

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

UNITED STATES OF AMERICA

v.

**ABD AL RAHIM HUSSAYN
MUHAMMAD AL NASHIRI**

AE 270C

RULING

**DEFENSE MOTION FOR
APPROPRIATE RELIEF:
INSUFFICIENCY OF
GOVERNMENT'S NOTICE IN
COMPLIANCE WITH AE 045H**

17 DECEMBER 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) (hereafter “2009 M.C.A.”). He was arraigned on 9 November 2011.

2. The Defense in AE 270 requested five (5) forms of relief from the Commission relative to the Prosecution’s notices of compliance with AE 045H¹ an order dated 21 August 2014. The Defense requested the Commission:

1. accept the defense objections to the government’s 27 March notice in AE045Z;
2. find that the reasoning provided by the government for turning evidence over past the 20 September 2013 deadline is insufficient in AE45S, AE45U, AE45Z and AE45DD;
3. compel the government to disclose whether it will be seeking to admit any evidence submitted pursuant to these or future late discovery notifications so that it can prepare necessary and appropriate suppression motions based on timing;
4. its objections be noted by the Commission in determining the defense motion in AE045W through AE045Y; and,
5. issue an order barring the prosecution from stating and arguing that [it] has provided all affirmative discovery to the defense as of 20 September 2013. (AE 270 at 1).

The Prosecution response (AE 270A) urged denial of the motion “to declare the government’s discovery notices insufficient and to compel the government to decide whether any discovery

¹ AE 045H, ORDER, Government Motion for a Scheduling Order, dated 21 August 2013.

produced after 20 September 2013 will be offered as evidence at trial.” (AE 270A at 1).

Additionally, the Prosecution argued there was “no need for the Commission to decide whether to ‘bar the prosecution from stating and arguing that is [sic] has provided all affirmative discovery to the defense as of 20 September 2013.’” (AE 270A at 1). The Prosecution maintained it abided by the 20 September 2013 suspense by producing more than 235,000 pages of classified and unclassified discovery materials and it will continue to produce updated discovery information “in the possession, custody, or control of the many federal agencies that it already searched, and the government will continue to seek updated information,” (AE 270A at 2.) as required by R.M.C. 701(a)(5). The Defense reply (AE 270B) disputed the explanations provided by the Prosecution for the factual basis of the notices filed at AE 045S,² AE 045U,³ AE 045Z,⁴ and AE 045DD⁵ as misleading. The motion was argued on 28 May 2014.⁶

3. During oral argument the Defense distilled its request for relief to three (3) items:

1. a finding that the government has been noncompliant in regards to your order of 045H;
2. that the government be ordered to provide additional explanation as to this very delinquent discovery that was turned over after your September deadline; and,
3. that the military judge can fashion appropriate remedies that fall under the power of this Commission in 701(1) and 701(3).” (Unofficial/Unauthenticated Transcript at 4429).

The Defense argued the relief requested could assist their argument for an adjusted trial date at some point in time in the future.

² AE 45S, Government Notice in Compliance with AE 045H, filed 20 December 2013.

³ AE 45U, Government’s Second Notice in Compliance with AE 045H, filed 7 February 2014.

⁴ AE 045Z, Government’s Third Notice in Compliance with AE 045H, filed 28 March 2014.

⁵ AE 045DD, Government’s Fourth Notice in Compliance with AE 045H, filed 14 April 2014.

⁶ See Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 28 May 2014 from 01:34 P.M. to 02:25 P.M. at pp. 4428 - 43.

4. At the time of this ruling the Commission notes the Prosecution has filed 11 notices in compliance with its order in AE 045H.⁷ The Commission also notes in AE 045KK⁸ dated 15 September 2014 the deadlines and milestones in the litigation of this case which were adjusted in AE 045FF,⁹ and were suspended pending the resolution of several significant issues, many of which remain pending.¹⁰ There is no set start date for this trial. The Prosecution continues to provide the Defense with discovery it obtains from various governmental agencies as evidenced by the 11 notices of provision of discovery. The Commission imputes no bad faith or lack of due diligence in this continual flow of information to the Defense, even now more than a year after the original deadline of 13 September 2013.

