

UNCLASSIFIED//FOR PUBLIC RELEASE
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 ALI"),
MUSTAFA AHMED ADAM
AL HAWSAWI

AE 419B(MAH)
Defense Reply to

Government Response to
Motion to Compel Production of Medical
Records from Mr. al Hawsawi's CIA Captivity

Filed: 21 April 2016

1. **Timeliness:** This Reply is timely filed.
2. **Relief sought:** Mr. al Hawsawi continues to seek that this Commission compel the Prosecution to produce complete, unredacted medical records from the three and a half years (March 1, 2003-September 6, 2006) he was imprisoned under the control of the U.S. Government.

3. **Discussion:**

A. The Commission Should Follow the Procedure Agreed Upon, and Consider the Defense Theories as It Reviews the Adequacy of Government Proposed Substitutes for Actual Medical Records from Black Site Custody.

In the process of reviewing classified records to determine whether the Government could substitute adequate summaries for those records, this Commission announced its intent to consider defense case theories. The Commission did so by specifically ordering that the defense teams could submit theories of their respective defenses, which the Military Judge would then review as he determined whether the Government's proposed summaries were adequate substitutes. *See* AE 156C, Order re Government's *Ex Parte, In Camera* Motion and Memorandum for Second Protective Order Pursuant to M.C.A., 10 U.S.C. § 949p-4, and

M.C.R.E. 505, May 8, 2013. Specifically, as to his request for defense theories, the Military Judge found he would review those theories “so the Commission is in a more informed position to determine the adequacy of the Government's summaries.” AE 156C, Order, at 3. The Judge also concurrently ruled that the Defense could not see the Government’s original *ex parte* motion invoking the national security privilege and justifying the need for summaries, AE 156, and the Defense could not know the general subject topic area of the Government’s *ex parte* pleading. *Id.*

In reliance on the Commission’s Order and Ruling, Mr. al Hawsawi provided the judge with theories for his defense on May 2nd, 2014. *See* AE 156O (MAH), *Ex Parte and Under Seal*, May 2, 2014; *see also* AE 156-2, Ruling on Defense Motion for Extension of Time Within Which to Provide Theories of Defense, May 24, 2013 (granting a defense extension until 30 days after resolution of AE 156C, AE 156D and AE 164 (WBA), to file theories of defense).¹ As the Government’s Response has now disclosed, by April 29, 2014 the Commission already had made a decision that the summaries were adequate substitutes, and that the review of classified documents taking place *ex parte* in AE 156 related to CIA black site medical records. Given the timing of the Commission’s decision on the adequacy of proposed summaries, and given the Commission’s original expressed intent to consider the theories of defense before approving substitutes, the present motion is not one for reconsideration: it is a motion for the Commission to review the adequacy of the Government’s proposed summaries in a manner consistent with the Commission’s expressed intent to consider defense theories as it conducts its review.

The precise purpose of submitting the defense theories was to place the Commission “in a more informed position to determine the adequacy of the Government’s summaries.” *See* AE-

¹ The last motion decided in that list, AE-156D, was resolved on April 29, 2014. *See* AE-156M, Order AE 156D (WBA) Defense Motion for Clarification of Order AE156 and AE156E (KSM, WBA, AAA, MAH) Joint Defense Motion to Reconsider AE 156C, Apr. 29, 2014.

156C. As the Defense now knows through the Government's Response, AE 419A(GOV), the Commission made a decision on the adequacy of summaries of medical records *before* the expiration of the 30-day period the Commission had allowed for submission of Defense theories, and before Mr. al Hawsawi filed his defense theories. The Commission therefore could not have considered the defense theories, as it stated was its intent, in order to make an informed determination as to the adequacy of the summaries.

