

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

UNITED STATES OF AMERICA

v.

ABD AL RAHIM HUSSAYN
MUHAMMAD AL NASHIRI

AE 277M

RULING

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

9 APRIL 2015

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. On 4 June 2014, the Defense submitted AE 277, requesting the Commission order a magnetic resonance image (MRI) of the Accused's brain. (AE 277 at 1). The Defense argued the Government, as the detaining authority, is obliged to provide adequate medical care for the Accused and an MRI would present relevant evidence in mitigation. (*See id.* at 1-2). On 18 June 2014, the Government filed its response (AE 277A) arguing "the choice of diagnostic tools used in the accused's medical care is generally a matter beyond the scope of this Commission," and "the defense first must make its request to the Convening Authority with an adequate showing of necessity," if it is seeking government funding for potential evidence in mitigation. (AE 277A at 1-2). On 25 June 2014, the Defense filed its reply, AE 277C. On 6 August 2014, the Commission heard argument on AE 277,¹ resulting in the Defense submitting a request to fund an MRI of the Accused's brain to the Convening Authority on 20 August 2014. (*See* AE 277K at 2). On 29 September 2014, the Commission ruled "[t]he Defense did not establish the care provided to the Accused is inadequate," nor has it shown a "deliberate indifference" to his medical needs. The

¹ *See* Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 6 August 2014 from 10:43 A.M. to 12:07 P.M. at pp. 5049-5071.

Commission found AE 277 to be equivalent to a request for expert assistance and ruled “[t]here is no evidence in the record the Defense requested the Convening Authority provide . . . expert assistance as required by Rule for Military Commissions 703(d) and Regulation for Trial by Military Commission (2011 Edition)[.] . . . [a]s such, the request, as it pertains to discovery and expert assistance, is not properly before the Commission and is not ripe for decision.” (AE 277H at 2-3). On 8 October 2014, the Convening Authority denied the Defense’s request for funding for an MRI of the Accused’s brain. (AE 277K, Attachment B). Thereafter, on 16 October 2014, the Defense filed AE 277K, seeking reconsideration of the Commission’s ruling in AE 277H, based on the Convening Authority’s denial of the 20 August 2014 request for funding. (AE 277K at 2). The Government responded in AE 277L, arguing “the Defense has not met its burden to show the necessity for an MRI of the accused’s brain.” (AE 277L at 5).

3. The Defense requested oral argument. The Prosecution’s position was oral argument was not required, however if the Defense request was granted, the Prosecution desired to be heard. “In accordance with Rule for Military Commission (R.M.C.) 905(h) the decision to grant oral argument on a written motion is within the sole discretion of the Military Judge.”² In this instance, oral argument is not necessary to the Commission’s consideration of the issue before it. The Defense request for oral argument is **DENIED**.

4. “The unique severity and irrevocable nature of capital punishment, infuses the legal process with special protections to insure a fair and reliable verdict and capital sentence.” (*Loving v. United States*, 62 M.J. 235, 236 (C.A.A.F. 2005)). As such, “many issues that are irrelevant to the guilt-innocence determination step into the foreground and require consideration at the sentencing phase.” (*Simmons v. S.C.*, 512 U.S. 154, 163 (1994) (discussing proper mitigating

² Military Commissions Trial Judiciary Rule of Court 3(5)(m) (May 2014).

factors for presentment to a jury). Stated plainly, the specter of death necessitates a duty to scrutinize this case with painstaking care. (*See Burger v. Kemp*, 483 U.S. 776, 785 (1987).

a. The Defense argues and the Commission agrees evidence of brain trauma or neuropsychological³ infirmity of an accused is relevant and necessary to pre-trial, trial, and post-trial mitigation. (*See Jefferson v. Upton*, 560 U.S. 284, 286 (2010) (remanded where counsel failed to fully investigate childhood head injury suffered by appellant)). The Accused's alleged past or current brain trauma, to include memory loss as a result of prior abuse by the Government, if true, such facts would indeed be mitigating factors and well within the broad scope of R.M.C. 1004.⁴ (*See id.*). Further, the Defense's position that such evidence may "buttress the defense's arguments to suppress past statements of the accused, support arguments for pre-trial confinement credit, and demonstrate to members the extent of the punishment already administered to [the Accused]" is persuasive. (AE 277 at 6). The Commission finds further inquiry into the Defense's claims of the Accused's neuropsychological infirmity both relevant and necessary for mitigation.

b. The question now before the Commission relates to the particular relief requested by the Defense. Is an MRI of the Accused's brain necessary to show trauma of the Accused's brain? Though the Government's position is an MRI at this time is unnecessary, it offered the availability and use of "contrast and non-contrast computed tomography scans ('CT Scans')" as serving the same general purpose as the MRI, in the event such treatments became necessary. (AE 277A at 3). MRIs and CT scans both produce images of the brain for use in patient

³ Neuropsychological injuries pertain to injuries affecting the relationship between the brain, human cognitive, emotional, and behavioral function. The American Psychological Association. <http://www.apa.org/pubs/journals/neu/index.aspx>, last accessed on 5 April 2015.

⁴ "The accused shall be given broad latitude to present evidence in extenuation and mitigation." Rules for Military Commissions 1004(b)(3).

diagnosis.⁵ While the Commission remains unqualified to determine appropriate testing methods for brain injuries, the Defense's *ex parte* submission to AE 277K, to include the signed declaration of a Commission approved expert witness, Dr. Sondra Crosby, that an "MRI is warranted" and that the Accused "undergo brain imaging . . . with [an] (MRI)" outweighs the Government's assertion that a CT scan will serve the same purpose. (See AE 277, Attachment A). The Commission finds an MRI of the Accused's brain may further inform the Defense's understanding of the Accused's injuries and resulting symptoms.

5. The Commission, after having reconsidered its Ruling in AE 277, finds the Defense's argument persuasive, accordingly AE 277 is **GRANTED**. The Convening Authority will provide the Accused an MRI of his brain for mitigation purposes. To be clear, the Commission previously denied AE 277 on the basis that "[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." (AE 277H at 2). The basis of the prior denial of AE 277 (AE 277H, paragraph 2) is unaffected by this ruling.

So **ORDERED** this 9th day of April, 2015.

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

⁵ Torpy JM, Lynn C, Glass RM. Magnetic Resonance Imaging. *Journal of the American Medical Association, JAMA*. 2009;302(23):2614.doi:10.1001/jama.302.23.2614.