

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

UNITED STATES OF AMERICA

v.

ABD AL RAHIM HUSSAYN
MUHAMMAD AL NASHIRI

AE 332WW

RULING

Government Request
For Issue of Warrant of Attachment in
Support of AE 332X

19 October 2016

1. Background.

a. 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.

b. Mr. Stephen Dennis Gill testified via video teleconference (VTC) on 7 September 2016 from the Mark Center in Alexandria, Virginia. During his examination, Mr. Gill indicated that he was unavailable to testify the following day as he was required to be in Massachusetts.¹ Mr. Gill also stated that he planned to fly to Massachusetts at 2130 on 7 September 2016. (Transcript at 6318-6319). After direct and cross-examination of Mr. Gill, the Commission informed Mr. Gill that it was necessary to recall him to continue his testimony at the October 2016 hearing. (Transcript at 6344-48). Mr. Gill stated he would be available to testify during the dates of the October 2016 hearing. (Transcript at 6344-45). Mr. Gill added that he would “be happy to come down to GTMO. I mean, I haven’t been there in awhile. I’d be happy to come back.” (Transcript at 6347-48).

c. The Defense requested Mr. Gill to testify on 17 October 2016 before this Military Commission. On 17 October 2016, Mr. Gill provided the Government a five-page letter, to be

¹ Unofficial/Unauthenticated Transcript of the Al Nashiri (2) Motions Hearing (“Transcript”) Dated 7 September 2016 from 3:31 P.M. to 5:11 P.M. at pp. 6318-6319.

provided to this Commission at 0800 that same day, alleging that the subpoena he received was “unlawful, extra-jurisdictional, and otherwise invalid.” The Government requested the Commission issue a warrant of attachment to compel Mr. Gill to testify.²

2. Law.

a. The Commission has the authority compel witnesses to appear and testify during its proceedings. 10 U.S.C. § 949j(a). Rule for Military Commission (R.M.C.) 703(e)(2) provides this Commission with the authority to subpoena civilian witnesses. “If a subpoenaed witness requests relief on the grounds that compliance with a subpoena is unreasonable and oppressive, a military judge may direct that the subpoena be modified or withdrawn if appropriate.” R.M.C. 703(e)(2)(F).

b. If a civilian witness neglects or refuses to appear, the Commission may issue a warrant of attachment to compel the attendance of a witness if there is probable cause to believe:

the witness was duly served with a subpoena, that the subpoena was issued in accordance with these rules, that appropriate fees and mileage were tendered to the witness, that the witness is material, that the witness refused or willfully neglected to appear at the time and place specified on the subpoena, and that no valid excuse reasonably appears for the witness’ failure to appear.

R.M.C. 703(e)(2)(G)(ii).

4. Findings.

a. This Commission finds there is probable cause to believe: (1) on 11 October 2016, the Government issued a subpoena requiring Mr. Gill to appear before this Commission via teleconference at the Mark Center; (2) the subpoena was issued in accordance with Rule for Military Commission 703(e)(2); (3) Mr. Gill received a check for appropriate for appropriate fees and incidental costs, including a booked flight from Massachusetts to Virginia; (4) Mr.

² AE 332PP, Government Request For Issue of Warrant of Attachment in Support of AE 332X, filed 17 October 2016.

Gill's testimony is material to the Defense motion AE 332X; and (5) Mr. Gill refused to appear at the Mark Center on 17 October 2016 at 0800 to continue his testimony.

b. Mr. Gill's "professional opinion" that the subpoena is technically flawed, as well as his argument that this Commission lacks jurisdiction to compel Mr. Gill to testify via VTC from the Mark Center, is without merit. (AE 332PP at Attachment E). Although Mr. Gill requests relief in accordance with R.M.C. 703(e)(2)(F), Mr. Gill presented no facts to support that "compliance with a subpoena is unreasonable and oppressive." Therefore, the Commission denied Mr. Gill's request for relief and further found no valid excuse reasonably appeared for Mr. Gill's failure to appear at the Mark Center. R.M.C. 703(e)(2)(G)(ii).

c. This Commission further notes Mr. Gill was subpoenaed to testify via VTC at the Mark Center in Alexandria, Virginia. During the 17 October 2016 hearing, the Government indicated that, absent an agreement otherwise by the parties, the Mark Center is the default location for witnesses to testify via VTC. The Mark Center is preferred because of its technical reliability, security, software compatibility, and the ability to seamlessly display documents to the witness.

6. **Ruling.** The Government's request for a Warrant of Attachment is **GRANTED**. Accordingly, this Commission has issued a Warrant of Attachment for Mr. Gill. (*See* AE 332TT).

So ORDERED this 19th day of October, 2016.

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