainee areas of Camp 7;
- (c) Standard Operating Procedures (SOP) regarding treatment of Camp 7 detainees which have been in effect at any time since September 2006, including any policy governing transfer from Camp 7 to other facilities;
- (d) Documents regarding the conditions of confinement at Camp 7, including any alleged mistreatment of Camp 7 detainees;
- (e) Documents or information regarding the certification of Camp 7 as a SCIF.

AE 404 (AAA) at 4-5; AE 254VV (AAA) at 5.²

On 6 June 2014, the Defense submitted an additional discovery request to the Prosecution requesting, “[d]ocuments or information, including but not limited to memoranda, directives, or emails, regarding the segregation of so-called “high-value detainees” from other internees at Guantanamo Bay Naval Station.” AE 404 (AAA), Attachment E; AE 254VV (AAA), Attachment E. Within their submission, the Defense failed to give any showing as to relevancy or materiality to the information they then and now seek.

² The quoted language is specifically stated in AE 404 (AAA) at 4-5 and AE 254VV (AAA) at 5 and is from an unclassified portion of DR-159-AAA (AE 254VV (AAA), Attachment C).

On 1 April 2014, the Prosecution timely responded by informing the Defense that it was currently conducting its due diligence and would respond accordingly upon completion of its due diligence. *See* AE 404 (AAA), Attachment D; AE 254VV (AAA), Attachment D.

On 12 June 2014, the Prosecution timely responded to the Defense request stating the following:

The Defense does not cite to any specific theory of relevance that would reasonably warrant production of the requested information, nor does the Defense request appear to be material to the preparation of the defense, pursuant to R.M.C. 701.

Further, the Defense has access to the actual conditions of confinement of their client pursuant to the order of the Commission in AE 108J.

As such, the Prosecution respectfully declines to produce the requested material.

AE 404 (AAA), Attachment F; AE 254VV (AAA), Attachment F.

On 5 February 2015, the Defense filed AE 254VV (AAA), the Defense Motion to Compel Production of Evidence of Confinement Conditions at Camp Seven. *See* AE 254VV (AAA). Within its motion, the Defense requested this Commission “compel JTF-GTMO and any other relevant agency to produce a complete and un-redacted set of all documents and information relating to Mr. [Ali’s] confinement conditions at Camp 7, including Standard Operating Procedures (SOPs), Temporary Standing Orders (TSOs), and building records.” *Id.* at 1. Much like in the instant motion, the Defense asserted that the requested material is necessary “to challenge those specific policies and procedures which fail to meet domestic and international standards.” *Id.* at 8; *see also* AE 404 (AAA) at 13-14.

On 19 February 2015, the Prosecution timely responded and filed AE 254HHH (GOV), the Government Response to the Defense Motion to Compel Production of Evidence of Confinement Conditions at Camp Seven. *See* AE 254HHH (GOV). Responding to the Defense Motion, the Prosecution requested the Commission deny the motion arguing that “the Defense reliance on pre-trial detention cases examining illegal pre-trial punishment is entirely

misplaced,” *id.* at 4, and that Counsel have access to the Accused’s actual confinement conditions. *See id.* at 6.

On 8 October 2015, the Commission issued AE 254XXX, Order, Motion to Compel Witnesses and Produce Documentary and Physical Evidence in Regard to AE 254Y. In its Order, the Commission denied the Defense Motion (AE 254VV (AAA)) on the basis that the request was overbroad. AE 254XXX at 22. Further, it stated that, “[t]he Defense has not met its burden to show how this evidence is relevant for the court’s determination of whether [sic] the current policy is reasonably related to legitimate penological interests under *Turner*.” *Id.* at 22.

On 1 February 2016, nearly four months after denial of its original motion, the Defense filed the instant motion requesting, as it did in AE 254VV (AAA), that this Commission “compel JTF-GTMO and any other relevant agency to produce a complete and unredacted set of all documents and information relating to [Mr. Ali’s] confinement conditions at Camp 7, including Standard Operating Procedures (SOPs), Temporary Standing Orders (TSOs), and building records.” AE 404 (AAA) at 1.

