

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

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED
ABDU AL-NASHIRI

AE 297

**DEFENSE MOTION TO DISMISS
CHARGE III, SPECIFICATION 2
BECAUSE THE STATUTE OF
LIMITATIONS HAS RUN**

July 1, 2014

1. Timeliness: This request 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.b.(1).

2. Relief Requested: The defense moves this commission to dismiss Charge III, Specification 2 because the statute of limitations has run.

3. Overview:

The Military Commission Act (MCA) lacks a statute of limitations provision. The statute of limitations on Charge III, Specification 2 under the existing federal statute at the time of Mr. Al-Nashiri's alleged misconduct is five years. *See* Article 43(b)(1), UCMJ. In Charge III, Specification 2, Mr. Al-Nashiri is charged with attempted murder for his alleged actions on 12 October 2000. Block five of the charge sheet indicates that the charges were received by a convening authority on 16 September 2011. On its face, over eleven years have lapsed between the commission of the alleged offense and receipt of sworn charges. The five year statute of limitations has run as to Charge III, Specification 2 and it must be dismissed.

4. Burden of Proof and Persuasion: Because this challenge goes to subject-matter jurisdiction, the government bears the burden of persuasion by a preponderance of the evidence. R.M.C. 905(c)(2). Denial of this motion will violate the defendant's rights as guaranteed by the Fifth, Sixth, and Eighth amendments to the Constitution of the United States of America, the

Military Commission Act of 2009, the Detainee Treatment Act of 2005, treaty obligations of the United States, and fundamental fairness.

5. Statement of Facts:

a. Abd Al Rahim Hussayn Muhammad Al Nashiri is charged with multiple offenses under the M.C.A. relating to his participation in the attack on USS COLE (DDG 67) on 12 October 2000, and MV Limburg on 6 October 2002, and in the attempted attack on USS THE SULLIVANS (DDG 68) on 3 January 2000.

b. Charge III, Specification 2 reads in pertinent part:

In that...al NAHSIRI...did, in or around Aden, Yemen, on or about 12 October 2000, in the context of and associated with hostilities, with the specific intent to commit the offense of Murder in Violation of the Law of War, attempt to intentionally and unlawfully kill one or more persons onboard USS COLE (DDG 67), in violation of the law of war, to wit: by committing an act of perfidy, and committing acts that amount to more than mere preparation, and to effect the commission of Murder in Violations of the Law of War, the two suicide bombers dressed in civilian clothes launched an explosives-laden boat, to perfidiously approach USS COLE (DDG 67), detonate the explosives while alongside USS COLE (DDG 67) so as to damage and sink USS COLE (DDG 67), and kill one or more persons onboard that vessel.

c. The sworn charges were received at 1126 hours, on 16 September 2011 at Alexandria, Virginia for the Convening Authority by Donna L. Wilkins, GS-15.

6. Argument:

In Charge III, Specification 2, Mr. Al-Nashiri is charged with attempted murder for his alleged actions on 12 October 2000. Block five shows receipt of sworn charges by the convening authority on 16 September 2011. The charge sheet evidences receipt of sworn charges almost eleven years after the alleged misconduct occurred well beyond the five year statute of limitations under Article 43, UCMJ. The federal statute criminalizing war crimes triable by military commission in effect at the time of Mr. Al-Nashiri's conduct was 10 U.S.C. § 821. For

offenses arising under 10 U.S.C. § 821, the statute of limitations is five years. *See* Article 43(b)(1), UCMJ. (A person charged under the code may not be tried...over objection if sworn charges have not been received by an officer exercising summary court-martial jurisdiction over the command within five years). Consequently, the prosecution of Charge III, Specification 2 in this case is time barred. To the extent the five year statute of limitations may be tolled, extended, or suspended, the prosecution bears the burden of proving that the statute of limitations has been tolled, extended or suspended. *See* R.C.M. 907(b)(2)(B) Discussion.

The 2006 MCA arguably repealed Article 43's statute of limitations for military commissions. However, the *Ex Post Facto* Clause bars Congress from reviving a previously time-barred prosecution. *Stogner v. California*, 539 U.S. 607, 632-633 (2003). Accordingly, even if the MCA 2006 repealed the previously livable statute of limitations, the *Ex Post Facto* Clause requires Mr. Al-Nashiri be tried under the laws, rules of evidence and procedure in place at the time his alleged crimes were committed including Article 43 UCMJ. U.S. CONST. art. I, § 9, cl. 3 ("no Bill of Attainder or *ex post facto* law shall be passed."). On its face, the five year statute of limitations has run and Charge III, Specification 2 must be dismissed.

7. **Oral Argument:** The defense requests oral argument on this motion.
8. **Witnesses:** None.
9. **Conference with Opposing Counsel:** The defense has conferred with the government and it objects to this motion.
10. **List of Attachments:** None

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CERTIFICATE OF SERVICE

I certify that on 1 July 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.

/s/ Daphne Jackson
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