

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

AE 346B

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED
ABDU AL-NASHIRI

**DEFENSE REPLY TO
GOVERNMENT RESPONSE TO
DEFENSE MOTION TO PRECLUDE
THE UNITED STATES AIR FORCE
FROM TRANSFERRING LTCOL
[REDACTED] FROM THE
OFFICE OF THE CHIEF DEFENSE
COUNSEL TO ANOTHER,
UNRELATED ASSIGNMENT**

2 July 2015

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

2. **Additional Facts:** The United States Air Force has refused LtCol [REDACTED] oral request to rescind the orders transferring her from the Office of the Chief Defense Counsel. LtCol [REDACTED] was advised that she could either accept these orders or retire from the Air Force.

The Convening Authority has, to date, refused to grant additional hours to Mr. Robert Lessemun, who is the defense's longest serving investigator and who the Commission approved as a part time investigator, despite the fact that the Convening Authority was aware of LtCol [REDACTED] anticipated departure.

Since 1 Apr 2015 the defense has lost four military counsel, one to separation from the military and three to transfer. It is anticipated that another military counsel will be returning to civilian status and will be leaving the defense in October 2015. Since 1 Apr 2015, there have been two military replacements assigned to the Nashiri team, neither of whom have capital experience. They have little or no experience with homicide cases, nor even recent significant courtroom experience. Two additional civilian counsel will be joining the team later this year;

however, neither will have clearances for many months, thus their ability to assist the defense will be quite limited for the foreseeable future. Likewise, the two replacement military counsel assigned do not yet have appropriate clearances. Given the recent widely reported security issues within The Office of Personnel Management, the lack of clearances for new defense personnel will be a problem for the foreseeable future.

3. Reply: The prosecution suggests that the defense must request the Air Force rescind LtCol [REDACTED] orders and if that does not occur, then the defense must ask the Convening Authority for new, additional investigative resources. The prosecution also suggests that as the military routinely transfers personnel, LtCol [REDACTED] transfer is just part of military life, and the defense must accept that fact and adapt to the changed circumstances.

What the prosecution fails to grasp or address is that the underlying issue is Mr. Al-Nashiri's right to effective assistance of counsel. The frequent personnel changes occasioned by military transfers, while perhaps part of ordinary military life, demonstrate that the Military Commissions system, however well intended, cannot provide capital defendants effective assistance of counsel. Indeed, if the repeated and continuing turnover of military personnel is truly beyond the control of the Commission itself, as the prosecution argues, then the Military Commissions system cannot ensure that the capital defendants receive effective assistance of counsel. While the Air Force no doubt sees the need for LtCol [REDACTED] to transfer through its institutional lens, that lens does not account for the impact the loss of LtCol [REDACTED] has upon the Al-Nashiri defense. The prosecution argues the defense should merely seek additional resources from the Office of the Convening Authority (OCA), but this approach ignores the past denials of the OCA and assumes the OCA is not hostile to the defense- given the history of this

case, the defense cannot rely on the “good faith” of the OCA to ensure it can effectively represent Mr. Al-Nashiri.

The transfer of LtCol [REDACTED] one of the lead investigators on the case, will reduce the defense to one investigator in a capital case. With the loss of several detailed counsel, LtCol [REDACTED] is one of the few remaining team members with institutional knowledge about the case and actions that the defense must take in order to prepare an adequate defense. The transfer of LtCol [REDACTED] exacerbates the problem the defense faces as it, like the loss of military counsel, deprives the defense of the working relationships that have been built and institutional knowledge gained by LtCol [REDACTED]

A. The Lack of Stability to the Defense Precludes Effective Assistance of Counsel.

In light of this case’s complexity and scope combined with the unpredictability and inherent difficulty of litigating at Guantanamo, it was certain that this case would take years to litigate. The case has been further plagued by the many other impediments to progress: the governmental secrecy about the RDI program, delays and refusal to comply with discovery obligations, the Convening Authority’s attempt at unlawful influence, and the prosecutor’s appeals. These actions make it clear that this case will take years to litigate properly. Given the knowledge that this case (and all pending capital Commissions cases) will take years to properly litigate, the decision to assign military personnel that typically serve 2-3 years at a duty station was regrettable. Transferring counsel and support personnel with such frequency wreaks havoc to the stability to the defense teams, which only further impedes the defense ability to expeditiously prepare and defend these cases for trial.

