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	AE 498(WBA) **Defense Motion** to Compel Documents and Information Regarding the Presence and Involvement of the National Security Agency at Camp 7 Date Filed: 2 March 2017

1. Timeliness:

This filing is timely pursuant to Military Commissions Trial Judiciary Rule of Court 3.7(b) and Rules for Military Commission 905 and 906.

2. Relief Sought:

Counsel for Mr. Walid bin 'Atash request this Commission enter an order compelling the Chief Prosecutor to tender to the defense all records and information related to the presence and involvement of National Security Agency ("NSA") personnel or resources in any way connected to the Guantanamo Bay detention facilities, specifically including Camp 7 and/or Echo 2. The Commission must order the Prosecution to comply with the attached discovery request of the Defense, pursuant to the Rules for Military Commissions 701, 703, 905 and 906, Military Commissions Rule of Evidence 502; United States v. Lloyd, 69 M.J. 95 (C.A.A.F. 2010); United States v. Garries, 22 M.J. 288 (C.M.A. 1986); and United States v. Toronowski, 29 M.J. 578 (A.F.C.M.R. 1989).

3. Overview:

The Prosecution continues to resist compliance with simple discovery requests from the Defense. In this instance, the Defense has requested documents and information pertaining to the presence and involvement of NSA personnel or resources in any way connected to the Guantanamo Bay detention facilities, specifically including Camp 7 and/or Echo 2, with emphasis on the custody, torture and exploitation of Mr. bin 'Atash, or his co-accused, for questioning, interrogation, surveillance, recording or intelligence gathering purposes. These pieces of information are material to several key issues in this case, including the admissibility of any incriminating statements by Mr. bin 'Atash or by any of his co-accused or other detainees held in those facilities, the identification of potential witnesses or evidence in support of any exculpatory information for Mr. bin 'Atash or any of his co-accused, any outrageous conduct by the Government in the designing, planning and construction of torture facilities, and any Government observation of, participation in, or intentional infliction of torture. All of this information is in the sole custody and control of the Government.

The Government has not objected to the materiality and relevance of this information. In fact, the Government has agreed to provide it in accordance with the M.C.R.E. 505 procedures. However, to date, the Government has failed to provide any documents or information.

4. Burden of Proof:

As the moving party, the Defense accepts the burden of proof on factual issues by a preponderance of the evidence. R.M.C. 905(c)(1). Specifically, if the Defense can establish, by a preponderance of the evidence, that documents and information regarding the presence and involvement of the NSA at Camp 7 would be material to the defense, and is in the custody or control of the Government, then the Commission must grant this Motion. See Lloyd, 69 M.J. at

98-99, 103; United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994); Garries, 22 M.J. at 290-291.

5. Facts:

a. On 15 August 2016, the Defense sent a series of discovery requests to the Office of the Chief Prosecutor (styled as DR-262, DR-263, and DR-264) seeking all information regarding the conditions of confinement of Mr. bin 'Atash while he was in the custody of the United States, including interrogation and intelligence collection against Mr. bin 'Atash, his co-accused, and any witnesses in his case. (Attach. B). Specific to this Motion, DR-262 sought information on the presence or involvement of NSA personnel or resources involved in Camp-7-related facilities and contained the following language:

> All information regarding Mr. bin 'Atash's conditions of confinement while under the custody of the United States, to include interrogations and intelligence collection against Mr. bin 'Atash, his co-accused, and any witness in his case, is discoverable to the defense. Additionally, the surreptitious recording of conversations related to attorney work product and private attorney client communications is evidence of outrageous government conduct. Therefore, Mr. bin 'Atash through Counsel requests and all documents and information, to include memoranda, reports, briefings slides, notes of meetings or phone calls, electronic or written communications, and the like, describing, tending to indicate, or in any way pertaining to:
>
> a. The presence of NSA personnel or resources at or near (or electronically connected to) Camp 7, related facilities, including Echo 2, or other Guantanamo Bay detention camps, or to the custody and exploitation of Mr. bin 'Atash (or of any co-accused or potential witness against him).
>
> b. The involvement of NSA personnel or resources in any activity relating to Camp 7, related facilities, including Echo 2, or other Guantanamo Bay detention camps, or to the custody and exploitation of Mr. bin 'Atash to include, for example:

> i. Planning, siting, design, construction, modification, staff, resourcing, and operation of Camp 7, of related facilities, including Echo 2, and of other Guantanamo bay detention camps.
> ii. Suggesting, recommending, discussing, observing, participating in, or exploiting interrogation or monitoring requirements, objectives, techniques, methods, and approaches.
> iii. Formulating or posing specific questions.
> iv. Directing or inviting the attention of any person to, or prioritizing the translation or reporting of, statements pertaining to particular subject matter.

