MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI**	**AE 120AA** **ORDER** **GOVERNMENT MOTION TO RECONSIDER AE 120C IN PART SO THE COMMISSION MAY TAKE INTO ACCOUNT DECLASSIFICATION EFFORTS UNDERWAY AT PRIOR PROSECUTION REQUEST, CLARIFY THE DISCOVERY STANDARD THE COMMISSION IS APPLYING, AND SAFEGUARD NATIONAL SECURITY WHILE ENSURING A FAIR TRIAL** **24 JUNE 2014**

1. The Accused is charged with multiple offenses in violation of the Military Commissions Act of 2009, 10 U.S.C. §§ 948 *et seq.*, Pub. L. 111-84, 123 Stat. 2574 (Oct. 28, 2009). He was arraigned on 9 November 2011.

2. Procedural History – Original Motion. The Defense filed AE 120, a classified motion requesting information in the possession of any foreign government and the United States related to the arrest, detention, rendition, and interrogation of the Accused. The motion encompassed a 9 August 2013 Discovery request for 75 line items of various records and documents (AE 120, Attachment A (Unclassified//FOUO)), and seven (7) additional requests for information. (AE 120, Paras 2b - 2h, (Classified)). The Prosecution responded (AE 120A) requesting the motion be denied as the Prosecution previously fulfilled its discovery responsibilities. Additionally, the Prosecution argued the information was not discoverable; asserted the requests were overbroad; asserted the requests were for information not relevant and material to the preparation of the defense; and, asserted the requested information was not proper mitigation or extenuation

evidence as described in Rules for Military Commissions (R.M.C.) 1001 and 1004. The Commission issued its order, AE 120C, on 14 April 2014.

3. Procedural History – Reconsideration. On 23 April 2014, the Prosecution filed AE 120D, seeking clarification of the Commission's order (AE 120C). The Defense response (AE 120E) urged denial as the request was "a ploy to toll the prosecution's deadline for seeking an interlocutory appeal of AE 120C" (AE 120E, pg 1). The Prosecution reply (AE 120I) continued to request clarification of the order. In support of its motion for reconsideration, the Prosecution filed AE 120F, an *ex parte, in camera*, under seal pleading with what the Prosecution termed "Memorandum D" and AE 120G, an *in camera*, under seal classified pleading with what the Prosecution termed "Memorandum E." The Defense filed AE 120H, in response to AE 120G. The Prosecution filed a reply (AE 120J).

4. Oral Argument. Because of the classified nature of the information requested, the original motion (AE 120) was argued *in camera* pursuant to Military Commissions Rule of Evidence (M.C.R.E.) 505 and R.M.C. 806, on 22 February 2014.[1] The unclassified portion of the argument concerning AE 120D was heard on 28 May 2014.[2] On 29 May 2014, the portion of the argument involving classified information was argued *in camera* pursuant to M.C.R.E. 505 and R.M.C. 806.[3] On 30 May 2014, the Prosecution made a classified *ex parte, in camera* presentation to the Commission pursuant to 10 U.S.C § 949p-4(b)(2) and M.C.R.E. 505f(2)(b).[4]

5. Reconsideration.

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[1] *See* Unofficial/Unauthenticated Redacted Transcript of the Al Nashiri (2) Motions Hearing Dated 22 February 2014, from 9:14 AM to 11:05 AM at 2988 - 3062.

[2] *See* Unofficial/Unauthenticated Transcript of the Al Nashiri (2) Motions Hearing Dated 28 May 2014, from 2:42 PM to 4:27 PM at 4449-5400.

[3] *See* Unofficial/Unauthenticated Redacted Transcript of the Al Nashiri (2) Motions Hearing Dated 29 May 2014, from 9:04 A.M. to 12:12 P.M. at 4501 - 4627.

