# MILITARY COMMISSIONS TRIAL JUDICIARY GUANTANAMO BAY

UNITED STATES OF AMERICA

V.

KHALID SHAYKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI AE 367C(MAH 3<sup>rd</sup> Sup)
Mr. al Hawsawi's Supplement to Defense
Motion to Dismiss
on National Security Grounds

Filed: 4 April 2016

- 1. **Timeliness:** This supplement is timely filed.
- 2. Relief Sought: The Defense for Mr. al Hawsawi asks that this Commission accept this supplement to AE 367, Defense Motion to Dismiss on National Security Grounds (filed July 22, 2015). Newly available facts present further evidence as to why the purported needs of national security trump the need for a just criminal proceeding. This case cannot be tried in a fair manner that comports with due process because of the Government's continued self-serving and arbitrary invocations of national security to restrict the full litigation of this case and to intrude into the defense function.
- 3. <u>Burden and Standard of Proof</u>: The Defense bears the burden on this supplement. *See* R.M.C. 905(c).

### 4. Facts:

Several new facts supporting a supplement to this motion are detailed below:

a. In the last supplement to this motion, AE 367C(MAH 2d Sup), Mr. al Hawsawi described how the prosecution was encroaching on the defense function by picking and choosing which defense personnel could access certain information material to the litigation, and which personnel could not.

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Specifically, the Chief Prosecutor had disclosed, during the hearings of October 2015, the existence of an Additional Compensatory Control Measure (ACCM) required before defense personnel could access information directly related to litigation then pending. To ensure the hearing would move forward, the Chief Prosecutor arranged for members of the defense teams to be read on right in Guantanamo. Six members of Mr. al Hawsawi's defense team were read on to the program at that time, though the Prosecution elected not to read on other members who were present; other teams had varying numbers of personnel read on. Shortly after the reads on, defense counsel sought to obtain the appropriate read on for remaining personnel on the team, whom defense counsel deemed necessary to access such information. At this point, the Chief Prosecutor General Mark Martins announced that not all defense personnel would be able to obtain access unless they could demonstrate a need to know. General Martins then posited that perhaps ten members of each team, "any ten," could receive access to the program. Learned Counsel for Mr. al Hawsawi objected that such a procedure would violate Mr. al Hawsawi's right to effective assistance of counsel and impermissibly intrude into the defense function.<sup>1</sup>

b. At a closed proceeding held on February 25, 2016, during which certain information falling under the above-discussed ACCM was intended to be discussed, the commission was informed that the sole detailed military defense counsel for Mr. bin 'Attash was not approved for access to the information related to this ACCM. When it became apparent that the hearing might continue without detailed military defense counsel, the Chief Prosecutor requested a recess and an opportunity to reach out to some unknown party in order to resolve the situation. Following a brief, half-hour, recess of the commission, the Government ensured that this counsel (who, per Mr. bin 'Attash's learned counsel was behind forty other persons on a list of personnel awaiting ACCM access) was approved

<sup>1</sup> See United States v. Mohammad, et al., Unofficial Transcript, Oct. 25, 2015, at 8625-8634 (Objection of learned counsel Mr. Ruiz, and Military Judge's acknowledgement that the Prosecution had cited no authority for its limitation on defense team members' access to this information.)

for immediate access to the ACCM information. However, other defense team members, including a Defense Information Security Officer (DISO) on Mr. bin al Shibh's team, were not permitted to obtain this approval, even though they were available, otherwise properly cleared, and critical to the defense team's classified session litigation efforts, according to his learned counsel.<sup>2</sup> The Government again represented that there was a limit of ten persons per Defense team authorized for approval on this ACCM.<sup>3</sup> No authority was cited for this professed requirement, and it was clear that this "limit" was an arbitrary construction of the Prosecution that was not based on any regulation or agreement with the Defense. Learned counsel for Mr. al Hawsawi again objected to the Prosecution-imposed limitations on defense team access.<sup>4</sup> Additional facts regarding this matter are detailed in a classified attachment to this Supplement. (Att. B).

