

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED  
ABDU AL-NASHIRI

AE064

**DEFENSE RESPONSE TO  
GOVERNMENT MOTION TO COMPEL  
DISCLOSURE OF THE ACCUSED'S  
MENTAL-HEALTH INFORMATION IN  
LIGHT OF THE DEFENSE HAVING  
PLACED HIS MENTAL HEALTH AT  
ISSUE IN ITS REQUEST FOR THE  
ACCUSED TO BE UNRESTRAINED  
DURING ATTORNEY-CLIENT  
MEETINGS**

**9 April 2012**

- 1. Timeliness:** This response is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905.
- 2. Facts:** The government claims that it needs Mr. Nashiri's medical records to adequately cross examine him and a defense expert in mental health. Both the accused and the defense expert will testify in support of the defense's Motion for the Defendant to be Unrestrained during Legal Meetings, AE026, filed 14 December 2011. This motion sought to remove ongoing impediments that Mr. Nashiri's excessive restraints during legal meetings place on him. The restraints cause him unnecessary stress that prevent effective communication because they are a consistent trigger for the trauma of being tortured while in CIA custody. Additionally, the restraints inhibit him from physically demonstrating relevant information to defense counsel. *Id.* at 4. ("[The restraints] are also intrusive and humiliating. They distract the accused and interfere with the attorney-client meetings. If the court sees the accused, as it must as an individual still suffering the effects of trauma caused by torture, the court will understand the intrusive and lasting effect of the restraints."). The government asked this Commission to defer to the JTF-GTMO Brig commander and minimized both the "psychotherapeutic interest and specifically its interest in more fully using a particular interview technique." Gov't Resp. to AE026, at 9, filed 28 December 2011.

The defense offered argument on this issue at the commission hearing held in late January. Mr. Kammen sought to offer extensive argument respecting Post-Traumatic Stress Disorder, including submitting passages from the DSM-IV. Unofficial/ Unauthenticated Transcript, at 357. Mr. Mattivi objected on the ground that this evidence had not been submitted with the motion. *Id.* at 358. The military judge sustained the objection because the defense's prior motion had not specifically linked the accused's pre-2006 treatment with the problems arising from his restraint during meetings. The military judge then ruled that the defense had not put on sufficient evidence to demonstrate extraordinary circumstances warranting judicial intervention into the operation of the detention facility, but left the door open for the defense to renew its motion with more facts. *Id.* at 372.

On 30 January 2012, the military judge set a deadline of 11 March 2012 for any motions that counsel for either the defense or prosecution wished to address at the April hearings. Docketing Order, AE036, filed 30 January 2012. Accordingly, the defense filed more than a dozen motions by this date including motions to compel discovery. The government also filed a number of motions by this date, and on 21 March 2012, the military judge issued a docketing order enumerating the motions to be heard. Among those the defense timely filed was a renewal of its AE026 motion, wherein it elaborated in greater detail why it was reasonable to assume that the retraumatization of prolonged physical restraints in an interview context was inhibiting the defense's ability to be effective. Renewed Defense Motion for JTF-GTMO to Allow the Defendant to be Unrestrained during Legal Meetings, AE026C, filed 9 March 2012. In that motion, the defense specifically listed both the accused and Dr. Barry Rosenfeld as witnesses in support. *Id.* at 8. The government filed a timely response, in which it reiterated its plea for deference to the JTF-GTMO commander. It listed two witnesses: the commander of JDG-

GTMO and a representative from the Metropolitan Corrections Center. On Thursday, 15 March 2012, the government requested discovery respecting Dr. Rosenfeld. The defense promptly provided the requested discovery on Monday, 19 March 2012.

Ten days later, late on the afternoon of 29 March 2012, counsel for the prosecution submitted another discovery request, this time for whatever mental-health records the defense had in its possession, knowing that the defense only has the medical records the government provided, allegedly without review---partial records from the accused's imprisonment in Guantanamo and none from the time he was in CIA custody. The defense responded later that day. Due to the unique privacy considerations attendant to an individual's medical records, defense counsel informed trial counsel that they would need to consult with Mr. Nashiri before agreeing to turn them over. The defense further requested that the government produce Mr. Nashiri's medical records from the four years when he was in CIA custody, which have heretofore been withheld. Trial counsel claimed that these materials were among the 505 substitutions submitted to the military judge. The defense has alleged that Mr. Nashiri's retraumatization is a result of the abuse he suffered during the CIA custody, making those the relevant records for this hearing.

On 3 April 2012, the government filed a motion to compel Mr. Nashiri's Guantanamo medical records in advance of the litigation of AE027. Government Motion to Compel Disclosure Of The Accused's Mental-Health Information in Light of the Defense having Placed his Mental Health at Issue in its Request For the Accused To Be Unrestrained During Attorney-Client Meetings, AE064, filed 3 April 2012.

**3. Argument:** The Court should deny the government's motion. Insofar as the government made this request at the last minute, the defense would like the opportunity to

reserve the full two weeks it is allowed under the rules to file a proper response. However, since it appears that the government is using this motion in an effort to derail the hearing regarding AE 26 in order to preserve the façade of transparency, the defense files this preliminary response so that the government's procedural maneuvers do not impair Mr. Nashiri's ability to defend himself against capital charges and effectively use the time he has with his counsel.