[4] The transcript of the 30 May 2014, *ex parte in camera* presentation was sealed by the Commission in AE 120X, dated 17 June 2014. Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 30 May 2014 from 9:55 A.M. to 12:12 P.M. is identified as AE 120V.

a. The Prosecution requested reconsideration of the Commission's order (AE 120C). The Prosecution alleges that, since the legal standard employed in the Order is not clearly enough outlined to enable a determination of whether there has been error, the ambiguity calls for clarification. Additionally, the Prosecution avers it has shown substantial new facts meriting reconsideration of the Commission's Order.

b. The Defense opposes reconsideration. The Defense alleges the Prosecution failed to follow the procedural rules of reconsideration. On the substance of the request itself, Defense alleges the Prosecution has cited no error of law or new evidence to justify reconsideration.

c. On request by any party or *sua sponte*, the Military Judge may, prior to authentication, reconsider any ruling, other than one amounting to a finding of not guilty (*See* R.M.C. 905(f)).

d. The Defense's procedural objection to the motion is misplaced. The Military Commissions Trial Judiciary Rules of Court (RC), dated 24 April 2013 as amended on 4 June 2013, control the procedural requirements for the filing of pleadings.[5] RC 3.5e discusses the procedural requirements to file a supplement and states a "supplement is an additional filing to a previously filed motion, response or reply." A motion for reconsideration is not a supplemental pleading. As discussed earlier, a motion for reconsideration may be filed by any party or *sua sponte* by the Military Judge. As such, it is not bound by the same procedural requirements involved with filing a supplement.

e. New Evidence. In its pleadings, the Prosecution proffers the following as "new evidence:"

1. A declaration from a knowledgeable Government Official providing a more robust description of the costs to national security if the places the Accused was detained prior to

[5] The Rules of Court were updated on 5 May 2014. However, for purposes of analyzing the request for reconsideration, the 24 April 2013 as amended on 4 June 2013 rules apply.

6 September 2006 and the names of individuals having direct and substantial contact with the Accused during this time period are disclosed;

2. The risk of harm to individuals and / or their families if their names are released is described in greater detail;

3. The Prosecution's commitment to utilize declassification guidelines developed for the declassification review of the Senate Select Committee - Intelligence's Report on the RDI Program and apply them, to previously denied discovery and to information subject to discovery in the future;

4. The Prosecution's commitment to provide a summary chronology outlining the duration of the Accused's detention at various location(s) without identifying the location(s);

5. The Prosecution noted the Senate Select Committee - Intelligence's Report on the RDI Program is undergoing a declassification review process;

6. The Prosecution's commitment to provide a summary chronology outlining instances when the Accused cooperated with interrogators;

7. The Prosecution highlighted a "new" marking of select classified information as "Display Only," which is information the Defense Counsel can share with the Accused;

8. The Prosecution submitted an additional Prudential Search Request seeking additional information responsive to the Commission's order (AE 120C);

9. The Defense filed AE 120H which refined what the Defense considered "material" thus informing future analysis by the Prosecution;

10. The Prosecution's commitment to facilitating Defense requests to speak with various individuals who had direct and substantial contact with the Accused without divulging their identities;

11. The Prosecution's commitment to reproducing, in chronological order, previously approved summaries of classified information to facilitate the Defense's understanding of the information; and,

12. The Prosecution's commitment to provide new substitutions of classified information.

f. Arguably some of the "new evidence" was available prior to the briefing and argument of the original motion. Regardless, the Prosecution's request for clarification provides a separate basis to reconsider the order. Accordingly, the motion for reconsideration is **GRANTED**.

6. Discovery Legal Standard. In its request for reconsideration, the Prosecution asked the Commission to "clarify the legal standard it is applying to the defense discovery request by issuing detailed findings of fact and conclusions of law." (AE 120D, p. 1). Concerning the legal standard for discovery, the Commission followed the same legal standards applied to other discovery motions in this case. To be clear, the Commission will re-articulate those standards.

a. The Prosecution must produce information that is "material to the preparation of the defense" where the information is "within the possession, custody, or control of the Government." R.M.C. 701(c). The Prosecution must produce all exculpatory evidence that reasonably tends to (a) negate the guilt of the accused, (b) reduce the degree of guilt of the accused, or (c) reduce the punishment. R.M.C. 701(e)(1); *see also Brady v. Maryland*, 373 U.S. 83, 88 (1963). Information favorable to the defense includes evidence, which "would tend to exculpate [the defendant] or reduce the penalty." *Brady*, 373 U.S. at 87. The Prosecution also must produce any evidence that reasonably tends to impeach the credibility of a witness whom the Prosecution intends to call at trial, and it must produce evidence that reasonably may be viewed as mitigation evidence at sentencing. R.M.C. 701(e)(2)-(3); *see also Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

b. An additional burden for classified discovery is a finding that "such classified information would be noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing." 10 U.S.C. § 949p-4(a)(2).

c. Discoverable information includes information relating to the charged offenses, is exculpatory, impeaching, or mitigating, and is material to the preparation of the defense, and is actually relevant and necessary. *See* R.M.C.s 701 and 703; *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989).

