

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

AE 277P

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED
ABDU AL-NASHIRI

**DEFENSE REPLY TO GOVERNMENT
RESPONSE TO DEFENSE MOTION FOR
APPROPRIATE RELIEF: ORDER
APPROPRIATE PROTOCOLS IN
ADMINISTERING COURT-ORDERED
MAGNETIC RESONANCE IMAGE**

6 Oct 2015

1. **Timeliness:** This request is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905.

2. **Additional Facts:**

None.

3. **Reply:**

Despite the government's attempts to complicate the issue and redirect the Commission's attention to perceived procedural slights, the matter before the Commission is very simple. The Convening Authority should be made to comply meaningfully with the Commission's Order of April 9, 2015, which required the Convening Authority to conduct an MRI scan of Mr. Al-Nashiri's brain.

The government's objections to the Commission granting such relief come in four forms. First, it complains that the defense is now seeking a ruling from the Commission rather than addressing the matter with the Convening Authority. "Now that an MRI has been ordered by the Commission in April 2015, and the Convening Authority is actively pursuing providing JTF-GTMO with an MRI, this matter should continue to be evaluated as akin to providing expert assistance to the defense and should be addressed first with the Convening Authority."

AE 277O at 7. But the government undercuts its own argument: this is not an initial request for expert assistance. Rather, it is a situation in which, as has occurred before, the Convening Authority has either contravened the Commission's order¹ or else improperly refused to provide the defense valid assistance, forcing the defense back before the Commission to compel action.² This is not a situation that should be addressed "first" with the Convening Authority; that initial request has come and gone, and the Commission found the Convening Authority's response lacking. This is a situation in which the defense merely asks the Commission to enforce its own order.

Second, the government takes issue with the fact that the defense *did* address the matter with the Convening Authority. "Following [the Commission's order requiring an MRI], the defense on 27 May 2015 *proactively* delivered a memorandum to the Convening Authority. The defense provided its *unsolicited* opinions, suggestions, and recommendations on the best way for the Convening Authority to fulfill the Commission's ruling." AE 277O at 8 (emphasis added). In other words, the government is dissatisfied with the defense for following the course of action it itself would require. This demonstrates that the government is talking out of both sides of its mouth when it claims to be offended (*see id.* at 16) that the defense did not follow its suggestion to withdraw parts of AE 277N after conferencing.

Third, the government objects again and again (*see, e.g., id.* 8-10, 14, 16) to the defense's failure to sit tight and wait for a response from the Convening Authority. The Commission should note, and the government cannot contest that as of the date of AE 277N's filing, the defense had been waiting for a response to its Memorandum to the Convening Authority for 114

¹ *See, e.g.,* AE 332X (renewing the defense's Motion to Dismiss for Unlawful Influence after legal advisors to the Convening Authority who the Commission dismissed from this case were improperly allowed to remain on it).

² *See, e.g.,* AE 077H (compelling the Convening Authority to provide expert assistance by Dr. Elizabeth Loftus); AE 132D (compelling the Convening Authority to produce Ms. Tammy Krause as an expert witness at a hearing); AE 262C (compelling the Convening Authority to provide expert assistance by Robert Lessemun).

days, and 162 days had passed without any apparent movement from the Convening Authority on the Commission's MRI order. (As of the date of filing of this Reply, the defense has heard nothing substantive from the Convening Authority regarding the MRI or any progress made on that front for 180 days.)³ The defense suspects that, if the situation were reversed, the government would not entertain the notion that six months of complete silence and apparent inaction on the part of the defense constituted a "quick" (*see* AE 277O at 11) response.⁴

Fourth, the government implies that the defense does not appreciate all that has been provided for Mr. Al-Nashiri. (*See id.* at 9 (objecting that the defense is already unsatisfied with the Convening Authority's assistance on the MRI issue, even though "[t]he Commission has ordered that, on top of all of the other neuropsychological mitigation evidence afforded to the accused—to include access to a CT scan and assistance for testing from Dr. Crosby and Dr. Rosenfeld—that an MRI scan be conducted of the accused's brain[]").) But providing access to mitigation evidence in a capital case is not a favor bestowed by the government, it is the government's constitutional obligation.

It is important not to lose sight of what the instant request is about. The government intends to kill a man that it willfully and repeatedly tortured. As the Commission has noted, the defense has the right to evaluate the effects of that torture. The motion for appropriate relief does

³ Attempting to paper over this fact, the government states it informed the defense that a response from the Convening Authority was forthcoming. (AE 277O at 10, 16.) Putting aside the fact that the *government* received a response from the Convening Authority regarding the defense's request within 24 hours (*see* AE 277O, Attachment B), defense counsel is not required to refrain from taking action on Mr. Al-Nashiri's behalf based on representations by the government, or to play a middle-school game of telephone with the government and the Convening Authority when seeking compliance with the Commission's valid order.