c. Not content with manipulating individual defense teams, the Prosecution has effectively inserted itself into the strategic, ethical and statutorily created decision-making functions of the Military Commissions Defense Office (MCDO). The Prosecution has managed to strip the Chief Defense Counsel and the Chief Deputy Defense Counsel of their authority to manage, supervise and counsel defense teams within the MCDO. By exerting the power to determine when the Chief Defense Counsel and his Deputy, who are both fully cleared and admitted to the special access program pertinent to Guantanamo so-called "high-value" detainees, may have access to specific classified information relevant to the litigation and relevant to the performance of their duties to advise and consult with counsel when needed, the Prosecution has successfully infiltrated the MCDO and is controlling aspects of the defense function. In the most recent example, the Prosecution denied a second defense request from one of Mr. al Hawsawi's co-accused, containing an expanded

<sup>&</sup>lt;sup>2</sup> See United States v. Mohammad, et al., Unofficial Transcript, February 26, 2016, at 11485-86 (Learned counsel for Mr. bin al Shibh, Mr. Harrington's request that his DISO be read-on; request made in light of detailed military defense counsel for Mr. bin 'Attash's expeditious read on to the relevant ACCM program).

<sup>&</sup>lt;sup>3</sup> See id., at 11488.

<sup>4</sup> See id. at 11490-93.

justification submitted at the Prosecution's demand, for the Chief Defense Counsel and his Deputy to have access to certain classified information. The information shared would have assisted the Defense with issues surrounding litigation of AE 052 (classified TS/SCI) and the resourcing surrounding a request for extraordinary relief to the Court of Military Commission Review and the D.C. Circuit. *See* Prosecution Memorandum for Defense Counsel for Ali Abd al Aziz Ali (Mr. al Baluchi), dated Mar. 23, 2016 (Att. C). Under these circumstances, the Chief Defense Counsel and his Deputy are being relegated to figureheads who cannot properly advise and counsel defense teams regarding procedural and ethical issues confronted in the litigation, as their statutory and regulatory duties require.

d. The Government has been periodically turning over some information contained in the Detainee Information Management System (DIMS). Two versions, both of which are unclassified, are turned over to the Defense: one containing dates and times for each data entry shown, another, with no dates or times for any entries. Notwithstanding the fact that these are unclassified documents, the Government marks the version that has dates and times as "non-releasable to detainee." The result of that marking is that the Defense is not permitted to show these records to Mr. al Hawsawi. Only the version of DIMS records that has no dates in it can be shown to Mr. al Hawsawi.

Mr. al Hawsawi requested that the Government produce the dated version of the DIMS records marked as "releasable to detainee," so that Mr. al Hawsawi could review them with counsel.

(Att. D, F) Without any justification in the classification rules, the Government denied Mr. al Hawsawi's request (Att. E, G), stating in its second denial:

The Prosecution will provide a version of these records for Defense Counsel, non-releasable to Mr. Hawsawi. As to a version of any of the detention records releasable to Mr. Hawsawi that includes dates and times, due to sensitive force protection concerns, that information cannot be provided as releasable to the detainee.

(Att. G).

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e. During the proceedings on February 17 and 25, 2016, the Prosecution took the position that it can withhold from the military judge documents and information that he would review in camera and ex parte under R.M.C. 505(f) for the purpose of determining the adequacy of summaries that the Government provides to the Defense. The judge, therefore, would not have available before him the information to determine the adequacy of any summaries. Despite its later agreement to turn over to the judge certain discrete documents in their entirety, the Prosecution has not moved from its overall stance that it has the unilateral authority to conceal from the judge information related to the assessment of the adequacy of summaries generated pursuant to R.M.C. 505(f).

f. On February 23, 2016, counsel for the Government emailed the Defense advising that certain exhibits the Defense used, which the Government had turned over in discovery, were in fact classified although they had not been marked as such at the time the Government turned them over.

See Att. H. Government counsel advised that these exhibits contained classified information, as did certain aspects of argument in a session held on the same date.