7. Classified Information.

a. The Prosecution reasserted its classified information privilege for the ten (10) categories of information to be disclosed pursuant to AE 120C. Although apparently not clear to the Prosecution, AE 120C does not impact any previous orders approving summaries. It also does not prevent the Prosecution from utilizing M.C.R.E. 505 to process classified discovery.

b. The Commission agrees with the Prosecution that the 2009 M.C.A. and binding precedent, *United States v. Yunis*, dictate whatever the standard otherwise means, it must mean at a minimum that once the privilege is properly asserted, classified information is discoverable only if it is actually relevant *and* helpful to the defense.

8. Particularity v. Over-breadth.

a. The Commission recognizes the Defense in its various requests attached to AE 120 utilized expansive language in describing the scope of the information requested. The Prosecution's point of over-breadth is well taken; however, their follow-on point asserting the Defense must identify particular documents is not reasonable. The Defense does not know with particularity what it does not know. What the Defense does believe is the Accused was subjected to abusive conduct after he was detained by U.S. authorities.

b. The Prosecution need only produce non-cumulative, relevant discovery encompassed in the ten (10) categories listed in the order. The ten (10) category construct, which the Prosecution does not oppose,[6] is designed to focus the Prosecution's analysis of information as it unilaterally fulfills its discovery obligations and responds to current and future discovery requests.

9. Un-redacted. The Prosecution objects to term "un-redacted" in paragraphs 5i and 5j of AE 120C. This point is well taken, and the Commission will address it in paragraphs 13i and 13j below.

10. The Commission finds the information concerning the conditions of confinement and detention of the Accused to be relevant and helpful to the Defense. In applying the *Yunis* standard to the ten (10) categories, the Commission is cognizant it is not defending the Accused, but must make a good faith determination, based on its lack of knowledge of the universe of evidence the Government possesses and / or intends to use at trial, as to what is relevant and helpful to the Defense. Theoretical relevance is not enough.[7] For the reasons discussed below, the Commission finds the requested discovery covered by this order is grounded in evidence and not theory.

a. The Commission finds the treatment of the Accused between capture and September 2006 is, at a minimum, relevant to a sentencing case in a capital prosecution. It is clear from the record to date in this case the Accused was subjected to Enhanced Interrogation Techniques (EITs) while in custody prior to 2006. This treatment of the Accused could be argued to mitigate the imposition of the death penalty.

[6] AE 120D, at p.9.
[7] *Yunis*, at 623.

b. Also, compliant behavior by the Accused could be evidence to argue he would not be a threat if sentenced to confinement rather the death.

c. The Defense has also proffered other grounds where the requested evidence would be helpful, e.g., in articulating outrageous government conduct in a motion for appropriate relief.

d. The Prosecution does not intend to introduce any statement from the Accused taken in the course of administering EITs. Nonetheless, the use of EITs on the Accused implicates the admissibility of any subsequent statement of the Accused by directly impacting whether the subsequent statement was tainted by the earlier statements.

12. This case is distinguishable factually from *Yunis* in one significant way.

a. In *Yunis*, the defense requested the taped conversations between the defendant and an informant. The DC Circuit Court of Appeals noted, "…Yunis was present during all the relevant conversations. It does not impose upon him any burden of absolute memory, omniscience, or superhuman mental capacity to expect some specificity as to what benefit he expects to gain from the evidence sought here."[8] In *Yunis*, the defense had access to the accused who is the best source of the information of what happened.

b. The defendant in *Yunis* and the Accused are not similarly situated. Although the Accused was present, he was not aware of where he was, when he was there, and many other aspects of his detention. This was by design. The Government created that design and cannot now turn around and say, "just ask Nashiri" about the conditions of his confinement. Accordingly, the Commission finds the requested information is not available to the Defense from the Accused.

