

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

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED
ABDU AL-NASHIRI

AE 277C

**DEFENSE REPLY TO GOVERNMENT
RESPONSE TO DEFENSE MOTION FOR
APPROPRIATE RELIEF: ORDER A
MAGNETIC RESONANCE IMAGE (MRI)
OF MR. AL-NASHIRI'S BRAIN**

25 June 2014

1. Timeliness: This reply is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and is timely pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7(e)(2).

2. Reply:

a. In paragraph 6(I) on page 4 of its response, the prosecution states that the management of daily detention operations, such as appropriate medical care, is unsuitable for judicial intervention. Even if this assertion were true, discovery of critical mitigation evidence is unquestionably judiciable. But this assertion of law is patently false and unsupported by the prosecution's cited cases. See *Florence v. Bd. Of Chosen Freeholders of Cnty. Of Burlington*, 132 S. Ct. 1510, 1517 (2012) and *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). In *Florence* the Supreme Court, in a 5-4 decision, upheld a regulation authorizing strip-searches by detention officials because it was reasonably related to a legitimate penological interest. *Florence* does not contemplate the arbitrary denial of adequate medical care that is occurring in this case. Here, there are no JTF-GTMO medical regulations at issue and even if there were, there is no cognizable, good-faith argument that denial of recommended diagnostic testing reasonably relates to a penological interest. Similarly, in *Turner*, the Court examined regulations limiting the correspondence between inmates at different prisons. The defense concedes that regulations concerning strip-searchers and inmate communication certainly could address the penological

concerns of safety and security. But here, again, the underlying facts and analysis in *Turner*, cannot be applied to the denial of medical treatment to Mr. Al-Nashiri in this case. Regulations limiting adequate medical care and denying access to appropriate diagnostic tools are not only justiciable but they are the very regulations addressed by the Supreme Court in *Estelle v. Gamble*, 429 U.S. 97 (1976). See Defense Motion, AE277 at 3, 4. Even the prosecution recognizes the authority of this case by later citing to it on page 6 of its response.¹

b. In paragraph 6(I) on page 5 of its response, the prosecution incoherently misstates the defense's key argument. The defense is not requesting an MRI to confirm Mr. Al-Nashiri's PTSD diagnosis. Rather, the defense is requesting an MRI because it believes that Mr. Al-Nashiri received a traumatic brain injury(TBI) from CIA agents while in the custody of the CIA from 2002 to 2006. The defense further believes, at the recommendation of its expert Dr. Crosby, that an MRI would be the most efficient and cost effective way to determine the severity and extent of that injury. The existence of severe, possibly personality-altering injury while in U.S. custody prior to trial would clearly be mitigating evidence. If convicted, it would demonstrate both the punishment he has already garnered for his crimes and the lack of adequate medical care administered after his mistreatment.

The prosecution further argues in the same paragraph that the defense has failed to show how an MRI would change Mr. Al-Nashiri's treatment or how his medical care affects these proceedings. An MRI would provide a detailed picture of Mr. Al-Nashiri's brain and allow Dr. Crosby to make further recommendations regarding a comprehensive treatment plan. Without a doubt, the treatment plan proposed by Dr. Crosby would be altered dramatically if the MRI

¹ Any suggestion that the authority cited by the defense is somehow unpersuasive because it is a civil action misunderstands the context in which this issue arises and is also disingenuous because the cases relied upon by the prosecution in its motion are also civil actions. See *Florence v. Bd. Of Chosen Freeholders of Cnty. Of Burlington*, 132 S. Ct. 1510, 1517 (2012) and *Turner v. Safley*, 482 U.S. 78, 84-85 (1987).

identifies a TBI as the defense suspects it will. The defense will offer Dr. Crosby's testimony and seek additional witnesses who will testify at the evidentiary hearing on this motion to further support the medical implications a TBI has on a treatment plan, prosecutability, and mitigation.

c. In paragraph 6(II) on page 6, the prosecution's assertion that the convening authority has any authority in this instance is non sequitur. The prosecution relies on overly broad language in the Regulation for Trial by Military Commission, asserting that the defense request for an MRI falls within "other resources" to argue it is within the purview and control of the Convening Authority. The prosecution then cites to the Rule for Military Commission governing the employment of expert witnesses for the assertion that this Commission would only have review and authority over the defense request if denied by the Convening Authority. This is not a request for expert assistance. This is a request for adequate medical treatment that is clearly the responsibility of the detention facility. *Estelle* at 103. The Convening Authority has no authority, and more importantly no command control, over the medical care provided to Mr. Al-Nashiri. It is the province of the SOUTHCOM Commander and JTF-GTMO Commander and their medical facilities. It is the province of the Commission to, at the same time assist the defense in the development of potential mitigation. Accordingly this motion is properly directed to the Commission. The draft order submitted by the defense reflects this command control.

3. **Additional Witnesses:** None.
4. **Additional Attachments:** None.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on 25 June 2014, I electronically filed the forgoing document with the Clerk of the Court and served the foregoing on all counsel of record by e-mail.

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