

**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 277L</p> <p>Government Response To Defense Supplement To AE 277: Defense Motion For Appropriate Relief: Order A Magnetic Resonance Image (MRI) Of The Accused's Brain</p> <p>30 October 2014</p>
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1. Timeliness

The government timely files this response pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.d.(1).

2. Relief Sought

The government respectfully requests that the Commission deny the defense motion for appropriate relief and to reconsider the Commission's ruling in AE 277H, denying the defense motion to order Magnetic Resonance Imaging ("MRI") of the accused's brain.

3. Overview

There has only been one development in the factual or legal circumstances since the Commission's ruling in AE 277H, and that is the Convening Authority's Memorandum, dated October 8, 2014, denying the accused's request for authorization and funding of an MRI of his brain. The Convening Authority conducted a thorough review of the Defense request as required by R.M.C. 703(d) and subsequently denied the request. That denial makes the defense request for an MRI ripe for the Commission's consideration. The Commission now should deny the defense motion. The matter is in no different a posture then it was at the conclusion of argument

on 6 August 2014, with one exception—the defense motion to order an MRI of the accused’s brain should still be denied.

Given the Commission’s ruling denying the defense request for an MRI based on a claim of inadequate medical care, and the fact the accused has abandoned this argument as a basis for relief in AE 277K, this motion now rests solely on whether the facts and law support the relief requested sufficiently for the Commission to compel the government to perform an MRI of the accused’s brain as a matter of discovery.¹

4. Burden of Proof

As the moving party, the defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

5. Facts

The government charged Abd Al Rahim Hussayn Muhammad Al Nashiri (“the accused”) with multiple offenses under the M.C.A. relating to terrorist attacks against the United States and its coalition partners. These include the attempted attack on USS THE SULLIVANS (DDG 68) on 3 January 2000, and the attacks on USS COLE (DDG 67) on 12 October 2000 and on the French supertanker MV *Limburg* on 6 October 2002, which together resulted in the deaths of 18 people, serious injury to dozens of others, and significant property damage.²

¹ The government incorporates by references its prior pleadings and proceedings.

² The Commission dismissed the separate charges relating to the accused’s alleged participation in the attack on MV *Limburg* (Charge IV, Specification 2, & Charges VII-IX). AE 168G; AE 241C. The government moved for reconsideration of the Commission’s order dismissing those charges. AE 168H; AE 241D. The Commission granted reconsideration and, on reconsideration, denied the government’s requested relief while modifying his initial order to state dismissal of the charges was without prejudice. AE 168K; AE 241G. The order does not affect the Conspiracy charge (Charge V), which includes overt acts comprising the attack on MV *Limburg*. On 29 September 2014, the government filed an interlocutory appeal with the United States Court of Military Commission Review, causing AE 168K/241G to be stayed automatically pending disposition by the appellate court. Oral argument is scheduled for 13 November 2014.

On 4 June 2014, the accused filed a motion asking the Commission to order an MRI of the accused's brain. AE 277. On 18 June 2014, the government filed its response. AE 277A. On 25 June 2014, the defense filed its reply. AE 277C. The motion was argued before the Commission on 6 August 2014. Unofficial/Unauthenticated Transcript, at pp. 5042-75. During oral argument, the Court suggested, and counsel for the accused conceded, that a preliminary step in the process would be for the defense to request an expert witness from the Convening Authority prior to the Commission ruling on the merits of the motion. Unofficial/Unauthenticated Transcript, at pp. 5060-62; 5067-69; 5071-73. The Commission then filed its Ruling, AE 277H, on 29 September 2014, formalizing its 6 August 2014 statements from the bench, specifically finding, "[T]he Defense did not establish the care provided to the Accused is inadequate, nor has it established the Government, as the detaining power has shown a 'deliberate indifference' to his medical needs. As such, the request is DENIED." AE 277H, at 2 ¶ 2. In addition, the Commission further held that since the defense had framed the request as one for discovery, the Commission viewed the request to be for expert assistance, and as such, it "is not properly before the Commission and is not ripe for decision." AE 277H, at 2-3 ¶ 3. On 8 October 2014, the Convening Authority denied the 20 August 2014 defense request for authorization and funding for an MRI of the accused's brain. Thereafter, on 16 October 2016 [sic], the accused filed a Supplement to AE 277, seeking reconsideration of the Commission's ruling in AE 277H, based solely on having been denied funding for an MRI of the accused's brain by the Convening Authority. AE 277K.

The defense supplement, AE 277K, which is actually couched as a motion for reconsideration, no longer argues that the relief sought is based upon inadequate medical care.³

³ There is one reference to "better treatment," but this is contained in the Overview section of the pleading, wherein the accused recites the history of the litigation, and it is not further offered or

Accordingly, the sole issue before the Commission is the argument that the government's discovery obligations require it to complete an MRI of the accused's brain.