5. Law and Argument

I. The Prosecution Will Produce Any Requested Information That Is Material To The Preparation Of The Defense Or Is Otherwise One Of The Enumerated Categories Of Discoverable Information Under R.C.M. 701 And Other Applicable Law

The Military Commissions Act of 2009 (“M.C.A.”) affords the Defense a reasonable opportunity to obtain evidence through a process comparable to other United States criminal courts. *See* 10 U.S.C. § 949j. Pursuant to the M.C.A., the Rules for Military Commissions (R.M.C.) require that the Prosecution produce evidence that is material to the preparation of the defense. Specifically, R.M.C. 701(c)(1) requires the Prosecution to permit defense counsel to examine,

[a]ny books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or 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 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). However, notwithstanding this requirement, no authority grants defendants an unqualified right to receive, or compels the Prosecution to produce, discovery merely because the defendant has requested it. Rather, the relevant rules and statutes define the Prosecution's discovery obligations. See generally *United States v. Agurs*, 427 U.S. 97, 106 (1976) (noting that "there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor").

A criminal defendant has a right to discover 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 defendant to inspect and copy documents in the government's possession, but only if the documents meet the requirements of R.M.C. 701. Military courts have adopted a standard by which "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *United States v. Graner*, 69 M.J. 104, 107-108 (2010). In instances where the Defense did not present an adequate theory of relevance to justify the compelled production of evidence, C.A.A.F has applied the relevance standard in upholding denials of compelled production. See *Graner*, 69 M.J. at 107-109. A defense theory that is too speculative, and too insubstantial, does not meet the threshold of relevance and necessity for the admission of evidence. See *United States v. Sanders*, 2008 WL 2852962 (A.F.C.C.A. 2008), citing *United States v. Briggs*, 46 M.J. 699, 702 (A.F.C.C.A. 1996). A general description of the material sought or a conclusory argument as to its materiality is insufficient. See *Briggs*, 46 M.J. at 702, citing *United States v. Branoff*, 34 M.J. 612, 620 (A.F.C.C.A. 1992) (remanded on other grounds), citing *United States v. Cadet*, 727 F.2d 1453, 1468 (9th Cir. 1984).

II. The Defense Request for Discovery Related to Camp VII

In essence, this is a Defense motion to reconsider a prior ruling of this Commission.

However, as an initial matter, the Defense reliance on pre-trial detention cases examining illegal pre-trial punishment is entirely misplaced in the context of military commissions. *See* AE 404 (AAA) at 15-17; AE 254VV (AAA) at 10-12. Contrary to Defense assertions, the Accused is neither a pre-trial detainee nor a civilian detained under the law of war,³ but rather is lawfully detained at Naval Station Guantanamo Bay, Cuba⁴ as an Alien Unprivileged Enemy Belligerent

³ As established in AE 119A (GOV), the Accused are members of al Qaeda which is engaged in an armed conflict against the United States. Through their membership and alleged conduct, specifically the murder of 2,976 people as a result of the attacks on 11 September 2001, the Accused have been properly classified as Alien Unprivileged Enemy Belligerents (AEUB) under the Authorization for Use of Military Force and not civilians detainees under the law of war. The Prosecution stands ready to prove *in personam* jurisdiction in this case over all five Accused with evidence establishing that each of the Accused are AUEBs at any hearing convened for such purpose. The Prosecution incorporates by reference its facts and argument contained within AE 119A (GOV).

⁴ The Defense continues to assert that “American and international law provide a nested set of protections to [Mr. Ali] 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.” AE 404 (AAA) at 9. In doing so, the Defense cites to *Boumediene v. Bush*, 553 U.S. 723 (2008), for the premise that Mr. Ali’s detention at “Naval Station Guantanamo Bay brings with it the protections of the United States Constitution unless an individual protection is ‘impracticable and anomalous.’” AE 404 (AAA) at 11 (citing *Boumediene*, 553 U.S. at 759, 770). Specifically, the Defense argues that the United States’ decision to detain Mr. Ali at Guantanamo Bay confers him with rights under both the Fifth and Eighth Amendment to the United States Constitution. AE 404 (AAA) at 11. This is simply not so, and the Supreme Court did not set forth an “impracticable and anomalous” standard for lower courts to apply on the various different constitutional rights AUEBs may claim to possess. The Defense position in this regard is in error, as in *Boumediene* the Court considered only the limited question of whether “Art. 1, § 9, cl. 2 of the Constitution has full effect at Guantanamo Bay.” *Boumediene*, 553 U.S. at 771. No court has applied the constitutional rights cited in the Defense Motion to any AUEB accused in a military commission. Both the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia have specifically decided the issue to the contrary. *See Kiyemba v. Obama*, 555 F.3d 1022, 1032 (D.C. Cir. 2009) (concluding that the Supreme Court “had never extended any constitutional rights to aliens detained outside the United States” and that “*Boumediene* therefore specifically limited its holding to the Suspension Clause”); Memorandum Opinion at 10-11, *Salahi v. Obama*, Civil Action No. 05-0569 (RCL) (D.D.C. Dec. 17, 2015) (holding “the Due Process Clause of the Fifth Amendment does not apply to Guantanamo detainees” and that *Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014) did not overrule *Kiyemba*); *see also United States v. Hamdan*, 801 F. Supp. 2d 1247, 1316-18 (U.S.C.M.C.R. 2011) (rejecting the argument that, under *Boumediene*, all the “constitutional due process and equal protections must apply to [his] military commission” and holding that “read[ing] the *Boumediene* opinion to extend Fifth Amendment equal protection rights to [alien