(Attach. B).

b. On 15 September 2016, the Prosecution issued its Response to the Request. (Attach. C). In its Response, the Prosecution did not deny the existence of responsive documents or information, but rather provided its intention to respond in the form of substitute evidence under M.C.R.E. 505. Specifically, the Prosecution responded with:

> The Prosecution has certain information responsive to this request that it intends to provide to the Defendant following approval of a substitute in accordance with M.C.R.E. 505.

(Attach. C).

c. The Prosecution has, to date, neither provided documents or information responsive to this request nor availed itself of the M.C.R.E. 505 procedure. The Request remains outstanding.

6. Law and Argument:

Every accused defendant has a right to a robust factual record, and to obtain witnesses and evidence to present a complete defense. Washington v. Texas, 388 U.S. 14, 19 (1967); 10 U.S.C. § 949j(a)(1)(A) (2012). Mr. bin 'Atash's right to a complete defense includes the right to obtain all evidence against him, to receive any incriminating statements purported to be by him

or by his co-accused, to review any exculpatory information relating to him or his co-accused, to receive and to use any mitigating evidence, and to identify and reveal any outrageous government conduct.

International and domestic laws prohibit the use of torture or inhumane treatment or degrading treatment in the collection of statements or evidence against an accused. These bodies of law also prohibit the violation of a defendant's right to counsel, or the violation of a defendant's right to have free and open communication with counsel. Mr. bin 'Atash's Request is supported by the Military Commissions Act of 2009 ("M.C.A."), the Rules for Military Commissions ("R.M.C."), the Military Commissions Rules of Evidence, ("M.C.R.E."), the Fifth, Sixth and Eighth Amendments to the U.S. Constitution, and international law.

A Government Agency's presence at or involvement in any torture, inhumane treatment or degrading treatment could provide the basis of a successful motions to suppress the statements of Mr. bin 'Atash or to suppress the admission of evidence against Mr. bin 'Atash. Further, a Government Agency's presence at or involvement any violation of the Defendant's right to counsel, or violation of a communication privilege, could provide the basis of successful motions to suppress the statements of Mr. bin 'Atash or to suppress the admission of evidence against Mr. bin 'Atash. Lastly, the presence or involvement of a Government Agency could amount to conduct that is so outrageous that it violates the requirement of due process, making prosecution impossible. Since various Government Agencies, including the NSA, have been known to involve themselves or to participate in the collection and purported use of such statements, the Defense has an absolute right to obtain that evidence.

a. The M.C.A. forbids the use of any statement gathered as a result of torture.

The M.C.A. could not be more clear about prohibiting the use of a statement garnered as a result of torture when it states:

> No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment . . . whether or not under color of law, shall be admissible in a military commission under this chapter . . . .

10 U.S.C. § 948r(a). Under additional M.C.A. provisions, Congress specifically and consciously recognized the importance of calling witnesses 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(a)(1)(A). Therefore, the involvement by the NSA in any contemplation, production or use of torture facilities that resulted in a statement garnered by torture violated the M.C.A. and remains relevant and subject to the provisions of U.S. domestic law.

At issue in this case is the admissibility of any statements purportedly given by Mr. bin 'Atash to the CIA and then later to the FBI, among other participants, while in the United States' custody. The Prosecution has evinced a desire to introduce the statements reported by the FBI. Whether these statements are tainted by the torture of Mr. bin 'Atash at the hands of the Government will be focused through the lens of the totality of the circumstances of Mr. bin 'Atash's confinement. Clewis v. Texas, 386 U.S. 707, 710 (1967); United States v. Karake, 443 F. Supp. 2d 8, 87 (D.D.C. 2006). The Supreme Court has observed that a causal connection between any two confessions is heightened if the prior confession was obtained through physical violence or other deliberate means of coercion. Oregon v. Elstad, 470 U.S. 298, 312 (1985); Rabbani v. Obama, 656 F. Supp. 2d 45, 54 (D.D.C. 2009). Further, any earlier coerced statement

"is to be considered in appraising the character of the later confession" and that even when the relation between the two confessions "is not so close," the effect of the prior statement "is one for the trier of fact." Rabbani, 656 F Supp. 2d at 54 (citing Lyons v Oklahoma, 322 U.S. 596, 603 (1944)). Accordingly, in Rabbani, the district court concluded that "evidence that coercion, abuse or torture were used to obtain inculpatory statements from [a] defendant at any point during his detention must be produced." 656 F. Supp. 2d at 54.