6. Law and Argument

I. The Defense Has Not Its Burden for Reconsideration Relating to Inadequate Medical Care

A court should grant a motion for reconsideration if “the moving party shows new facts or clear errors of law which compel the court to change its prior position.” *Nat'l Ctr. for Mfg. Sciences*, 199 F.3d 507, 511 (D.C. Cir. 2000) (affirming the district court's decision to grant a motion for reconsideration because the district court correctly found “clear errors of law”); *see also* AE 155F at 1, *United States v. Mohammad* (Mil. Comm'n Apr. 17, 2013) (“Generally, reconsideration should be limited to a change in the facts or law, or instances where the ruling is inconsistent with case law not previously briefed.”).

As noted *supra*, there are no new facts, or clear errors of law, that should cause the Commission to reconsider its prior ruling that the accused has not shown the care provided to the accused has been inadequate, nor has it established the government has shown “deliberate indifference to serious medical needs,” as is required in order to constitute a violation of the accused's statutory right against cruel and unusual punishment.⁴ *Estelle v. Gamble*, 429 U.S. 97,

referenced in the Argument section. To the extent the defense revives and pursues this reasoning henceforth, the government relies on all prior pleadings and proceedings in this action.

⁴ The accused has a statutory right against cruel and unusual punishment. 10 U.S.C. § 949s. The statutory right against cruel and unusual punishment extends to the outer limits of the Eighth Amendment's prohibition against cruel and unusual punishment. As such, there is no need for the Commission to consider whether the Eighth Amendment's prohibition against cruel and unusual punishment applies here. *See Syracuse Peace Council v. F.C.C.*, 867 F.2d 654, 657 (D.C. Cir. 1989) (“But it is an elementary canon that American courts are not to ‘pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of.’”) (quoting *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). *See also Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) (“If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.”).

106 (1976). The only new fact, which would permit reconsideration of the Court's denial of the defendant's motion on the discovery ground, is the Convening Authority's denial of the defense request for authorization and funding for an MRI. Nevertheless, as previously plead and argued, there is neither a factual nor legal basis for the Commission to grant the relief requested.

II. The Defense Has Not Demonstrated the Need for an MRI

The government must produce to the defense evidence "within the possession, custody, or control of the government, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, and which are material to the preparation of the defense" R.M.C. 701(c)(2). The government has a further obligation to produce exculpatory evidence, which reasonably tends to: (a) negate the guilt of the accused; (b) reduce the guilt of the accused; or (c) reduce the punishment. R.M.C. 701(e)(1). Finally, the government must disclose evidence "that reasonably may be viewed as mitigation evidence at sentencing." R.M.C. 701(e)(3). The accused has failed to show how an MRI will result in evidence that will fall into any one of these categories of discoverable information. The problem for the defense is that this assertion is completely speculative and not supported by any factual evidence before the Commission, and the Convening Authority recognized this deficiency. AE 277K, Attachment B. The defense supplement provides no further connection between the request for an MRI and the requirements of the defense for discoverable material.

As the government previously stated, the defense has not met its burden to show the necessity for an MRI of the accused's brain. AE 277A at 7-8. While the defense has stated its intended use of evidence concerning the accused's memory, the defense has not provided a valid basis to believe that an MRI procedure will show any brain abnormality, much less that an MRI will generate evidence of memory loss. Further, it has not demonstrated how an MRI would be

of benefit to the trier of fact during any presentencing phase of the trial. The defense motion for an MRI relies entirely on a suggestion that the defense expert (Dr. Crosby) put in the most speculative of terms: “For instance, this testing *may* suggest the presence of a Traumatic Brain Injury (TBI)—an injury that would separately contribute to memory loss.” AE 277, Attachment A (emphasis added). At the same time, Dr. Crosby asserts the memory loss she describes is due, in her opinion, to the accused’s Post-Traumatic Stress Disorder (“PTSD”), and only possibly contributed to by other causes. *Id.* (opining the accused “suffers from memory loss because of PTSD and, *perhaps*, other physical causes”) (emphasis added). The accused has been diagnosed with PTSD by a Board convened pursuant to R.M.C. 706 to inquire into the mental capacity of the accused, and by the defense’s own expert. Yet, there is no evidence that an MRI would show that any potential memory loss was caused by PTSD.

An MRI will not show the *cause* of any brain damage found; the *time period* in which any brain damage occurred; nor the *effect* of any brain damage, such as the accused’s alleged memory loss. Declaration of MD, AE 277A, Attachment B at 2 (emphasis added). Accordingly, it cannot be “material to the preparation of the defense,” nor can it “reasonably [] be viewed as mitigation evidence,” and thus the government should not be ordered to hunt for, and develop, evidence that is completely speculative in nature, and simply not discoverable. R.M.C. 701(c)(2) & (e)(3). The government’s discovery obligations do not extend to requiring it to complete an MRI of the accused’s brain, particularly when an MRI “is not otherwise clinically indicated” for the accused. Declaration of MD, AE 277A, Attachment B at 1.

7. Conclusion

The Commission should deny the defense request to order the government to perform an MRI of the accused’s brain.

ATTACHMENT A

Filed with TJ
30 October 2014

Appellate Exhibit 277L (Al-Nashiri)
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CERTIFICATE OF SERVICE

I certify that on the 30th day of October 2014, I filed **AE 277L, Government Response To Defense Supplement To AE 277: Defense Motion For Appropriate Relief: Order A Magnetic Resonance Image (MRI) Of The Accused's Brain**, with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

//s//

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Military Commissions