As capital case law cautions, the Commission should be "particularly sensitive to ensure that every safeguard is observed" before a death sentence can be imposed. *See Gregg v. Georgia*, 428 U.S. 153, 192 (1976). The Defense acted in reliance on the Commission's stated intent, and the process and timeline the Commission ordered for submitting defense theories. In light of how the review process actually took place and its contravention of the public record of Commission's order, which the Defense depended on, the Military Judge should conduct the review process the way it was to have taken place – that is, by reading the case theories against the original medical records, and comparing with the Government's proposed summaries.

B. The Senate Torture Report Contains New Evidence not Available to the Commission at the Time of the Commission's Decision on the Adequacy of the Government's Proposed Substitutes for Black Site Medical Records.

The release of the facts contained in the Senate Select Committee on Intelligence's Torture Report changed the analysis that must be conducted in reviewing a Government invocation of the national security privilege to withhold or redact information from disclosure to the Defense. *See Study of the Central Intelligence Agency's Detention and Interrogation Program*, Dec. 9, 2014 (SSCI Report). Whatever national security arguments the Government made at the time have changed in view of the newly declassified information in the SSCI Report. Furthermore, during the period when the summaries were under review, the Commission did not

have the benefit of the information from the Report, and the Defense could not incorporate into its defense theories the relevant medical history in that Report. The Commission's review of the summaries was therefore truncated because it did not have the benefit of the facts contained in the SSCI report.

As the Commission found, under the Military Commissions Act,

[b]efore the Government may request to "delete, withhold, or otherwise obtain other relief with respect to the discovery of or access to any classified information," they must provide the Commission a declaration invoking the United States' classified information privilege and set out the damage to the national security that the discovery of or access to such information reasonably could be expected to cause. This declaration must be signed by a "knowledgeable United States official possessing authority to classify information."

See AE 156C, at 2, quoting 10 U.S.C. § 949p-4(a)(1).

Whatever declaration the Government provided to the Commission (as it is required to do under R.M.C. 505) to justify the classification of the CIA black site medical records, that justification is no longer valid because of the array of information that was declassified in releasing the SSCI Torture Report. The Government concedes that it had to look at the CIA medical records again, following release of that Report, and that it conducted a classification review of the summaries of medical records in light of that release. *See* AE 419A(GOV), at 4. The Government states that its review led to the declassification of some summaries. *Id.* Therefore, the matters declassified with the release of the SSCI Report impacted the analysis of what was classified and what is not; they impacted what should be released and how -- *with respect to these very medical records*. The Government's actions prove the obsolescence of whatever national security privilege rationale it invoked over these medical records, two years ago with this Commission. Accordingly, it is also an inescapable fact that the matters declassified in the SSCI Report would impact this Commission's comparison of these medical

records against the Government's reasons for invoking the national security privilege and the adequacy of the proposed summaries the Government offered. Put another way, the fact that the Government saw fit to review the medical records because of the release of the Torture Report shows the need for this Commission to review the records as well. There is now a new landscape, and the justifications that initially undergirded the Commission's decision to permit substitutions for medical records, and to determine the adequacy of those substitutions, must be examined.

Beyond the classification issues, the new facts in the SSCI Report also call for the Commission to review the adequacy of the summaries. The Government's decision to carry out a classification review of the summaries does not get to the question of the *adequacy* of the summaries themselves. And the analysis required to answer that question involves consideration of Mr. al Hawsawi's defense theories, which the Commission did not have the benefit of at the time it carried out its review. *See* AE 156O(MAH), Ex Parte and Under Seal, filed May 2nd, 2014; AE 156O(MAH Sup), Ex parte and Under Seal, filed Mar. 2nd, 2015.

The issues laid bare in that Report are highly relevant to the analysis required in attempting to substitute Government summaries for actual medical records. Mr. al Hawsawi's medical conditions arising during custody are squarely addressed in the Report:

CIA leadership, including General Counsel Scott Muller and DDO James Pavitt, was also alerted to allegations that rectal exams were conducted with "excessive force" on two detainees at DETENTION SITE COBALT. CIA attorney [REDACTED] was asked to follow up, although CIA records do not indicate any resolution of the inquiry. CIA records indicate that one of the detainees, Mustafa al-Hawsawi, was later diagnosed with chronic hemorrhoids, an anal fissure, and symptomatic rectal prolapse. *See* email from: [REDACTED]; to [REDACTED]; cc: [REDACTED]

SSCI Report, at 100, note 584.