As the M.C.A. and precedent describe, any statement given under torture may taint future statements. Facts surrounding torture are relevant and material in-and-of-themselves; the facts surrounding torture can neither be dismissed nor single-handedly declared immaterial by the Government. Since Mr. bin 'Atash has not been outside of the United States' custody since his arrest in April 2003 and he was tortured while in United States' custody prior to the elicitation of statements by the FBI, the totality of all of the circumstances of his confinement, from his first day of his capture to the present, are material and relevant. Since they are material and relevant, the Defense has an absolute right to obtain that evidence.

b. Under RMC 701, the Government must produce all material to the preparation of the defense, all statements by the Defendant, and all exculpatory or impeaching evidence.

Under R.M.C. 701, the Government must produce to the Defense any and all tangible objects within its possession, custody or control that are material to the preparation of the defense, which contains statements attributed to Mr. bin 'Atash, and any exculpatory or impeaching evidence. This requirement of production of tangible objects is described as items that are both "material to preparation of the defense," as well as tangible objects that are "helpful to the defense." United States v. Yunis, 867 F.2d 617, 623 (D.C. Cir. 1989). This is sure to

require the production documents and information having to do with the presence or involvement of NSA personnel or resources in any activity relating to the custody of Mr. bin 'Atash, as well as any of his co-accused, at Guantanamo Bay. Specifically, R.M.C. 701(c)(1) states that:

> Any 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.

R.M.C. 701(c)(1). In addition, the Government must produce to the Defense the content of all statements made or adopted by Mr. bin 'Atash. Specifically, R.M.C. 701(c)(3) states that:

> 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, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and are material to the preparation of the defense are intended for use by trial counsel as evidence in the prosecution case-in-chief.

R.M.C. 701(c)(3). Additionally, the Government must also produce to the Defense—without being asked by the Defense—all tangible objects or pieces of information that are exculpatory to the defense and impeaching of the credibility of a Government witness. R.M.C. 701(e). As such, R.M.C. 701(e) requires that the Government provide all such exculpatory or impeaching material without being asked, when it states:

> (1) … the trial counsel shall, as soon as practicable after referral of charges, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to: (A) negate the guilt of the accused of an offense charges, (B) reduce the degree of the guilt of the accused with respect to an offense charged, or (C) reduce the punishment.
>
> ***

> (2) The trial counsel shall, as soon as practicable after referral of charges, disclose to the defense the existence of evidence that reasonably tends to impeach the credibility of witnesses whom the government intends to call at trial

R.M.C. 701(e)(1)-(2).

Certainly, the information contemplated by Mr. bin 'Atash's request falls into the category of exculpatory or impeaching information. Any torture that Mr. bin 'Atash has endured will have a direct exculpatory, impeaching and mitigating relevancy to his guilt or punishment. Further, the evidence is clearly relevant, material and probative of any allegation of outrageous government conduct in the planning, presence, involvement or intentional infliction of torture to Mr. bin 'Atash or any of his co-accused. Certainly, it helps that the Defense has asked for these items. The Government, however, is already under the affirmative duty of R.M.C 701(e) to provide them to the Defense.

c. M.C.R.E. 401 states that this evidence meets the threshold of materiality, and must be provided.

The evidence sought in the Defendant's Request meets the evidentiary definition of materiality since it is probative of whether or not any statement provided by Mr. bin 'Atash is tainted by years of coercive confinement and torture. M.C.R.E. 401 details the scope of probative evidence in military commissions, and states:

> Evidence has probative value to a reasonable person when a reasonable person would regard the evidence as making the existence of any fact that is of consequence to a determination of the commission action more probable than it would be without the evidence.

