

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

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI</p>	<p>AE 233C</p> <p>RULING</p> <p>DEFENSE MOTION TO DISMISS CHARGE IV (TERRORISM), SPECIFICATION 1, FOR MULTIPLICITY</p> <p>5 SEPTEMBER 2014</p>
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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. Defense in AE 233 requested the Commission dismiss Specification 1 of Charge IV (Terrorism), 10 U.S.C. § 950t(24), because it is multiplicitous with Charge II and its specification (Murder in Violation of the Law of War), 10 U.S.C. § 950t(15), under the test announced in *Blockburger v. United States*, 284 U.S. 299 (1932). The Defense theorized Specification 1 of Charge IV, which alleges the Accused committed an act of terrorism resulting in the death of 17 Sailors on the USS COLE, is the same conduct as Charge II, which alleges the Accused murdered 17 Sailors on the USS COLE. The Defense argued the differences between the two charges are the *mens rea* and *actus rea* required. Proving murder, the Defense averred, requires the specific intent to commit a homicide whereas terrorism requires a lesser intent, that being to intimidate or retaliate against the United States Government. The Defense argued the *actus rea* of murder, i.e., the event causing the death, is more substantial than the *actus rea* of terrorism, an act evincing a wanton disregard for human life. Additionally, the Defense argued Terrorism is a lesser included offense of Murder in Violation of the Law of War, because of the lesser *mens rea* and *actus rea* required, all other elements being subsumed. The Prosecution response (AE 233A)

argued under *Blockburger*, the motion should be denied because the two charges have different statutory elements of proof. Specifically, the specific intent necessary under each charge is different and so cannot be multiplicitous. Additionally, the Prosecution argued it is allowed to plead in the alternative to account for exigencies of proof with the possibility for merger of the charges at sentencing. The Defense reply (AE 233B) pointed the Commission to the test announced in *Rutledge v. United States*, 517 U.S. 292, 297 (1996), which requires a court to ascertain whether proof of all the elements of one charge necessarily result in an accused's conviction of another. The Defense averred such is the result as to Specification 1 of Charge IV and Charge II and its specification, and thus, one of the two charges should be dismissed. The motion was argued on 23 April 2014.<sup>1</sup>

3. The analysis contemplated by the Supreme Court in *Blockburger* requires a comparison of the statutory elements of the charged offenses. The Court of Appeals for the Armed Forces in, *United States v. Weymouth*, 43 M.J. 329, 340 (C.A.A.F. 1995), modified the *Blockburger* test to account for the difference in charging an offense in the military context by writing, "in the military, those elements required to be alleged in the specification, along with the statutory elements, constitute the elements of the offense for the purpose of the elements test." The Defense, in their motion, compared the statutory and pled elements of Specification 1 of Charge IV, Terrorism, 10 U.S.C. § 950t(24), with the statutory and pled elements of Charge II, Murder in Violation of the Law of War, 10 U.S.C. § 950t(15). A strict comparison of the statutory and as pled elements of the two offenses clearly shows a requirement to prove beyond a reasonable doubt the existence of one or more different elements.<sup>2</sup> This is similar to the fact pattern in

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<sup>1</sup> See Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 23 April 2014 from 1:05 P.M. to 2:56 P.M. at pp. 3683 - 90.

<sup>2</sup> The statutory elements listed in the Manual for Military Commissions (2010) (M.M.C.) for Terrorism are:

*Whalen v. United States*, 445 U.S. 684, 692 - 93 (1980), in which the Court held the accused could not be sentenced separately at the same trial for rape and felony murder based on the same rape as the rape was subsumed by the felony murder. Given the killing of one or more persons is alleged in both charges, *United States v. Ball*, 470 U.S. 856 (1985), envisions corrective action, if any, would occur if the finder of fact returns with findings of guilty as to both offenses.

We emphasize that while the Government may seek a multiple-count indictment against a felon for violations of [18 U.S.C. §] § 922(h) [receiving a firearm in interstate commerce] and [18 U.S.C. §] 1202(a) [possessing a firearm] involving the same weapon where a single act establishes the receipt and possession, the accused may not suffer two convictions or sentences on that indictment. If, upon the trial, the district judge is satisfied that there is sufficient proof to go to the jury on both counts, he should instruct the jury as to the elements of each offense. Should the jury return guilty verdicts for each count, however the district judge should enter judgment on only one of the statutory offenses. *Ball*, 470 U.S. at 865.

The Commission is not persuaded the *mens rea* and *actus rea* required in Terrorism are somehow less than the *mens rea* and *actus rea* required in Murder in Violation of the Law of War, rather they are different.

4. The Commission finds Specification 1 of Charge IV (Terrorism), 10 U.S.C. § 950t(24), has different statutory and as pled elements of proof from Charge II and its specification (Murder in Violation of the Law of War), 10 U.S.C. § 950t(15). The two charges are not multiplicitous under the *Blockburger / Weymouth* test. Additionally, the Commission acknowledges the ability of the Prosecution to charge in the alternative to account for exigencies of proof, with corrective action

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(1) The accused intentionally killed or inflicted great bodily harm on one or more protected persons or engaged in an act that evinced a wanton disregard for human life;

(2) The accused did so in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct; and,

(3) The killing, harm or wanton disregard for human life took place in the context of and was associated with hostilities. (M.M.C. at IV-19.)

The statutory elements of Murder in Violation of the Law of War are:

(1) One or more persons are dead;

(2) The death of the persons resulted from the act or omission of the accused;

(3) The killing was unlawful;

(4) The accused intended to kill the person or persons;

(5) The killing was in violation of the law of war; and

(6) The killing took place in the context of and was associated with an armed conflict. (M.M.C. at IV-13.)

taken at sentencing, if required. *United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010) (citing *United States v. Villareal*, 52 M.J. 27, 31 (C.A.A.F. 2009); *United States v. Medley*, 33 M.J. 75, 76 (C.M.A. 1991); *United States v. Heyward*, 22 M.J. 35, 37 (C.M.A. 1986)); *United States v. Staples*, 19 M.J. 741, 743 (A.F.C.M.R. 1984).

Accordingly, the Defense motion AE 233 is **DENIED**.

So **ORDERED** this 5th day of September, 2014.

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VANCE H. SPATH, Colonel, USAF  
Military Judge  
Military Commissions Trial Judiciary