The Government callously avers in its Response that there is no “theoretical relevance” regarding this information. *See* AE 419A(GOV), at 7, note 3. However, as this Commission is well aware, Mr. al Hawsawi continues to suffer from the above injuries. *See* AE-332, Defense Emergency Motion for Appropriate Medical Intervention, Dec. 15, 2014. The SSCI Torture Report indicates Mr. al Hawsawi experienced these injuries in 2003. Accordingly, it is now clear that Mr. al Hawsawi has lived with these injuries for over ten years before this Commission even reviewed the black site medical records and ruled on the adequacy of summaries. Recognizing that the SSCI Report affected defense theories and the Commission’s review of any classified summaries the Government might propose, Mr. al Hawsawi filed an *ex parte* supplement to his initial submission of his defense theory. *See* AE 156O(MAH Sup), Mar. 2, 2015. But this later submission of defense theories could not cure the Commission’s inability to properly consider the materiality of the CIA black site medical records, whose summaries the Commission approved before the release of the SSCI Report.

The SSCI Report lent granularity to Mr. al Hawsawi’s experience by revealing details that were omitted from the proposed summaries. For example: the Report disclosed that Mr. al Hawsawi underwent a medical emergency while in black site custody. *See* SSCI Report, at 154.² The Government-selected snippets of medical information contained in the summaries, however, do not even mention a medical emergency. One summary document describes Mr. al Hawsawi as being post-surgery for a prolapsed rectum, a condition that is not mentioned *anywhere* else in the summaries, before or after that one entry. And, since it has no specific dates for these events,

² The SSCI Torture Report discusses difficulties in obtaining emergency medical services for CIA black site detainees, and as to Mr. al Hawsawi, it reveals that “[a]fter failing to gain assistance from the Department of Defense, the CIA was forced to seek assistance from three third-party countries in providing medical care to al-Hawsawi and four other CIA detainees with acute ailments.” SSCI Report, at 154.

the Defense has no way of knowing if the medical emergency referenced in the SSCI Report is the prolapsed rectum injury alluded to, once, in the summaries.

Details regarding this medical treatment are vital to any genuine presentation of Mr. al Hawsawi's medical history while in U.S. hands. Without having clarity regarding the genesis and likely origin for Mr. al Hawsawi's injuries, the Commission could not have made an informed decision about the materiality of the black site medical records and whether anything, much less Government contrived summaries, could substitute for those actual records. *See United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1998) ("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." (internal citations omitted)).

As Mr. al Hawsawi emphasized in his initial motion to compel, under the Eighth Amendment and Fifth Amendment's Due Process clause, he has the right to present "all relevant facets of his character and record," including the record of his life in prison. *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986). In addition, his right to effective counsel includes his counsel having "access to the raw materials integral to the building of an effective defense." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). There is no question therefore that production of the actual medical records goes to a fundamental aspect of Mr. al Hawsawi's defense.

Without knowledge of the facts from the SSCI Report and Mr. al Hawsawi's particular history, the Commission could *not* in fact determine that "the summary statements provided [Mr. al Hawsawi] with substantially the same ability to make a defense as would discovery of or access to the specified classified information," – classified information, we now know, is the medical records themselves. *See* AE 419(GOV), at 4, citing AE 156M, Order.

C. The Government Misrepresents the Facts When it Claims to Have Turned Over “All Requested Medical Records.”

To distract from the new facts now available, the Government resorts to its customary incantation of numbers, contending that it has provided volumes of relevant documents. *See* AE 419A(GOV), at 4-6. Raw numbers of pages, however, are not the crucible for determining a legally sufficient discovery production. Moreover, what the Government refers to are some records which it has turned over from Mr. al Hawsawi’s imprisonment at Guantanamo since 2006. Those records are not the subject of the present motion. As discussed above, Mr. al Hawsawi moves for production of the actual records from his medical handling *while he was in black site custody* from March 2003 until September 2006.

