

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

<b>UNITED STATES OF AMERICA</b>  <b>v.</b>  <b>ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI</b>	<b>AE 242F</b>  <b>ORDER</b>  <b>DEFENSE MOTION TO COMPEL THE PRODUCTION OF IDENTITY OF HVDs HELD IN CIA CUSTODY WITH MR. AL NASHIRI</b>  <b>12 MAY 2015</b>
---	--

1. The Accused is charged with multiple offenses in violation of the Military Commissions Act (M.C.A.) 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. The Defense filed AE 242, requesting the Commission order the Government to “produce the names of all High Value Detainees (HVDs) detained with [the Accused] while in CIA custody and the dates in which they were held in the same location.” (AE 242 at 1). The Defense argued the Government is obligated by R.M.C. 701(e) and *Brady v. Maryland*, 373 U.S. 83 (1967) “to disclose all evidence favorable to the accused and material either to the accused’s guilt or punishment.” (AE 242 at 5). The Defense also argued the capital nature of this trial affords the Accused access to “any evidence criticizing the conditions of [his] confinement while in CIA custody” as such evidence would be relevant and material for extenuation and mitigation under Rule for Military Commission (R.M.C.) 703(e)(1)(C) and R.M.C. 701(c)(1). *Id.* at 5-6. The Government filed AE 242A in response to the Defense motion, arguing the Defense “did not demonstrate how the requested information is actually relevant and helpful to the material preparation of the defense.” (AE 242A at 7). The Defense replied and argued the “ability to know the names of other individuals held within the [RDI] program is crucial for Defense

counsel to explore and document all of [the Accused's] confinement experiences." (AE 242B at 3).

3. Oral argument was heard in a closed session pursuant to R.M.C. 806 on 25 April 2014.<sup>1</sup>

4. The Defense "is entitled to the production of evidence which is relevant, necessary and noncumulative." R.M.C. 703(f)(1). "An accused right to discovery is not limited to admissible evidence. It includes materials that would assist the defense in formulating a defense strategy." *United States v. Luke*, 69 M.J. 309, 319-20 (C.A.A.F. 2011), citing *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008). Further, R.M.C. 701(e)(1) compels the Government to produce all exculpatory evidence that reasonably tends to reduce the punishment of an accused.

5. The Accused asserts he is entitled to the names and dates of detention requested as such evidence may assist him in his case for extenuation and mitigation. (*See* AE 242 at 4-5). The Government agreed the Accused's conditions of detention and his treatment while in CIA custody is relevant for mitigation, but argues one detainee's experience does not necessitate the same experience for the Accused.<sup>2</sup> This argument misses its mark. The issue before the Commission is simply whether the defense has made the necessary showing that the evidence is discoverable under the R.M.C. and controlling case law, namely *United States v. Yunis*, 867 F.2d 617, 623, (D.C. Cir. 1989). *Yunis* requires a showing that the requested evidence be relevant and helpful to the defense of the accused. *See Yunis*, 867 at 623. This showing may be difficult for defense with limited information, however, the U.S. Supreme Court stated in *Valenzuela-Bernal*, 458 U.S. 858, 871 (1982):

... while a defendant in such circumstances may face a difficult task in making a showing of materiality, the task is not an impossible one. In such circumstances it is of course not possible to make any avowal of how a witness may testify. But

---

<sup>1</sup> *See* Redacted Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 25 April 2014 from 2:52 P.M. to 3:42 P.M. at pp. 4106 - 16.

<sup>2</sup> *Id.* at pp. 4113 - 14.

the events to which a witness may testify, and the relevance of those events to the crime charged, may well demonstrate either the presence or absence of the required materiality.

6. *Yunis Analysis.*

a. Relevance.

Evidence of abuse tending to help the members determine an appropriate punishment for an accused is relevant and material to his defense. *See Yunis*, 867 at 623. The Defense avers the Accused was subjected to abuse at the hands of the CIA, was not the only detainee held by the CIA, and not the only detainee abused while in CIA custody.<sup>3</sup> A detainee's conditions of detention can be mitigating evidence, and therefore is relevant to this proceeding.

b. Information material or at least helpful to his defense.

The Defense alleges only through interviews of HVDs held in conjunction with the Accused, will they will be able to provide a complete picture of the Accused's conditions of detention. While other means may be available, the Commission is persuaded relevant and material evidence may be gained from the information requested by the Defense. Given the facts of this case and the nature of the requested discovery, the relevance and existence of such evidence is more than merely theoretical. Unlike *Yunis*, the Defense has shown how this can lead to admissible, relevant and material evidence. The cumulative nature of any such evidence is a decision for a later date.

c. Disclosure to the Accused versus the need for national security.

---

<sup>3</sup> See generally AE 242, Defense Motion to Compel the Production of Identity of HVDs Held in CIA Custody with Mr. Al Nashiri, filed 19 March 2014.

Given that parties in this case will continue to comply with the Commission's Protective Orders,<sup>4</sup> and that nothing in this order should be interpreted to prevent the Prosecution from utilizing the procedures of Military Commission Rule of Evidence (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, the Commission believes the need for security, at this juncture, does not override the discovery interests of the Accused. Further, 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.

7. The Defense's request to "produce the names of all High Value Detainees (HVDs) detained with [the Accused] while in CIA custody and the dates in which they were held in the same location" is broader than its stated theory of relevance. However, the names of all HVDs detained with the Accused who have personal knowledge of the conditions of the Accused's detention are relevant, material and may be favorable to the Defense. The Government has the duty to seek out evidence that is material to the preparation of the defense in the Prosecutors' own files, the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses, the files of entities closely aligned with the prosecution that are related to the case, and files designated in the Defense discovery request that involve a specified type of information within a specified entity. *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999). The Government is expected to perform its duty to inspect its files, law enforcement files, closely-aligned entities' files, and files enumerated in the Defense discovery request for information pertaining to the names and dates of HVDs who have personal knowledge of the Accused's conditions of detention, and disclose to the Defense the identity of

---

<sup>4</sup> AE 013S, SECOND AMENDED PROTECTIVE ORDER #1, Protection of Classified Information Throughout All Stages of Proceedings, dated 27 March 2014 and AE 014C, PROTECTIVE ORDER #2, Protected but Unclassified Information, dated 19 January 2012.

any HVD it discovers has personal knowledge of the Accused's conditions of detention.

Accordingly, AE 242 is **DENIED IN PART AND DEFERRED IN PART**.

So **ORDERED** this 12th day of May, 2015.

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