

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

UNITED STATES OF AMERICA

v.

ABD AL RAHIM HUSSAYN
MUHAMMAD AL NASHIRI

AE 318B

ORDER

GOVERNMENT MOTION FOR THE
COMMISSION TO PERMIT
GOVERNMENT TESTING OF DNA
EVIDENCE

21 OCTOBER 2014

1. The Accused is charged with multiple offenses in violation of the Military Commissions Act of 2009 (M.C.A.), 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. The Prosecution filed AE 318 seeking the Commission's permission to direct the Federal Bureau of Investigation's (FBI) Laboratory to conduct DNA testing on four (4) hair samples, collected as part of the investigation into the Accused's alleged misconduct, outside the presence of a member of the Defense team. The Prosecution will not be present during the testing. The testing of each individual hair sample could fully consume the sample. The Defense responded (AE 318A) objecting to the proposed testing of the samples outside the presence of a Defense expert and asked for additional information from the Government. A reply was not filed. The Prosecution did not request oral argument; however, the Defense did request oral argument.
3. "[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."¹ In this instance, oral argument is not necessary to the Commission's consideration of the issues before it.

¹ Military Commissions Trial Judiciary Rule of Court 3(5)(m) (May 2014).

4. Assuming, without deciding for the purpose of resolving this motion, if the Accused is entitled to the due process protections of the Fourteenth Amendment of the Constitution, the Commission will evaluate the request to possibly consume evidentiary samples in the conduct of DNA testing under Fourteenth Amendment due process standards.

5. The 2009 M.C.A. provides the Accused the same opportunity to obtain witnesses and evidence as an accused appearing in an Article III Court. 10 U.S.C. §949j(a)(1). 10 U.S.C. §949j(b) establishes the government's basic disclosure of evidence rules. The government must disclose evidence tending to negate the guilt of an accused as to a charged offense and evidence that tends to reduce the degree of guilt of an accused as to a charged offense. *See* R.M.C. 701. Neither case law nor any statute establishes a constitutional or other due process right to attend and observe the forensic testing of a piece of evidence when the test may consume the entire sample. *United States v. Garries*, indicates it may be a best practice to allow a defense representative to observe, but does not establish this as a judicially enforceable right. *See Garries*, 22 M.J. 288, 293 (1986).

6. If an accused is not allowed to observe the testing and the sample is consumed, federal courts provide guidance as to when a remedy is appropriate. In *United States v. Rogers*, 201 WL 5015329 (D. Kansas, 2010) the court explained the difference in the two standards set out in separate Supreme Court opinions. In *California v. Trombetta*, 467 U.S. 479, 490 (1984), the Court held it was not a Fourteenth Amendment due process violation for law enforcement to consume a sample when the exculpatory value of the evidence was not apparent to the Government prior to the conduct of the test, and the evidence was such that an accused could not obtain comparable evidence by other reasonably available means. There, police did not preserve the breath samples of two driving under the influence suspects for possible re-testing. The

Rogers court advised using this standard when the exculpatory value is apparent before the evidence is destroyed. *Rogers*, 201 WL 5015329 at 2-3.

7. In *Arizona v Youngblood*, 488 U.S. 51, 59 (1988), the Court held “unless a criminal defendant can show bad faith on the part of police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” In *Youngblood*, police negligently failed to take appropriate action to preserve evidence collected from a sexual assault victim for comparison testing with the accused who was not taken into custody for an additional six weeks. This standard should be applied “when the evidence possesses potentially exculpatory evidence. Potentially exculpatory evidence is evidence that could be subjected to testing, the results of which might exonerate the defendant.” *Rogers*, 201 WL 5015329 at 3. In *United States v. Smith*, 534 F.3d 1211 (10th Cir.2008), the court articulated five factors a court should consider in determining if the government is acting in bad faith:

1. whether the government has explicit notice that the defense believed the evidence was exculpatory;
2. whether the claim that the evidence is potentially exculpatory is conclusory, or instead backed up with objective, independent evidence giving the government reason to believe that further tests of the evidence might lead to exculpatory evidence;
3. whether the government could control the disposition of the evidence once the accused indicated it might be exculpatory;
4. whether the evidence was central to the case; and
5. whether the government offers any innocent explanation for its disposal of the evidence. *Id.* at 1224 - 25.

8. In *United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991), the Third Circuit Court of Appeals applied the *Youngblood* standard. Law enforcement conducted serological testing on a saliva sample collected on a laboratory microscope slide which may or may not have originated from Stevens, and, in doing so, consumed the entire sample. “This test either might have inculpated or

exculpated Stevens; no one knew. We agree with the district court that the performance of this alternative test bespoke of no bad faith.” *Id.* at 1388.

9. The Commission finds the Government does not know if the test results of the samples in question will result in the creation of exculpatory or inculpatory evidence or be inconclusive and have no evidentiary value in this case, as the identity of the source person of each sample is unknown. Each outcome is equally possible. Since any potential exculpatory value of the evidence is not apparent to the Government at this time, the first test under *Rogers* does not apply. Applying the second test, the Commission finds the Government is not acting in bad faith. Although the Prosecution is on notice the Defense asserts the results may be exculpatory, the Defense’s claim the evidence is exculpatory is at best conclusory and failed to demonstrate how the samples are central to its case.

10. The Defense has not shown any intention by law enforcement to mishandle or unnecessarily consume the entire sample in the conduct of the tests. Tests, if conducted, will be performed in the normal course of business, applying the FBI laboratory’s standard operating test procedures. The Government will provide the Defense copies of test results and procedures, and, if the sample is not completely consumed in testing, the Defense will be allowed to independently test the remainder of the sample. The Defense will be able to review the laboratory reports with their expert, interview FBI lab personnel, and, if FBI lab personnel testify, cross examine them in court. The Government’s proposed course of action satisfies the requirements of *Youngblood*, *Stevens*, and *Rogers*.

11. The Defense has not satisfied its burden of showing bad faith in the proposed handling of the samples nor has it shown apparent exculpatory value of the evidence.

Accordingly, the Government’s Motion, AE 318, is **GRANTED**.

The Defense request in AE 318A to have an Expert who is a member of the Defense Team observe the testing is **DENIED**.

So **ORDERED** this 21st day of October, 2014.

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