The Government’s argument that the Defense has received all of the requested medical records is, quite simply, a misrepresentation. *See* AE 419A(GOV), at 8. First and foremost, it is an incorrect assertion because summaries are *not* medical records; the Defense has not received the full black site medical records and the Government’s representations to the contrary are flatly wrong. Second, the Defense for Mr. al Hawsawi has repeatedly informed the Government that turning over a few documents here and there, and providing them three to six months after they are initially generated by medical personnel, does not constitute providing requested documents. Indeed, as noted above, the adequacy of the medical summaries themselves is highlight questionable when these summaries fail to say anything about an emergency surgery that is revealed in the SSCI Torture Report. To-date therefore, the Government has not turned over complete medical records – and this, despite the fact that the Government itself concedes “medical records are discoverable.” AE 419A(GOV), at 8.

The Government also grossly misrepresents Mr. al Hawsawi’s position regarding what the Government turned over. In the face of yet another last minute Government production of

records less than two days before a court hearing, Mr. al Hawsawi's counsel simply noted that the decision to withdraw that appeal was made in reliance on the Government's representations to the U.S. Circuit Court that it had turned over "all medical records through October 7, 2015."³ The substantive difference in the Defense's choice of words and the Government's misrepresentation of the Defense position should not be lost on any officer of the Court: the Defense position is far from "accepting" that the Government had turned over all those medical records. AE 419A(GOV) at 5, 9.

D. Conclusion.

Mr. al Hawsawi moves for this Commission to remain consistent with its expressed intent by reading his defense theory, and then reviewing the medical records to make a determination as to the adequacy of the Government's proposed summaries. He further asks that this Commission conduct this review with consideration of the information contained in the Senate Torture Report as it pertains to him and his medical history.

If necessary by law, there are mechanisms in the Military Commissions rules which would ensure these medical records are protected when turned over to cleared defense counsel who have now signed the Government's M.O.U. *See* R.M.C. 505, 701(f). What is not justified under the Constitution or even the Commission rules is the continued concealment from the Defense of information that is vital to the development of Mr. al Hawsawi's case. Failure to afford Mr. al Hawsawi the ability to present his history in confinement would violate the Fifth,

³ In fact, upon an opportunity to review the records the Government generated at that time (November 2015), it became apparent that the Government had yet again turned over carefully parsed snippets of medical information from six months prior to the production. That particular eleventh hour production, which covered only a short period in the spring of 2015, consisted of selective data, such as some standard forms generated by medics showing times and dates when items such as Tylenol and Tums were given; medical entries noting Mr. al Hawsawi's own comments about his medical injuries; and entries with a lab test result recounting, yet again, the known fact that he suffers from a prolapsed rectum, blood in his urine, hemorrhoids, chronic migraines, and pain from compressed disks in his neck. Conspicuously, despite the Government representation to the US Circuit Court that it had turned over "all medical records through October 7, 2015," it had not produced medical records covering June, July, August, September or October of that year.

Sixth and Eighth Amendments. The Commission should order the Government to produce complete, unredacted medical records for Mr. al Hawsawi from the entire period of his captivity (March 1, 2003—September 6, 2006).

4. **Attachments:**

A. Certificate of Service.

//s//

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//s//

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CERTIFICATE OF SERVICE

I certify that on 21 April 2016, I caused to be electronically filed **AE 419B(MAH),
Defense Reply to Government Response to Defense Motion to Compel the Production of
Medical Records from Mr. al Hawsawi's CIA Captivity**, with the Clerk of the Court and
caused the same to be served on all counsel of record by e-mail.

//s//

WALTER B. RUIZ

Learned Counsel for Mr. Hawsawi