("AUEB") under the Authorization for Use of Military Force ("AUMF") signed into law in September 2001. The AUMF was signed following the attacks of 11 September 2001, and under the Law of War the United States is entitled to detain Mr. Ali until hostilities against Al Qaeda have ceased. At no point was he, or should he be, classified as being in a state of "pre-trial confinement."

While the Accused are detained at Camp VII in full compliance with Article 3 of the Geneva Conventions, the case law describing the contours of the field of "pre-trial punishment" for servicemen and women charged before court-martial are wholly inapplicable to this military commission. Whereas pre-trial punishment in military justice cases deal with individuals whose liberty has been deprived, prior to their trial, for reason of flight risk or danger to the community, their detention is solely and singularly related to their charges before their court-martial. All of the Accused in this case are being detained as a result of their enemy belligerency, and their detention is not singularly related to the charges before this Commission, nor is their detention dependent on the charges before this Military Commission. Instead, it is focused on keeping them off the battlefield. As such, the conditions of their detention are far more attenuated from this Commission than a typical pre-trial detainee in a court-martial context.

The Defense also asserts that they need the requested information for their own "experts" so the experts can "challenge" whether detention policies have a legitimate and rational basis. *See* AE 404 (AAA) at 19; AE 254VV (AAA) at 14. Were that to be true, and if the Defense could have its own experts come in and opine as to whether every aspect of the Accused's detention has a legitimate penological interest, it would render all U.S. Supreme Court and federal circuit case law cited by the Prosecution in earlier filings, requiring deference to the expertise of the actual confinement facility, completely and utterly meaningless. *See* AE 254EE (GOV) at 19. The Military Judge should give zero weight to this aspect of the Defense's legal argument in support of its request for discovery.

unlawful enemy combatants] tried before military commissions would be an exceptionally broad and incautious expansion of constitutional rights").

A. Discovery Regarding Conditions of Confinement Provided to Date

As it did in AE 254VV (AAA), the Defense seeks here an un-redacted set of all documents and information relating to Mr. Ali's confinement conditions at Camp VII, including Standard Operating Procedures (SOPs),⁵ Temporary Standing Orders (TSOs), and building records. And as it was in AE 254VV (AAA), the request remains overbroad and the information is not required under R.M.C. 701.

Prior to considering the Defense's re-packaged motion, it is important to note what the Defense has already received, or will receive (as discovery is updated with recent records on a rolling basis), to date. It is only in light of the already disclosed discovery on the conditions of confinement that the Commission can properly assess whether additional discovery on the conditions of confinement is non-cumulative, or otherwise required under R.M.C. 701.

The Defense for Mr. Ali have previously had a 12-hour visit to the detention facility (they are the only Defense team in this case to have done so, to date) during which they took photographs of the Accused's actual confinement conditions. The Defense also have all medical records of their client from September 2006 to October 2015, and will be provided updates once processed. Additionally, they also have the relevant information within the DIMS records, which are the Accused's disciplinary records, from September 2006 to October 2015, and will be provided with updates once processed. Further, while not conceding that Standard Operating Procedures that describe certain aspects of an Accused's conditions of confinement are *per se* relevant to his conditions of confinement, the Prosecution has previously disclosed to the Defense relevant portions⁶ of those SOPs that touch upon the Accused's conditions of

⁵ The Prosecution has previously disclosed relevant JTF-GTMO SOPs to the Defense, to include, SOP #11 (Detainee Mail Handling Procedures), SOP #11 (Attorney-Detainee Visitation), SOP #34 (Search and Inspection), and SOP #41 (Detainee Mail Handling), [REDACTED] AE 404, Attachment G.