Presently, every military counsel who was present at Mr. Al-Nashiri’s arraignment has left the team due to transfer or separation from the service. Only learned counsel has a lengthy

relationship with the defendant. By 31 Oct 2015, only learned counsel and LCDR Pollio will be available to represent the accused before this Commission. Of the paralegals that were in place when the case began, only one remains- a military paralegal that will also soon be transferred. Only Mr. Lessemun remains of the investigators in place at the time of arraignment and his status is doubtful as the Convening Authority refuses to grant him additional hours. LtCol [REDACTED] has been with the team since 2013 and provides a great deal of stability to the defense. Her transfer represents yet another staggering loss of institutional case knowledge.

This lack of stability is unacceptable in a capital case. The lack of stability in the defense team risks undermining, in a very real way, the defense's ability to provide effective assistance of counsel. In essence, the Al-Nashiri defense team must be entirely re-constructed, save for learned counsel. While at present the case is in abatement, the need to re-constitute the defense team makes it impossible for the case to proceed to trial for at least a year after the last new member of the team receives their full security clearance. The preparation obligation for a capital trial of the scope, difficulty, and complexity as this case is that time consuming. And this timeframe assumes the unlikely condition that there are no further changes in the composition of the defense team.

B. The Office of the Convening Authority is Improperly Refusing to Provide Adequate Resources the Defense.

The prosecution argues, in great length, that the defense must properly remedy its lack of resources by requesting additional resources from the Convening Authority. This argument ignores the reality of this case.

The defense has alleged that the legal advisors to the Convening Authority and the Convening Authority are continuing their pattern of Unlawful Command Influence. *See* AE 332X. The present legal advisor, Mr. Michael Quinn, was a legal advisor when the plan to

implement Change One was created and served for as Legal Advisor for nearly half of the time the plan was created. Having escaped being excluded by the Commission's order because he had left the Convening Authority's office and his position was not readily visible in the discovery available, Mr. Quinn returned and continues to undermine the defense.

Germaine to this discussion is the Convening Authority's decision not to grant Mr. Lessemun additional hours. This Commission, over objection of the government and initial requests to the Convening Authority, authorized Mr. Lessemun to assist the defense as a part-time investigator. This was due to the defense's need for an experienced investigator, Mr. Lessemun's prior work on the case, and his resulting institutional knowledge. When Mr. Lessemun used up his authorized hours, the defense requested additional hours and that request has been, to date, denied by the Convening Authority. Attachments B and C. Even with knowledge that the defense may be reduced to one investigator due to the loss of LtCol [REDACTED] the Convening Authority and his Legal Advisor continue to deny the defense request, which is not for additional resources, but to merely preserve the status quo of resources.

The undermining of the defense needs for investigative resources goes beyond the denial of additional hours for Mr. Lessemun. When the Chief Defense Counsel requested training for new investigators assigned to the OCDC, many of whom had never investigated a case for a criminal defendant, the Convening Authority declined to approve funds for that training. The prosecution's suggestion that the defense should simply request resources from the Office of the Convening Authority ignores the history of this case, where the OCA is unlikely to provide the necessary resources.

C. The Commission Has the Authority and Responsibility To Insure That the Defense has Both Adequate and Stable Resources.

Ultimately, this Commission has the obligation to insure that the defense receives effective assistance of counsel. This means counsel who have the skills and experience to defend a major capital case and who are adequately resourced. Adequate resources are determined in light of the realities of the case. The reality of this case demands a huge investigative obligation- the allegations reach back over 15 years, took place across the globe, involve many witnesses, and require in depth investigative skill and travel. These demands require at least three skilled investigators. Investigators are not fungible. Some do not have the experience or temperament to do a capital defense investigation. Some do not have the ability to work in foreign environments. Any new investigator must learn the case, a process that takes at least six months given the facts of this particular case. He or she must attempt to resurrect the relationships that LtCol [REDACTED] has developed. Only then, can they begin to contribute in a meaningful way.

The loss of LtCol [REDACTED] at this critical juncture is devastating to the defense. The Air Force, believing other duties are more pressing, will not extend LtCol [REDACTED] in her present position. The prosecution suggests that OCDC should have “planned ahead” to accommodate this loss, which illustrates its complete lack of understanding of the manning at OCDC. The lack of investigators is yet another resource issue that OCDC has consistently raised with the OCA, yet the problem persists.

