

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

UNITED STATES OF AMERICA

v.

**ABD AL RAHIM HUSSAYN
MUHAMMAD AL NASHIRI**

AE 362B

INTERIM RULING

**Defense Motion To Compel Funding For
Attorney Bernard Kleinman To Prevent
Systematic Ineffectiveness of Counsel**

3 November 2016

1. Background.

a. On 30 September 2016, the Accused filed AE 362 requesting the Commission compel the Convening Authority to appoint and fund “reasonable travel expenses” and hourly legal fees for attorney Bernard V. Kleinman to travel from White Plains, New York to the United States Penitentiary Administrative Maximum Facility (“USP Florence ADX”), located in Florence, Colorado.¹ The purpose of Mr. Kleinman’s travel is to be present while the Defense mitigation specialist interviews two of Mr. Kleinman’s clients who are incarcerated at USP Florence ADX and who are under Special Administrative Measures. The Defense has indicated Mr. Kleinman’s clients may possess mitigating information regarding the Accused, but the two individuals are unwilling to be interviewed outside of the presence of Mr. Kleinman. (AE 362 at 1-2).

b. On 14 October 2016, the Government filed AE 362A requesting the Commission deny the defense motion to compel funding.² After the Defense informed the Commission the Defense would not be filing a reply to AE 362A, the Commission heard argument on the issue in open court on 19 October 2016.³

¹ AE 362, Defense Motion to Compel Funding for Attorney Bernard Kleinman to Prevent Systematic Ineffectiveness of Counsel, filed 30 September 2016.

² AE 362A, Government Response To Defense Motion to Compel Funding for Attorney Bernard Kleinman to Prevent Systematic Ineffectiveness of Counsel, filed 14 October 2016.

³ Unofficial /Unauthenticated Transcript of Abd Al Rahim Hussayn Muhammad al Nashiri dated 19 October 2016 from 1:29 P.M. to 2:45 P.M. at pp. 7133-7157.

2. Law.

a. This Commission is well aware of an accused's right to adequate representation and right to "expert assistance" when the denial of expert assistance would result in a fundamentally unfair trial. *See generally United States v. Lloyd*, 69 M.J. 95 (C.A.A.F. 2010). The Commission, however, is unaware of any case law or statutory authority requiring the expenditure of government funds in a criminal trial to compensate an attorney who is representing uninvolved third parties who may, or may not, eventually be called as witnesses in such criminal trial.

b. The Defense argues Mr. Kleinman's funded involvement is necessary in this case because the interviewing of Mr. Kleinman's clients is in "furtherance of their obligations to conduct a thorough guilt, innocence and mitigation investigation." (AE 362 at 2). However, the Defense provided no indication of who the potential witnesses are, and what specific relevant information, if any, these two potential witnesses may actually possess.

3. Ruling.

a. The Commission **DEFERS** ruling on the Defense motion to compel.

b. The Commission, however, invites the Defense to submit an *ex parte* and *in camera* supplement to AE 362, disclosing the names of the two witnesses at USP Florence ADX to be interviewed by the Defense mitigation specialist, specifying what relevant information the two witnesses possess, detailing the reasons why the Defense believes the two witnesses can provide such information, and explaining why Mr. Kleinman should be paid \$183.00 per hour when his stated rate is listed in Appendix C of AE 362 as \$127.00 per hour.

c. If the Defense chooses to file an *ex parte* and *in camera* supplemental filing, such filing shall be filed **no later than 15 November 2016**. If no supplemental filing is submitted

prior to that date, the Commission will rule on AE 362 based solely upon the previous filings and oral arguments of the parties.

So **ORDERED** this 3rd day of November, 2016.

//s//

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