⁴ The government accurately notes that both parties have recognized the complexity of obtaining an MRI machine. (*See* AE 277O at 11.) The defense notes, however, that many of these difficulties could have been avoided if the Government had not taken Guantanamo's MRI, which it had in its possession for two years, and permanently installed it in Georgia 9 days after the underlying MRI motion was filed.

not presume the defense is entitled to the MRI of its choice, as the government claims (*see id.*), but it and the defense do presume that Mr. Al-Nashiri is entitled to an MRI that is performed for mitigation purposes—not one that retraumatizes him or that results (or is intended to result) in the garnering of new aggravating facts for the government. Nor does the motion constitute a request made on a whim and based on some subjective intuition that the MRI given will not be good enough. Rather, it is based on actions taken by the government, and by the facility at Guantanamo (*see AE 277N at 4-5*), which result in diminished confidence that the MRI will be used truly to gain mitigating evidence and not to prolong and exacerbate the very mental health conditions the government is responsible for causing.

Nor, finally, does the motion attempt to obtain a “medical opinion” from the Commission regarding the MRI procedure. What the government characterizes as such (*see AE 277O at 11-12*) is actually the defense pointing out the information regarding the MRI that has been made available for public consumption, as well as new developments regarding the facility’s apparent intent to subject detainees to the procedure without warning and without a Commission order. If the government wishes to test the basis or accuracy of the defense’s statements on these new developments, it is free to agree to oral argument and do so there.⁵ It is not free to ignore the facts stated in the motion, quote the defense’s characterization of those facts in its argument section, and then pretend to be clueless as to the grounds for such argument. (*See id.* at 14.)

Having argued (albeit unsuccessfully) that the defense is not entitled to relief on its motion, the government then moves on to claim to be perplexed by the very fact that it occurred to the defense to submit a motion in the first place. It implies that nothing in the world is

⁵ Although the government characterizes the defense’s claims as outlandish (*see AE 277O at 14*), given SOUTHCOM’s public claim that the Government was “discussing” using an MRI in other capital cases pending before the Military Commissions, since those defendants “will probably require an MRI at some future point[]” (*AE 277N at 4-5*), the defense’s concern does not appear unfounded.

preventing either Dr. Crosby or defense counsel from meeting with Mr. Al-Nashiri prior to the performance of an MRI. (*See id.* at 13.) The former claim is curious, given the fact that Dr. Crosby's security clearance was recently either revoked or somehow "lost," an issue which has recently been reported upon⁶ and of which the government, the prosecution, and the Convening Authority are surely aware.⁷ And the latter claim elides "meeting with Mr. Al-Nashiri" with "being given the opportunity to meet with him before the test is administered without defense counsel's knowledge". In neither case does the government make a valid argument for why the defense should not have filed a motion rather than accept the status quo.

The government also characterizes defense counsel's request to be present during Mr. Al-Nashiri's MRI as a potential security threat and chastises the defense for seeking guidance from the Commission rather than being satisfied with whatever accommodations the Commander of JTF-GTMO has to offer. AE 2770 at 14. But at the same time, it assures the Commission it does not object to defense counsel meeting with Mr. Al-Nashiri. (*Id.* at 13; *see also* AE 2770 Attachment B.) Plainly, therefore, the government's discomfort arises from defense counsel meeting with Mr. Al-Nashiri *during the MRI*.

Given this, and given that the Government appears inclined to test detainees without counsel's presence or knowledge, *and* given that the test is intended to glean mitigating evidence that may have resulted from Governmental mistreatment, it is safe to assume that what motivates the government's objection is not in fact a security concern but rather an attempt to prevent the defense from gaining a better understanding either of the effects of Mr. Al-Nashiri's torture or of

⁶ Spencer Ackerman, *Guantanamo Security Clearance Denied to Lawyers of Cooperating Witness*, THE GUARDIAN, Sept. 8, 2015, *available at* <http://www.theguardian.com/us-news/2015/sep/08/guantanamo-security-clearance-denied-lawyers-cooperating-witness>.

⁷ This clearance issue arose shortly after the underlying motion seeking an MRI was granted; that motion, of course, relied heavily on Dr. Crosby's declaration as to Mr. Al-Nashiri's mental state and her belief regarding the best actions to take in the future with respect to evaluating the effects of his torture.

the ways in which that torture was performed.⁸ But the MRI was ordered for mitigation purposes, not so that the government could mold the procedure to suit its own ends. Its attempt to do so should be roundly rejected.

The government thus makes no valid argument for why the motion for appropriate relief should be rejected. This Commission has the power to enforce its own orders, and it should do so in this case.

4. Additional Witnesses: None

5. Additional Attachments:

A. Certificate of Service, dated 6 Oct 2015 (1 page)

Respectfully submitted,

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⁸ Although the *Turner v. Safley*, 482 U.S. 78, 89-91 (1987), factors therefore are not applicable because there is no actual concern regarding institutional security, those factors nevertheless favor the defense. There is no rational relation between preventing counsel's presence during the test and any legitimate governmental interest, given that the Commission has already ordered that an MRI be provided for mitigation purposes. The notion that the presence of either counsel or Dr. Crosby constitutes a security threat is frivolous and, if put to a test to produce credible evidence, the Government would without question fail. Defense counsel's presence also will have no detrimental effect on Guantanamo guards or other staff or on prison resources—unless of course the facility staff's intent is to retraumatize Mr. Al-Nashiri or conduct a useless test, which surely cannot be the case. Defense counsel's proposal thus is a valid and unobtrusive option, and will meet the requirements of the Commission's order better than any other alternative.

ATTACHMENT

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Filed with TJ
6 October 2015

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

I certify that on 6 October 2015, I electronically filed the forgoing document with the Trial Judiciary and served it on all counsel of record via e-mail.

/s/ Brian Mizer
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