This Commission should summarily deny the government's discovery request as untimely. The defense's motion to remove the unnecessary restraints from Mr. Nashiri's body during his meetings with defense counsel has been before this Commission for nearly five months. The basis for this motion has always been two-fold: Less restraint will allow Mr. Nashiri to aid his attorneys in bridging the language divide in terms of describing his treatment while in CIA custody. And the use of chains themselves are "intrusive and humiliating" for an "individual still suffering the effects of trauma." Indeed, when this motion was heard at the January hearing, the prosecution objected to the fact that with respect to the latter ground, the defense had not put on enough evidence to substantiate its claim for relief. The military judge agreed and accordingly, the defense elaborated these grounds and listed two witnesses to support them in its renewed motion. The government responded as it had before without making any request for further discovery or even reaching the merits of the defense's claim. The only ground for objecting to the requested relief was its own urging that this Commission should refer to JTF-GTMO's discretion in the administration of Mr. Nashiri's detention.

No exigency and no emergency has now arisen to justify the prosecution's last-minute request for Mr. Nashiri's mental-health records. The government, like the defense, knew full well that motions to be heard at this hearing were to be filed no later than 11 March 2012. It knew that the trauma the CIA inflicted upon Mr. Nashiri was a significant basis for the defense's

need for this relief. It had been the defense's alleged failure to adequately offer the factual predicates for these arguments that resulted in the original denial of the defense's motion. In fact, the government made a timely request for discovery respecting the qualifications of Dr. Rosenfeld, and the defense promptly replied. The government responded to AE026C without even mentioning its need for these medical records. Its last minute demand for discovery is an abuse of process, with the goal of avoiding the hearing on AE 26 to preserve a façade of transparency.

Substantively, the defense is not yet in a position to know whether it will voluntarily produce these records. As the defense indicated to counsel for the prosecution when the request was made, the sensitive nature of the documents, at a minimum, requires consultation with Mr. Nashiri. As things now stand, however, Mr. Nashiri's mental health records are classified and not releasable to him. Before defense counsel can have a meaningful discussion with the accused about whether he wishes to give his prosecutors access the intimate details of his recent medical history, he should at least have an opportunity to review what those records contain. Indeed, the defense is at a loss to know how this motion can be litigated in the accused's presence.

The overriding concern the defense would articulate at this point, however, is that these mental-health records are not only irrelevant, but likely to deceive both the government and the Commission as to the truth. The government appears to believe that Mr. Nashiri's medical records will give them a potential tactical advantage in their cross-examination of both Mr. Nashiri and Dr. Rosenfeld in defeating AE026. They appear to believe that they may find gaps or inconsistencies between the medical records and the testimony of either or both of the accused and Dr. Rosenfeld.

These records also do not cover the most relevant periods of Mr. Nashiri's custody. The defense has specifically requested Mr. Nashiri's medical records for his incarceration with the Central Intelligence Agency. The government has denied these requests, yet it is this very period that is at issue in AE026. The defense noted this fact when the government requested the partial records in the defense's possession. The defense suggested that it needed the undisclosed records from the relevant four years before the defense could determine whether the requested records were responsive to the government's request. Counsel for the government's only response was that the CIA records may be included in the 505 substitutions that it has provided to the military judge.<sup>1</sup> Therefore, the defense is not in a position at the moment to evaluate their responsiveness. Moreover, as the defense will repeatedly argue, any redactions, summaries or other substitution of any medical, psychological or other records dealing with the torture inflicted upon the accused would be improper, and could not satisfy the requirements of MCRE 505.

Furthermore, the medical records the defense has received are partially redacted (by the government). The defense does not know the content behind the redactions and reliance on them for anything would ultimately mislead to the Commission in its determination of the facts relevant to this motion. Additionally, Dr. Rosenfeld has not been cleared to review the redacted medical records the defense has in its possession.

Without the full set of records from the time in CIA custody and the subsequent time at Guantanamo, the limited collection of redacted records is not only incomplete, but misleading. For this reason, as the prosecution well knows, the defense does not intend to introduce or otherwise rely upon Mr. Nashiri's medical records for the purpose of this motion.

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<sup>1</sup> Previously the prosecution opposed a defense effort to learn even basis information about the subjects of the 505 substitutions.

Significantly, and contrary to the government's assertions, the defense has not put Mr. Nashiri's mental health at issue. Mr. Nashiri's medical records from the time in Guantanamo are ultimately irrelevant to the claim he is making. Mr. Nashiri has not been evaluated by Dr. Rosenfeld. The defense will not put on evidence purporting to diagnose Mr. Nashiri nor otherwise make mental health claims beyond the common sense and readily perceivable traumatic effects that a human being would suffer under prolonged torture.

Mr. Nashiri will testify on the stand about his subjective experiences of wearing chains and what that evokes for him. The Commission will be able to draw its own conclusions whether the continued imposition of these physical restraints in the context of Mr. Nashiri's subjective experience and history present the "extraordinary circumstances" that warrant the minimal variation from the JTF-GTMO detention procedures that AE026 requests. The Commission will have the benefit of testimony from Dr. Rosenfeld. But Dr. Rosenfeld will not testify about Mr. Nashiri personally, because he has not yet been cleared to interview Mr. Nashiri or review any of his medical records. Dr. Rosenfeld is a world-renowned expert on the effects of torture and he will testify as to those effects for the Commission. The Commission will then be able to conclude for itself whether Mr. Nashiri's claims constitute the kind of "extraordinary circumstances" the Commission has deemed to be required before the relief requested can be granted.

In short, this Commission should summarily deny the government's untimely discovery request and permit testimony and argument on AE026 to proceed without delay. Given the overwhelming amount counsel must do to defend this case, meaningful and effective defense meetings with the accused are essential; this cannot wait for more time to elapse.



4. **Oral Argument:** Along with this response, the defense has filed an MCRE 505 notice because argument on these issues is likely to include classified information.

Respectfully Submitted,

//s//

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**CERTIFICATE OF SERVICE**

I certify that on 9 April 2012 I electronically served the forgoing document on the clerk of court and all counsel of record by e-mail.

//s//  
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