⁶ The Defense is entitled only to discoverable information, and not the entire document in which it is contained. As such, it is appropriate for the Prosecution to redact those portions of documents that are not required to be disclosed under R.M.C. 701, and it will continue to do so. To the extent that the Defense requests un-redacted copies of these materials without establishing that every word in every SOP is discoverable under R.M.C. 701, this request should be denied.

confinement, which effectively renders portions of the Defense-requested relief moot. *See* AE 404, Attachment G. And, of course, the Defense have access to their client. No one is in better position to describe Mr. Ali's current conditions of confinement than Mr. Ali himself, and he can share that information with his counsel.

B. Discovery the Prosecution Has Declined to Produce

The Prosecution is committed to disclosing relevant information regarding the Accused's conditions of confinement. However, pursuant to its obligations, and after conducting its due diligence, the Prosecution declined to produce certain information that is now subject to the instant motion, due to the fact that the Defense did not or could not adequately articulate how the documentation was material to the preparation of the defense or fell within one of the enumerated categories of discoverable information under R.M.C. 701.

Much like its predecessor, *see* AE 254VV (AAA), the instant Defense motion is replete with attempts to legally justify how information regarding the Accused's conditions of confinement, in general, is discoverable. However, overbroad requests are still overbroad, regardless of how many different ways you try to legally or factually justify them. Still, the Defense motion is almost entirely bereft of any argument as to why the specific categories of information they now seek actually constitute conditions of the Accused's confinement, or are otherwise discoverable. If conclusory arguments as to materiality of the information are insufficient, *see Briggs*, 46 M.J. at 702, certainly zero argument as to the materiality of the information sought is equally insufficient.

The Accused's conditions of confinement must be limited to those conditions he actually experiences while in confinement, such as his current cell, his former cells, his exercise yard, the media room and the medical room. This was the basis for the Military Judge's order in AE 108J, and should remain the correct standard for determining if the information sought has any relevance to the proceedings under R.M.C. 701. *See* AE 108J, ¶ (2)(b).

Utilizing such a standard to determine what constitutes relevant material regarding conditions of confinement under R.M.C. 701, the Defense cannot establish how information such as blueprints, line drawings, architect's concept sketches, as-built diagrams regarding the construction of the detainee areas of Camp VII, contracts regarding the construction of or the maintenance of the detainee areas of Camp VII, has anything to do with the actual conditions of confinement Mr. Ali experiences.

Further, the Defense seeks information regarding conditions of confinement during his questioning by the Federal Bureau of Investigation ("FBI") and the Department of Defense ("DoD") in 2007. *See* AE 404 (AAA) at 17-18; AE 254VV (AAA) at 12-13. All five Accused in this case were questioned by the FBI and DoD in the same place where Defense counsel meet with their clients during their defense meetings in Camp Echo. The Defense have been there many times and no further discovery on this aspect of the motion should be required.

Lastly, the Defense also seeks information regarding what it terms as the "Prisoner grievance system." *See* AE 404 (AAA) at 16; AE 254VV (AAA) at 11. Detainees in Camp VII can, and do, often write to the Camp Commander to express their concerns with camp operations. Mr. Ali is fully aware of this system, as he has utilized it previously by writing letters, which the Defense requested, and which was provided to the Defense by the Prosecution. *See* AE 254HHH (GOV) at 8.

Overbroad is overbroad, no matter how many different ways you try to dress it up. As the Defense cannot present an adequate theory of relevance to justify the compelled production of these materials, the Defense motion should be denied.

6. Conclusion

The Prosecution takes its discovery obligations seriously and will produce any documentation/material requested by the Defense that is material to the preparation of the defense or is otherwise one of the enumerated categories of discoverable information under R.C.M. 701 and other applicable law. As such, the Prosecution is currently engaged in obtaining

updated information previously discovered to the Defense. However, where the Defense cannot adequately justify, with any specificity, the relevancy of the denied requested materials, this Commission must deny the Defense's request for production.

7. Oral Argument

The Prosecution does not request oral argument. Further, the Prosecution strongly posits that this Commission should dispense with oral argument as the facts and legal contentions are adequately presented in the material now before the Commission and argument would not add to the decisional process. However, if the Military Commission decides to grant oral argument to the Defense, the Prosecution requests an opportunity to respond.

8. Witnesses and Evidence

The Prosecution will not rely on any witnesses or additional evidence in support of this response.

9. Additional Information

The Prosecution has no additional information.

10. Attachments

- A. Certificate of Service, dated 9 February 2016

Respectfully submitted,

//s//

Clay Trivett
Managing Trial Counsel

Christopher M. Dykstra
Captain, USAF
Assistant Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

