

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

<b>UNITED STATES OF AMERICA</b>  v.  <b>ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI</b>	<b>AE 277Q</b>  <b>RULING</b>  DEFENSE MOTION FOR APPROPRIATE RELIEF: ORDER APPROPRIATE PROTOCOLS IN ADMINISTERING COURT-ORDERED MAGNETIC RESONANCE IMAGE  <b>16 NOVEMBER 2015</b>
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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,<sup>1</sup> requesting the Commission order the Convening Authority (CA) to provide a magnetic resonance image (MRI) of the Accused's brain. *AE 277* at 1. On 29 September 2014, the Commission treated AE 277 as a request for expert assistance and denied the motion based on the Defense's failure to comply with Rule for Military Commissions 703(d). *AE 277H*<sup>2</sup> at 2. On 9 April 2015, following the CA's denial of a Defense request for expert assistance<sup>3</sup> the Commission ordered the CA to provide the Accused an MRI of his brain for mitigation purposes. *AE 277M*<sup>4</sup> at 4. On 18 September 2015, the Defense filed AE 277N<sup>5</sup> requesting the Commission compel the CA to administer the previously ordered

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<sup>1</sup> AE 277, *Defense Motion for Appropriate Relief: Order a Magnetic Resonance Image (MRI) of Mr. Al-Nashiri's Brain*, filed 4 June 2014.

<sup>2</sup> AE 277H, *Ruling on Defense Motion for Appropriate Relief: Order a Magnetic Resonance Image (MRI) of Mr. Al-Nashiri's Brain*, issued 29 September 2014.

<sup>3</sup> The Convening Authority denied the Defense's 20 August 2014 request for funding, resulting in the Defense filing AE 277K, *Defense Supplement to AE 277: Defense Motion for Appropriate Relief: Order a Magnetic Resonance Image (MRI) of Mr. Al-Nashiri's Brain*, filed 16 October 2014, seeking reconsideration of the Commission's ruling in AE 277H.

<sup>4</sup> AE 277M, *Ruling on Defense Motion for Appropriate Relief: Order a Magnetic Resonance Image (MRI) of Mr. Al-Nashiri's Brain*, issued 9 April 2015.

<sup>5</sup> AE 277N, *Defense Motion for Appropriate Relief: Order Appropriate Protocols in Administering Court-Ordered Magnetic Resonance Image*, filed 18 September 2015.

MRI of the Accused's brain with the following requirements: 1) the MRI be conducted in Defense counsel's presence and only after the Defense counsel and Dr. Sondra S. Crosby meet with the Accused to prepare him for the MRI; 2) the CA direct the MRI technician adhere to specific, Defense suggested methods and techniques of MRI imaging, as listed in a memorandum to the CA;<sup>6</sup> and, 3) the CA limit distribution of the results of the MRI to the Defense. *AE 277N* at 3. The Government's response, *AE 277O*,<sup>7</sup> requests the Commission deny the Defense's motion as unripe. *AE 277O* at 16. The Defense's reply, *AE 277P*,<sup>8</sup> argues the Accused "is entitled to an MRI that is performed for mitigation purposes—not one that re[-]traumatizes him or that results (or is intended to result) in the garnering of new aggravating facts for the [G]overnment [.]” *AE 277P* at 4.

3. The Defense requested oral argument. The Prosecution's position was oral argument was not required, but the Prosecution desired to be heard if the oral argument was granted. "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."<sup>9</sup> Oral argument is not necessary to the Commission's consideration of the issue before it. The Defense request for oral argument is **DENIED**.

4. When making a request for expert witnesses or specific resources, the Defense must request the resources from the CA. If the request is denied by the CA, the Defense can renew the request before the military judge. If the Commission finds the expert assistance or resources are relevant

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<sup>6</sup> Memorandum for the Convening Authority ICO UC v. Al-Nashiri Regarding the Appropriate Conditions and Circumstances of the MRI That Is to Be Administered to Mr. Al-Nashiri (May 27, 2015). *AE 277N* at Attachment B. It should be noted that the MRI sequences requested by the Defense are specific to a Siemens 3T MRI machine. *Id.* The Defense implicitly requested that this particular model of MRI be used, but indicated that a Siemens 1.5T MRI machine might be acceptable.

<sup>7</sup> *AE 277O, Government Response to Defense Motion for Appropriate Relief: Order Appropriate Protocols in Administering Court-Ordered Magnetic Resonance Image*, filed 2 October 2015.

<sup>8</sup> *AE 277P, Defense Reply to Government Response to Defense Motion for Appropriate Relief: Order Appropriate Protocols in Administering Court-Ordered Magnetic Resonance Image*, filed 6 October 2015.

<sup>9</sup> Military Commissions Trial Judiciary Rule of Court 3(5)(m) (May 2014).

and necessary, the military judge can order the CA to provide the requested expert or resources.

R.M.C. 703(d); Regulation for Trial by Military Commission (R.T.M.C.) para. 13-9 (2011 ed.).

5. The CA has not denied the Defense's constructive request for specific resources.<sup>10</sup> The

Commission will not consider the issue until a request has been denied by the CA. This issue is not ripe for resolution by the Commission.

6. The Defense's request to order the Government to allow Defense Counsel and Dr. Crosby to meet with the Accused before the MRI and allow the Defense Counsel to be present during the MRI is premature. The Defense has made no showing that requests to allow these meetings and

presence at the MRI have been made and denied by the appropriate official. This Commission generally defers to the judgment of the officials who run the detention facility, but the

Commission is less deferential when the decisions impact on the Commission. Presently, there is no decision by a detention facility official for the Commission to review. These issues are not

ripe for resolution by the Commission.

7. The Defense's request to limit the distribution of the MRI results to the Defense is moot.

8. Accordingly, the Defense's motion, AE 277N is **DENIED**.

So **ORDERED** this 16th day of November, 2015.

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

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<sup>10</sup> The Defense submitted a memorandum that "advises the CA and prosecution as to [its] understanding about what a proper MRI should look like." *AE 277N* at Attachment B. The memorandum lacks any discussion of why use of a particular machine to collect particular MRI sequences is necessary. Despite this deficiency, the CA is "treating the memorandum as a request for resources, is addressing the request, and plans to respond." *AE 277O* at 1. *See also id.* at Attachment B.