13. Order. The Prosecution will provide the Defense with the following discovery information:

[8] *Id.* at 624.

a. A chronology identifying where the Accused was held in detention between the date of his capture to the date he arrived at Guantanamo Bay, Cuba in September 2006;

b. A description of how the Accused was transported between the various locations including how he was restrained and how he was clothed;

c. All records, photographs, videos, and summaries the Government of the United States has in its possession, which document the condition of the Accused's confinement at each location, and the Accused's conditions during each movement between the various locations;

d. The identities of medical personnel (examining and treating physicians, psychologists, psychiatrists, mental health professionals, dentists, etc.), guard force personnel, and interrogators, whether employees of the United States Government or employees of a contractor hired by the United States Government, who had direct and substantial contact with the Accused at each location and participated in the transport of the Accused between the various locations. This includes individuals described in paragraph 10a and 10d of the Defense Request for Discovery dated 9 August 2012. (Attachment A of AE 120);[9]

e. Copies of the standard operating procedures, policies, or guidelines on handling, moving, transporting, treating, interrogating, etc, high value detainees at and between the various facilities identified in paragraph 5a. This includes documents described in paragraphs 15, 17, 18, 21a, and 22 of the Defense Request for Discovery dated 9 August 2012. (Attachment A of AE 120);

f. The employment records of individuals identified in paragraph 13d of this order and 5d of AE 120 limited to those documents in the file memorializing adverse action and/or positive

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recognition in connection with performance of duties at a facility identified in paragraph 13a of this order and 5a of AE 120 or in transporting the Accused between the various facilities;[10]

g. The records of training in preparation for the performance of duties of the individuals identified in paragraph 13d of this order and 5d of AE 120 above at the various facilities or during transport of the Accused. This includes documents described in paragraph 24 of the Defense Request for Discovery dated 9 August 2012. (Attachment A of AE 120);

h. All statements obtained from interrogators, summaries of interrogations, reports produced from interrogations, interrogations logs, and interrogator notes of interrogations of the Accused and all co-conspirators identified in Appendix C of the Charge Sheet dated 15 September 2011;

i. Copies of requests with any accompanying justifications and legal reviews of same to employ Enhanced Interrogation Techniques on the Accused and all co-conspirators identified in Appendix C of the Charge Sheet dated 15 September 2011. This includes documents described in paragraphs 48, 49, and 51 of the Defense Request for Discovery dated 9 August 2012 (Attachment A of AE 120), with "particular detainees" being the Accused and all co-conspirators identified in Appendix C of the Charge Sheet dated 15 September 2011; and,

j. Copies of documents memorializing decisions (approving or disapproving), with any additional guidance, on requests identified in para 5i to employ Enhanced Interrogation Techniques on the Accused and all co-conspirators identified in Appendix C of the Charge Sheet dated 15 September 2011. This includes documents described in paragraph 48, 49, and 51 of the Defense Request for Discovery dated 9 August 2012 (Attachment A of AE 120), with "particular

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detainees" being the Accused and all co-conspirators identified in Appendix C of the Charge Sheet dated 15 September 2011.

14. The Commission acknowledges the Prosecution's previous provision of discovery in response to paragraphs 3-5, 14, 20, 27-42, 44-46, 49, 53, 54, 57-62, 64, 68, 69, 70a, 70d, 72, and 73 of the Defense Request for Discovery dated 9 August 2012 (Attachment A of AE 120).

15. The requests for discovery contained in the remaining numbered line items of the Defense Request for Discovery dated 9 August 2012 (Attachment A of AE 120) continue to be denied as the Commission finds the Defense has failed to establish relevance and materiality to the preparation of the defense or how the requested information could be proper mitigation or extenuation evidence as described in R.M.C. 1001 and 1004.[11]

16. The parties will continue to comply with the Commission's Protective Orders, AE 013M, "Protection of Classified Information Throughout All Stages of Proceedings" and AE 014C "Protected but Unclassified Information." Nothing in this order should be interpreted to prevent the Prosecution from utilizing the procedures of M.C.R.E. 505 concerning summarization and substitution of classified information in fulfilling obligations imposed by this order and in otherwise fulfilling its discovery obligations. Nothing in this order should be interpreted to require or authorize a lack of compliance with the Intelligence Identities Protection Act, 50 U.S.C. §§ 421-426.

Accordingly, AE 120D is **GRANTED** in part and **DENIED** in part.

So ORDERED this 24th day of June, 2014.

//s//
JAMES L. POHL
COL, JA, U.S. Army
Military Judge

[11] The remaining numbered lines include all those not discussed in this Order.