M.C.R.E. 401. Certainly, the requested documents and information are relevant, material and probative in the determination of the admissibility of any inculpatory statements by Mr. bin 'Atash, any inculpatory statements of any one of his co-accused or other detainee, any

exculpatory or mitigating evidence, and any impeachment evidence. Additionally, the requested discovery could lead to evidence that the Government Agencies violated Mr. bin 'Atash's right to counsel, and/or his right to confidential communication. Therefore, the evidence is clearly relevant, material and probative of any allegation of outrageous government conduct in the planning, presence, involvement or intentional infliction of torture to Mr. bin 'Atash or any of his co-accused, or to the purposeful violation of the confidential communication privilege.

d. The items in the Request are relevant and material under rights granted by the U.S. Constitution

Mr. bin 'Atash, just like every accused, has a right to a complete investigation and to present a meaningful defense under the Constitution. See United States v. Webb, 66 M.J. 89, 92 (C.A.A.F. 2008), citing California v. Trombetta, 467 U.S. 479, 485 (1984).

1) The Fifth Amendment prohibits the use of statements derived from torture and bars conviction when government conduct shocks the conscience.

Under the Fifth Amendment, no person may be tortured into a confession, nor may a tortured confession be used against him, nor suffer a failure of due process lest the evidence be excluded or the case be dismissed. Oregon v. Elstad, 470 U.S. 298, 306-307 (1985) ("The Miranda exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation.") Further, "evidence that coercion, abuse or torture were used to obtain inculpatory statements from [a] defendant at any point during his detention must be produced." Rabbani, 656 F. Supp. 2d at 54 (citing Lyons, 322 U.S. at 603).

Additionally, the Government has an affirmative Constitutional duty to provide to the defense evidence favorable in the defense of the accused, whether exculpatory or impeaching. Brady v. Maryland, 373 U.S. 83, 87 (1963). In Kyles v. Whitney, 514 U.S. 419, 439-440 (1995), the State of Louisiana, on behalf of its prosecutors, sought a degree of "leeway in making a judgment call" as to the disclosure of any given piece of evidence. Id. But the Court overruled this request, by finding that unless:

> the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.

Kyles, 514 U.S. at 439. For confidence in the result is the goal of all persons involved in the process, as described by the Court in Brady:

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: the United States wins its point whenever justice is done . . . .

Brady, 373 U.S. at 86.

Lastly, the Due Process Clause to the U.S. Constitution prohibits punishment prior to trial. See Bell v. Wolfish, 441 U.S. 520, 535-36 (1979). The punishment may not include the imposition of unusually harsh conditions of confinement or the denial of medical treatment. See Weyant v. Okst, 101 F.3d 845, 856 (2d Cir. 1996); Campbell v. Cauthron, 623 F.2d 503, 505 (8th Cir. 1980). Further, the Supreme Court has recognized that "outrageous government conduct" could bar a criminal conviction. Hampton v. United States, 425 U.S. 484, 489 (1976); United States v. Bout, 731 F.3d 233, 238 (2d Cir. 2013) (noting that "to be 'outrageous' the

government's involvement in a crime must involve either coercion or a violation of the defendant's person.").

Therefore, any torture that Mr. bin 'Atash has endured may be considered "outrageous government conduct," and as such, will have a direct exculpatory, impeaching and mitigating relevancy to his guilt or punishment. The presence or involvement of specific Government Agencies, including the NSA, is material to the preparation of a complete defense and is under the sole and exclusive control of the Government. Further, the evidence is clearly relevant, material and probative of any allegation of outrageous government conduct in the planning, presence, involvement or intentional infliction of torture to Mr. bin 'Atash or any of his co-accused. Certainly, it helps that the Defense has asked for these items; however, the Government is under an affirmative Constitutional duty to provide them.

2) The Sixth Amendment guarantees the right to compel the production of witnesses and evidence.

The Sixth Amendment guarantees a criminal defendant the right to confront any witnesses and evidence used against him, to compel the Government to provide witnesses for the defense, and to allow or provide effective and conflict-free representation. The right of confrontation has been described as a "bedrock procedural guarantee" applying to all federal prosecutions. Crawford v. Washington, 541 U.S. 36, 42 (2004). In our case, the Sixth Amendment compels the Government to produce witnesses and subject them to cross examination. Id. at 61.

Second, the Government is required to assist the defense in compelling the attendance of witnesses favorable to the defense. See Taylor v. Illinois, 404 U.S. 400, 408 (1988); United

States v. Cooper, 4 U.S. 341 (C.C.D. Pa. 1800) ("The constitution gives to every man, charged with an offence, the benefit, of compulsory process, to secure the attendance of his witnesses.") The Court stated in Taylor:

> The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Taylor, 484 U.S. at 409. Therefore, the Government has an affirmative duty to identify and provide any witnesses or evidence that would provide exculpatory evidence or mitigating evidence. These pieces of information bear direct materiality and relevance to the admissibility of any incriminating statements of Mr. bin 'Atash or any of his co-accused, any exculpatory information for Mr. bin 'Atash or any of his co-accused, and any outrageous conduct by the Government in the design, planning and construction of torture facilities, followed by any observation of, participation in, or intentional infliction of torture.