5. With the filing of this motion, AE 270, the Defense's objections to the Prosecution's 27 March 2014 notice in AE045Z and the other ten (10) notices listed in footnote 7 below are a matter of record, a specific order is unnecessary. While the reasons provided in the notices are not described in detail, they are sufficient; the Commission will not require more. Because the Prosecution continues to seek discoverable information from federal law enforcement and intelligence agencies and provide the same to the Defense under its continuous duty to seek out

⁷ AE0 45S, Government Notice in Compliance with AE 045H, filed 20 December 2013.
 AE 045U, Government's Second Notice in Compliance with AE 045H, filed 7 February 2014.
 AE 045Z, Government's Third Notice in Compliance with AE 045H, filed 28 March 2014.
 AE 045DD, Government's Fourth Notice in Compliance with AE 045H, filed 14 April 2014.
 AE 045GG, Government's Fifth Notice in Compliance with AE 045H, filed 27 May 2014.
 AE 045HH, Government's Sixth Notice in Compliance with AE 045H, filed 23 June 2014.
 AE 045II, Government's Seventh Notice in Compliance with AE 045H, filed 31 July 2014.
 AE 045JJ, Government's Eighth Notice in Compliance with AE 045H, filed 31 July 2014.
 AE 045LL, Government's Ninth Notice in Compliance with AE 045H, filed 21 October 2014.
 AE 045MM, Government's Tenth Notice in Compliance with AE 045H, filed 13 November 2014.
 AE 045NN, Government's Eleventh Notice in Compliance with AE 045H, filed 8 December 2014.

⁸ AE 045KK, ORDER, 3rd Amended Litigation Schedule Order, dated 15 September 2014.

⁹ AE 045FF, ORDER, 2nd Amended Litigation Schedule Order, dated 9 May 2014.

¹⁰ Currently the following issues remain unresolved: provision of a copy of the Senate Select Committee on Intelligence's Report on the Central Intelligence Agency's Rendition, Detention, and Interrogation Program; the necessity for the Commission to review voluminous requests for summarization, substitution and other relief under Military Commission Rule of Evidence 505 submitted by the Prosecution; and the Prosecution's interlocutory appeal of the Commission's decision in AE 168K and AE 241G (RULING, Government Motion To Reconsider AE 168G/AE 241E And Reopen Matters For An Evidentiary Hearing On Personal Jurisdiction dated 16 September 2014) dismissing charges associated with the *MV Limburg*.

and provide discovery under the various statutory, regulatory and case-law imposed requirements, the Commission anticipates additional notices to be filed.

6. The Parties have filed several motions since AE 270 was filed seeking to either suppress or pre-admit evidence in this Commission.¹¹ In light of the absence of a trial date in the case, the Defense request for an order to compel the Prosecution to further disclose whether it will be seeking to admit any evidence submitted pursuant to these or future late discovery notifications is not necessary.

7. The Defense motion in AE 045W and AE 045Y was resolved in AE 045 FF, thus this request for relief is now **MOOT**.

8. Finally, the Commission declines to issue an order barring the Prosecution from stating and arguing that it has provided all affirmative discovery to the Defense as of 20 September 2013.

The Defense again has not shown prejudice in the provision of any discovery after 13 September 2013. As officers of the court, the Prosecutors will continue to be mindful of the assertions and

¹¹ AE 207, Government Motion *In Limine* for the Commission to Admit Evidence, filed 4 February 2014; AE 283, Government Motion *In Limine* for the Commission to Admit Photographs and Videos, filed 7 July 2014; AE 314, Defense Motion to Suppress Custodial Statements Made by Mr. Al-Nashiri to Federal Law Enforcement Agents Between 31 January and 2 February 2007, and to Government Agents During His Initial Combatant Status Review Process for Failure to Comply With the Presentment Requirement of *McNabb v. United States*, 318 U.S. 332 (1943) and *Mallory v. United States*, 354 U.S. 449 (1957) and Basic Due Process, filed 5 September 2014; AE 315, Defense Motion to Suppress Custodial Statements Made by Mr. Al-Nashiri to Federal Law Enforcement Agents Between 31 January and 2 February 2007, and to Government Agents During His Initial Combatant Status Review Process for Failure to Comply with *Miranda v. Arizona*, 384 U.S. 436 (1966) as Required by 10 U.S.C. § 948r and the Fifth Amendment, filed 11 September 2014; AE 319, Defense Motion to Exclude Hearsay Statements Identified in Government Notices AE166 and AE166A, filed 1 October 2014; AE 324, Government Motion *In Limine* for the Commission to Admit Evidence from the [REDACTED] and [REDACTED] [REDACTED] filed 18 November 2014; AE 325, Government Motion *In Limine* for the Commission to Admit Evidence from the Madinat Al-Shaab Residence, filed 17 November 2014; AE 326, Government Motion *In Limine* for the Commission to Admit Evidence from the Al-Tawahi Residence, filed 17 November 2014; and, AE 327, Defense Motion to Suppress Custodial Statements Made by Mr. Jamal Al-Badawi to Federal Law Enforcement Agents Between 4-20 November 2007, as Required by 10 U.S.C. § 948r and the Fifth Amendment, filed 25 November 2014.

arguments they make, just as the Defense attorneys must remain mindful in their zealous representational efforts.

9. Accordingly, the Defense Motion is **DENIED**.

So **ORDERED** this 17th day of December, 2014.

//s//

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