LtCol [REDACTED] is dual-hatted at OCDC- she is both the lead OCDC investigator, detailed by the Air Force, and our team investigator, detailed by the Chief Defense Counsel. The Chief Defense Counsel cannot simply replace her; rather, OCDC must wait until the Air Force sends a replacement for her as no other services can fulfill this manning requirement. Unsurprisingly, all the investigators with OCDC are already assigned to other teams, and much like attorneys, the

OCDC has vacant and gapped investigator billets. Furthermore, because LtCol [REDACTED] is being detailed relatively late in the detailing cycle without an identified replacement, it is very likely that the Air Force would not be able to detail a replacement for her position until the summer of 2016. The defense cannot “properly prepare” for her departure- as the prosecution suggests it has failed to do- when no replacement has been identified, much less provided by the Air Force. Even if a relief is eventually provided, the Air Force’s detailing actions will have precluded any effective turn over.

OCDC cannot manufacture investigators. The billet has already been requested by OCDC- it is a standing billet/request and the Air Force has not provided an adequate replacement. The Convening Authority cannot provide an adequate replacement. Therefore, this Commission is obligated to act.

D. The Prosecution is Estopped from Complaining about the Delay Occasioned by the Loss of LtCol [REDACTED].

At some point, the current appeals will be resolved and hearings will begin. At that time, if history is a guide, the prosecution will be pushing the Commission to set a trial date. While we cannot know precisely what the composition of the defense team will be when hearings resume, we can know that unless the abatement continues for another year or more, the defense will still be trying to recover from the loss of LtCol [REDACTED]. When the defense advises that it cannot be ready for trial until whatever time is realistic for an entirely new investigative and attorney team to adequately prepare, the prosecution and the Commission, if it fails to act, should be precluded from opposing that delay. The prosecution cannot oppose adequate, stable resources, encourage the Commission to refrain from assisting the defense to have adequate stable resources and then demand that the case proceed rapidly to trial. Fairness demands that the defense have adequate resources, including investigators, fully prepared for trial before trial begins.

A helpful step in insuring adequate defense resources is an order by the Commission to the United States Air Force that the transfer of LtCol [REDACTED] be rescinded and that she be allowed to remain in her present position without penalty to her career.

4. Additional Witnesses: None

5. Additional Attachments:

- A. Certificate of Service, dated 2 July 2015 (1 page)
- B. Denial from the CA for additional hours for Mr. Lessemun dated 2 June 2015 (3 pages)
- C. Response from Legal Advisor to the CA for additional hours for Mr. Lessemun dated 18 June 2015 (2 pages)

/s/ Brian Mizer
BRIAN MIZER
CDR, JAGC, USN
Assistant Detailed Defense Counsel

/s/ Jennifer Pollio
JENNIFER POLLIO
LCDR, JAGC, USN
Assistant Detailed Defense Counsel

/s/ Richard Kammen
RICHARD KAMMEN
DOD Appointed Learned Counsel

ATTACHMENT

A

Filed with TJ
2 July 2015

Appellate Exhibit 346B (Al-Nashiri)
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CERTIFICATE OF SERVICE

I certify that on 2 July 2015, I electronically filed the forgoing document with the Trial Judiciary and served it on all counsel of record via e-mail.

/s/ Richard Kammen
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ATTACHMENT

B



Convening Authority

OFFICE OF THE SECRETARY OF DEFENSE
 OFFICE OF MILITARY COMMISSIONS
 4800 MARK CENTER DRIVE
 ALEXANDRIA, VA 22350-2100

JUN 02 2015

MEMORANDUM FOR MAJOR ALLISON DANIELS, ASSISTANT DETAILED DEFENSE
 COUNSEL

SUBJECT: *Ex Parte* Request for Additional Funding for Part-Time Investigator—Mr. Robert Lessemun; *U.S. v. al Nashiri*

I have reviewed carefully the request that you submitted *ex parte*, which is dated March 19, 2015, to authorize additional hours for Mr. Robert Lessemun to continue to serve as a part-time investigator for Mr. al Nashiri. For the reasons set forth below, I deny your request.