Lastly, the Supreme Court clearly states that the Sixth Amendment right to effective representation demands, in a capital case, a thorough investigation and development of mitigating circumstances; and, a defense counsel's failure to conduct such an investigation renders him ineffective. See Rompilla v. Beard, 545 U.S. 374, 386-88 (2005); Wiggins v. Smith, 539 U.S. 510, 535 (2003); Williams v. Taylor, 529 U.S. 362, 390-92 (2000); Cuyler v. Sullivan, 446 U.S. 335, 343 (1980) (expressing the right to conflict free counsel as a fundamental right); United States v. Kreutzer, 61 M.J. 293, 299-304 (C.A.A.F. 2005). Moreover with regard to the violation of attorney-client privilege, secretive or surreptitious recording is likely to be a

violation of privileged attorney-client, or privileged joint-defense communications. See generally United States v. Mastroianni, 749 F.2d 900, 905 (1st Cir. 1984) (citing Weatherford v. Bursey, 429 U.S. 545, 558 (1977)). Certainly, the presence or involvement of specific Government Agencies, including the NSA, in the surreptitious recording of attorney-client or joint-defense privileged communications is material to the preparation of a complete defense and is under the sole and exclusive control of the Government.

3) The Eighth Amendment requires a greater degree of accuracy due to the capital charges.

In 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).

The Supreme Court has consistently rejected attempts to limit evidence of a defendant's background or character that he wishes to offer in mitigation, on relevance grounds, as a violation of the Eighth Amendment and due process. In Lockett v. Ohio, the Supreme Court invalidated a former provision in the Ohio death penalty statute that did not permit a sentencing judge to consider, as mitigating evidence, factors such as the defendant's character, prior record, and age. 438 U.S. 586, 597-604 (1978) (ruling the Eighth and Fourteenth Amendments require that the sentence not be precluded from considering, as a mitigating factor, 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). The Court extended this decision in Eddings v. Oklahoma, 455 U.S. 104 (1982), in which it held unconstitutional a capital sentence imposed after the trial judge excluded evidence of the defendant's family history. "By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in Lockett recognizes that a consistency produced by ignoring individual differences is a false consistency." Eddings, 455 U.S. at 112. Thus, "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." Id. at 113-14 (emphasis in original).

In Skipper v. South Carolina, 476 U.S. 1, 4 (1986), the Court ruled the defendant was denied due process by the refusal of the state trial court to admit evidence of the defendant's good behavior in prison in the penalty phase of his capital trial. Although the Skipper Court stressed that the defendant's good behavior in prison was "relevant evidence in mitigation of punishment," and thus admissible under the Eighth Amendment, it also expressly noted that the Court's conclusion also was compelled by the Due Process Clause. Id. Post-Skipper, the only relevant question is whether the proposed mitigation evidence would give a jury any "reason to impose a sentence more lenient than death." Smith v. Texas, 543 U.S. 37, 44-45 (2004).

Therefore, the presence or involvement of specific Government Agencies, including the NSA, in the design, planning and construction of torture facilities, followed by any observation of, participation in, or intentional infliction of torture is material to the preparation of a complete defense and plays an absolutely critical role in any mitigation of a defendant's sentence; it is direct evidence of outrageous government conduct.

e. International law requires the government to disclose requested information.

The international legal community recognizes the rights of the accused to include all of the aforementioned rights. Common Article 3 of the Geneva Conventions of 1949 prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Convention (First) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 75 U.N.T.S. 31. The Convention for the Protection of Victims of International Armed Conflicts has been recognized to afford the right to call witnesses as being an indispensable judicial guarantee. See Hamdan v. Rumsfeld, 548 U.S. 557, 633 (2006) (recognizing the Convention for the Protection of Victims of International Armed Conflicts (Protocol I), art. 75(4), Jun. 8, 1977, 1125 U.N.T.S. 3 ("Protocol I"); see also United Nations International Covenant on Civil and Political Rights, art. 14(3)(e), Dec. 16, 1966, 999 U.N.T.S. 171 (recognizing right to obtain the attendance and examination of witnesses in a criminal proceeding as a "minimum guarantee"). Further, international law prohibits cruel, humiliating, and degrading treatment such as "violence to the life, health and physical or mental wellbeing of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment." United States v. Al Bahlul, 820 F. Supp. 2d 1141, 1180 (C.M.C.R. 2011).

