

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL-RAHIM HUSSEIN MUHAMMED ABDU AL-NASHIRI</p>	<p>AE 354F</p> <p>Defense Reply to Government Response to Defense Motion to Compel Production of Witnesses In Support of AE 354:</p> <p>Defense Motion to Abate Proceedings Due to Destruction of Evidence: Videotapes of Mr. Al-Nashiri's Interrogations</p> <p>26 October 2016</p>
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1. **Timeliness:** This reply is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905.
2. **Reply:** The prosecution's continued opposition to producing virtually every single witness requested by the defense defies both common sense, and the clear guidelines set forth in both the MCA and RCM. The 2009 MCA states "Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses...[t]he opportunity to obtain witnesses and other evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the Constitution." 10 U.S.C. § 949j(a)(1).

These witnesses are logically and rationally related to the underlying AE 354 motion. Their testimony is necessary for the defense to present both the evidentiary value of the tapes, and the deliberate steps taken by government officials to destroy this

irreplaceable evidence. This information is highly relevant and necessary in determining the evidentiary value of the video tapes and what remedy this Commission should find for their intentional destruction. While the prosecution claims there is no dispute as to the contents of the tapes, the mere fact that the prosecution calls their contents “EITs,” rather than torture, highlights the dispute as to the contents of the tapes, their importance, and the appropriate remedy for destruction of evidence. These factual disputes require an evidentiary hearing. In fact, the relevance of these witnesses has already been deemed necessary in a *civil* case proceeding in an article III court- there can be no doubt such testimony is every bit as necessary and relevant in a capital criminal proceeding involving many of the same matters and controversy.

Further, the prosecution’s stated rationale for denial of the four requested witnesses is contradictory and relies on self-serving, circular logic. The prosecution argues that the underlying defense motion “lacks evidentiary support,” but then goes on to argue that the request can be decided on the pleadings alone.¹ This demonstrates, yet again, the prosecution’s misunderstanding of the purpose of an evidentiary hearing. Witnesses are called by parties to present evidence- their testimony *is* evidentiary support. In this case, the defense requested four witnesses to present evidence to the court on the underlying issue: the destruction of highly exculpatory evidence and determining appropriate

¹ The prosecution also avers the defense motion to compel witnesses was “untimely,” yet then claims that the motion is not yet ripe. However, during the September 2016 hearing, the Commission stated it would defer hearing argument on *Brady*/evidentiary motions until after the government fully complied with its discovery obligations. Although the prosecution filed notices and motions for relief arguing it has “substantially” complied with its discovery obligations, to date the defense has not received the stated discovery. *See* AE 120GGGGG.

remedies for such destruction.² If the defense motion truly lacks evidentiary support, as the prosecution argues, then the defense is entitled to present evidence at a hearing- including witnesses- to present the evidentiary support needed to meet its evidentiary burden. Essentially, the prosecution refuses all defense witness requests and then seeks to benefit from its refusal by claiming the defense has no evidence and cannot meet its burden. Such a proposition is circular and self-serving to the prosecution's interests. This continual pattern of interference and gamesmanship cannot be condoned. The defense must have the opportunity to present evidence, which necessarily includes the ability to call witnesses.

The government's response demonstrates a general failure to appreciate the defense's right to present its own case. It should not be allowed to hide the witnesses who actually know about destruction of exculpatory evidence and what exactly that evidence included, yet then claim the defense cannot meet its evidentiary burden to argue the evidence was exculpatory and that a strong remedy is required. As gatekeepers to all of the witnesses, the government has an obligation to let the defense present a full and fair presentation of evidence in support of defense motions. The defense requests the Commission hold a full evidentiary hearing on this issue, including allowing the defense to call the witnesses listed in AE 354D, in order to provide the Commission with all of the facts necessary to decide the very serious issues raised in AE 354.

² If the prosecution seeks to enter any statements made by Mr. Al-Nashiri, to include his so-called "clean team" statement, then evidence proving that those statements are derived from torture and inherently unreliable is clearly exculpatory. Additionally, it is well established law that evidence about conditions of confinement is mitigation evidence- particularly in a capital case. *See* AE 354.

3. **Additional Witnesses:** None.
4. **Additional Attachments:**
 - a. Certificate of Service, dated 26 October 2016 (1 page)

Respectfully submitted,

/s/ Richard Kammen
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/s/ Jennifer Pollio
JENNIFER POLLIO
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ATTACHMENT

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26 October 2016

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CERTIFICATE OF SERVICE

I certify that on 26 October 2016, I electronically filed the forgoing document with the Trial Judiciary and served it on all counsel of record via e-mail.

/s/ Jennifer Pollio
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LCDR, JAGC, USN
Detailed Defense Counsel