Rule for Military Commission (R.M.C.) 703(d) establishes the procedure for requesting expert assistance and requires the requesting party to provide notice to the non-requesting party. This process helps me to evaluate the need for the expert assistance sought, and to determine whether alternatives are preferable so as to avoid wasteful expenditures. I will review a request for employment of an expert *ex parte* upon a showing that *ex parte* review is necessary to ensure a fair trial. *See United States v. Garries*, 22 M.J. 288 (C.M.A. 1986). *See also, United States v. Kaspers*, 47 M.J. 176, 180 (C.A.A.F. 1997). However, *ex parte* review of a request for expert services would “rarely be appropriate in the military context.” *Garries, supra*, at 291.

Military practice under R.M.C. 703(d) and *Garries* is consistent with federal practice for considering *ex parte* requests for experts in capital cases. In capital cases, federal courts only will consider requests for expert services *ex parte* upon “a proper showing” of a need for confidentiality. *See* 18 U.S.C. § 3599(f) (“no *ex parte* proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made concerning the need for confidentiality”). While the Commission’s Order of July 26, 2013 (AE 114C) recognizes a “hybrid procedure” that permits *de minimis* notice to the non-requesting party in this case, the military judge since has clarified that military commissions continue to conduct a *Garries* analysis as part of evaluating *ex parte* requests for employment of experts at government expense. *See Nashiri* unofficial transcript, pp. 2959-2962.

On March 28, 2014, you filed a motion (AE 262) with the military commission, to compel the funding for Mr. Lessemun to serve as a part-time investigator for your defense team. This motion was not filed *ex parte*. The motion was briefed by both parties and argued in open commission proceeding on April 22, 2014. The military judge granted your motion on June 17, 2014, and in so doing issued an Order that has been released to the public. *See* AE 262C.

Your memorandum of March 19, 2015, states that your request contains “sensitive information” about your investigation and thereby warrants *ex parte* consideration. I am unable to discern what is “sensitive” about the information provided. None of the information which you present reveal defense theories or strategies. Even under a liberal application of *Garries*, you have not shown that *ex parte* review is necessary to ensure a fair trial.

Additionally, I find that you have not demonstrated the necessity for the continued employment of Mr. Lessemun. An accused is entitled to the employment of an expert, provided they can demonstrate the necessity for the expert assistance. See *Ake v. Oklahoma*, 470 U.S. 68 (1985); R.M.C. 703(d). As the *Ake* Court explained, an indigent defendant is entitled to “access the raw materials integral to the building of an effective defense.” 470 U.S. at 76-77. The court noted that an indigent defendant is not constitutionally entitled to “all the assistance that his wealthier counterpart might buy,” but that “fundamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system.” *Id.* Military courts have embraced this rule in a series of opinions spanning decades. See *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005); *United States v. Ndanyi*, 45 M.J. 315, 319 (C.A.A.F. 1996); *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994); *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994); *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986). In demonstrating the necessity for expert assistance, the defense must show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel are unable to gather and present the evidence that the expert assistance would be able to develop. See *Gonzalez*, 39 M.J. at 461; *Ndanyi*, 45 M.J. at 319.

In ordering the initial employment of Mr. Lessemun on June 17, 2014, , the military judge found that:

Expert assistance is not an unlimited resource, but rather must be measured against the proper legal standard of relevance and necessity supplied by *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994), *cert denied*, 513 U.S. 965 (1994). The Commission has an independent judicial duty to ensure expert assistance provided by the Government is not cumulative or redundant. The requested expert investigatory assistance is relevant and necessary, especially in the context of capital litigation. The defense currently lacks sufficient expertise in this area. The showing of the relevance and necessity of having Mr. Robert Lessemun continue to serve as a Defense part-time investigator is sufficient.

AE 262C, paragraph 3.

The military judge’s order specifically finds that one year ago your defense team lacked sufficient expertise in the area of capital litigation investigation, and that Mr. Lessemun’s part-time efforts were necessary at that time. In requesting additional hours, you have not provided any information as to why the full-time investigators who are assigned to your defense team still lack the necessary experience, or are otherwise unable to meet the investigative requirements set forth in your request. As the military judge notes, expert assistance is not an unlimited right, and you are not entitled to expert assistance at Government expense that is cumulative or redundant. In this instance, you have not carried your burden in demonstrating the continuing necessity of Mr. Lessemun’s services.