Therefore, the presence or involvement of a Government Agency to any torture, inhumane treatment or degrading treatment, or Mr. bin 'Atash's right to counsel and the violation of attorney-client protected communications, could provide evidence leading to suppression of any statements made by or evidence sought to be introduced against Mr. bin 'Atash; further, the

presence of or involvement of a Government Agency in any violation of the Defendant's right to counsel, or the violation of the communication privilege with his counsel, could provide evidence leading to suppression of any statements made by or evidence sought to be introduced against Mr. bin 'Atash. Also, the presence or involvement of a Government Agencies could amount to conduct so outrageous that it violates the internationally-recognized requirement of due process, making prosecution impossible. Since various Government Agencies, including the NSA, have been known to participate in the collection and purported utilization of such statements, the Defense has an absolute right to obtain that evidence.

7. Conclusion

The Government has not claimed that the information sought in DR-262 is immaterial and/or irrelevant to Mr. bin 'Atash's defense. On the contrary, the Government promised to provide it in accordance with the M.C.R.E. 505 procedures. That promise is unfulfilled. To date, the Government has failed to provide any documents or information related to this Request. The Defense has requested documents and information pertaining to the presence and involvement of NSA personnel or resources in any way connected to the Guantanamo Bay detention facilities, specifically including Camp 7 and/or Echo 2, with emphasis on the custody, torture and exploitation of Mr. bin 'Atash, or his co-accused, for questioning, interrogation, surveillance, recording or intelligence gathering purposes. These pieces of information are material to several key issues in this case, including the admissibility of any incriminating statements by Mr. bin 'Atash or by any of his co-accused or other detainees held in those facilities, the identification of potential witnesses or evidence in support of any exculpatory information for Mr. bin 'Atash or any of his co-accused, any outrageous conduct by the

Government in the designing, planning and construction of torture facilities, and any Government observation of, participation in, or intentional infliction of torture. All of this information is in the sole custody and control of the Government.

This Commission should grant this Motion and enter an order compelling production of the requested information.

8. Oral Argument:

The Defense requests oral argument.

9. Witnesses

Defense counsel for Mr. bin 'Atash do not request witnesses at this time.

10. Conference with Opposing Counsel:

The Government opposes the relief requested herein.

11. Attachments:

A. Certificate of Service

B. The Defense's Request for Discovery, styled as DR-262, dtd 15 August 2016. (Classified)

C. The Prosecution's Response to Request for Discovery, dtd 15 September 2016.

12. Signatures:

Very respectfully,

//s//
CHERYL T. BORMANN
Learned Counsel

//s//
EDWIN A. PERRY
Defense Counsel

//s//
MATTHEW H. SEEGER
MAJ, USA
Detailed Military Counsel

//s//
MICHAEL A. SCHWARTZ
Defense Counsel

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on 2 March 2017, I caused to be electronically filed AE 498(WBA) Defense Motion to Compel Documents and Information Regarding the Presence and Involvement of the National Security Agency at Camp 7 with the Trial Judiciary and served it on all counsel of record.

//s//
CHERYL T. BORMANN
Learned Counsel

ATTACHMENT B

APPELLATE EXHIBIT 498 (WBA)
(Pages 23 - 24)

Classified

Attachment B

APPELLATE EXHIBIT 498 (WBA) is located in the classified annex of the original record of trial.

POC: Chief, Office of Court Administration
Office of Military Commissions

ATTACHMENT C

[redacted]

OFFICE OF THE
CHIEF PROSECUTOR

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

15 September 2016

MEMORANDUM FOR Defense Counsel for Mr. bin 'Attash

SUBJECT: Prosecution Response to 15 August 2016 Requests for Discovery (DR-262-WBA, DR-263-WBA, DR-264-WBA)

1. The Prosecution received the Defense requests for discovery on 15 August 2016. The Prosecution hereby responds to the Defense requests, below, in bold:

2. The Defense requests information regarding Camp VII.

The Prosecution has certain information responsive to this request that it intends to provide to the Defense following approval of a substitute in accordance with M.C.R.E. 505.

Respectfully submitted,

//s//
Nicole A. Tate
Assistant Trial Counsel

[redacted]