While I must deny your request, you are free to submit additional information for consideration on this issue, with appropriate notice to the prosecution. If you file a motion to compel, please ensure that this response is included with any pleadings you file with the commission.

A handwritten signature in black ink, appearing to read "L. Oostburg Sanz", with a long horizontal line extending to the right.

Paul L. Oostburg Sanz
Convening Authority
for Military Commissions

ATTACHMENT

C



CHIEF OF STAFF AND
LEGAL ADVISOR

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
4800 MARK CENTER DRIVE
ALEXANDRIA, VA 22350-2100

June 18, 2015

MEMORANDUM FOR COMMANDER MIZER, JAGC, USN, DEFENSE COUNSEL

SUBJECT: Defense Request for Additional Hours for Defense Expert Consultant, Mr. Robert Lessemun – *U.S. v. Al-Nashiri*

On June 11, 2015, this office received your request for “approval of 2000 additional hours (\$125/hr) for Mr. Lessemun to continue to assist the defense.” The justification for your request is that the defense team for Mr. al-Nashiri will lose its senior military investigator due to her imminent transfer. I further note that on June 12, 2015, you filed a motion with the commission seeking to preclude the United States Air Force from transferring Lieutenant Colonel [REDACTED] from the Office of the Chief Defense Counsel (OCDC). AE 346. So that I can properly frame the issues and advise the Convening Authority, I am writing to request additional information.

Section 9-1.a.6.H of the Regulation for Trial by Military Commissions (R.T.M.C.) provides that “[o]utside learned counsel shall have access to OCDC Defense paralegals, interpreters, analysts, *investigators*, supplies, and other resources. Outside learned counsel shall not be entitled to reimbursement for expenses associated with the hiring of interpreters, analysts, or *investigators*.” (italics added).

This office has long held that requests for full-time defense investigator support are to be submitted to the Chief Defense Counsel (CDC), the official with responsibility for informing the Convening Authority of all requirements for personnel, office space, equipment, and supplies to ensure the successful functioning and mission accomplishment of the OCDC. See section 9-4, R.T.M.C. Once personnel have been made available to the CDC, the CDC is responsible for managing the military and civilian personnel who have been assigned and to allocate such personnel appropriately across trial teams.

As you are aware, OCDC is provided investigators from the military services as well as through a contract with SRA International, Inc. (SRA). I understand that LtCol [REDACTED] has been with your team since 2013 and is scheduled to transfer in mid-August, 2015. Your request implies that you will have a new military investigator assigned to your team, but that you expect such individual to be inexperienced. Your SRA investigator, Mr. [REDACTED], has also been assigned to your defense team full-time since 2013, during which he has worked extensively with Mr. Lessemun. I am also informed that Mr. [REDACTED] has recently been certified as a criminal defense investigator.

The CDC is the official to whom you should address a request for full-time additional investigator support. If you have already done so, please indicate if the CDC plans on providing your team a replacement for LtCol [REDACTED] and when such replacement may be expected.

Assuming that you will be assigned a replacement military investigator, please explain why Mr. [REDACTED] – who appears to be well-qualified and experienced both as a defense investigator and in the details of your case – is unable to provide the necessary oversight in making this transition.

I also invite you to address the specific nature of your proposed utilization of Mr. Lessemun. As you are aware, the military judge ordered Mr. Lessemun's appointment in June 2014 to serve as a part-time investigator due to the judge's finding that, at that time, the Defense lacked sufficient expertise in investigatory assistance. AE 262C. Even if we were to assume that some additional hours may be warranted based upon a loss of expertise represented by the transfer of your military investigator, your request for 2,000 hours suggests that you seek Mr. Lessemun's return to full-time investigator status. This is beyond the limited appointment authorized by the military judge. I request you further explain your request in this regard.

Finally, I would also ask you to address why the Convening Authority should consider your request for additional hours for Mr. Lessemun while your motion to preclude the transfer of LtCol [REDACTED] is pending. If the military judge granted relief, how would this impact your request for additional hours? Similarly, if the Convening Authority were to approve additional hours for Mr. Lessemun to serve as a part-time investigator (*see* Footnote 1 of AE 346), how would this affect your motion?

Upon receipt of your response, and any additional information you choose to provide, I will endeavor to present your request to the Convening Authority as expeditiously as possible.



Michael I. Quinn
Acting Legal Advisor

Copy to:
Trial Counsel