As a result of this Government determination, the majority of computers of counsel, paralegals and other case personnel in the Defense are having to be cleaned (or "scrubbed"), a process which on average involves each defense team members' computer being unavailable for approximately six hours. On information and belief, the computers of prosecutors, their paralegals and other personnel, as well as the personnel of this commission and the judge, have also undergone this scrub process. The exhibits at issue, which the Government turned over in discovery via unclassified channels on February 5, 2016, are now classified at the Secret level. The transcript of the commission's proceedings of February 23, 2016, was redacted in part, after the hearing and, on information and belief, without judicial review.<sup>5</sup>

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<sup>&</sup>lt;sup>5</sup> See United States v. Mohammad, et al., Unofficial Transcript, Feb. 23, 2016, at 1896-99.

g. Classified Attachment B to this supplement provides additional facts supporting this motion to dismiss.

### 5. Argument:

A. The Government's Expansive View and Arbitrary Exercise of its National Security Authority Violates Statutory Rules, the Sixth Amendment Right to Counsel, Fifth Amendment Due Process, and the Eighth Amendment, Precluding Even the Possibility of a Just and Fair Trial in this Capital Case.

The Prosecution once again demonstrated its ability to indiscriminately claim and arbitrarily apply easily malleable "national security" arguments in order to advance its litigation interests. This case's history of Governmental overreaching speaks for itself and, despite the Prosecution's yearnings to bury the seedy past, the stench of the present continues to remind the Defense and this commission that a just and fair trial will not be possible. The Government's continual invocation of national security, and the attendant arbitrary and abusive exercise of power to subvert the Defense's resources, eviscerate access to information and warps the landscape of the litigation through what are, ultimately, merely pretextual and arbitrary claims of national security concerns used to gain and enhance litigation advantages. As laid out in the previous defense supplement to this motion,<sup>6</sup> the Chief Prosecutor has demonstrated the ability and willingness to control the defense function by reaching into the defense teams and himself determining which defense team members can have access not only to information, but to the courtroom itself.

Now, not content with manipulating individual defense teams, the Chief Prosecutor has elevated his ambitions to controlling and manipulating the internal operations of the MCDO. Under the guise of unspecified national security authority, the Chief Prosecutor has represented a myriad of inconsistent positions calculated to support the Government's position of the day. First, the Chief Prosecutor decreed that defense personnel would be required to show a "need to know," before being permitted to access information otherwise discoverable to defense teams. He subsequently

<sup>6</sup> See AE-367(MAH 2d Sup), filed Feb. 4, 2016.

proclaimed that only ten (10) defense team members (any ten) could receive information falling under a Department of Defense "ACCM" (alternative compensatory control measures"). No authority has ever been specifically cited for either of these pronouncements. The Prosecution also continues to pick and choose what information the Chief Defense Counsel and his Deputy may review in the course of carrying out their statutorily mandated duties.

In the latest episode of the Government's arbitrary actions and abusive invocation of national security claims, the Prosecution interfered and manipulated these national security constraints in order to further its litigation agenda. That is, when it recognized that a specific defense team member would be excluded from proceedings, the Prosecution speedily arranged for that counsel's access. At the February 25, 2016, hearing of the commission, upon defense counsel's objection and when the Prosecution realized that the proceeding was about to take place without Mr. bin 'Attash's sole detailed military defense counsel, the Prosecution conveniently ensure that, in Guantanamo and within 35 minutes of the issue coming to a head, detailed military defense counsel be read on to the ACCM program.<sup>7</sup> Despite other counsels' requests for their team members – such as a Defense Information Security Officer and a defense investigator -- to be read on at the same time (given that the read-on was going to take place regardless for Mr. bin 'Attash' counsel), the Prosecution only allowed that one detailed military defense counsel to receive the ACCM briefing. Counsel for Mr. al Hawsawi again objected, citing the continued denial of this very same read on for nine (9) members of Mr. al Hawsawi's defense team, whom learned defense counsel deemed vital and for whom repeated requests had been submitted over the course of four months. A week following the above events, the Government made changes to its position that, once again, demonstrate the capricious application of national security labels to suit the Prosecution's litigation goals. See classified Attachment B.

<sup>7</sup> As of the date of this filing, the transcript of the closed February 25, 2016, proceeding has not been made available to the defense.

There are statutory and regulatory processes for vetting defense counsel and members of their teams, to determine who may obtain a security clearance. There are rules in place for judicial review. Executive powers in the area of classified information are already formidable. *See* 50 U.S.C. §3341 (b), (c) (setting out the Executive branch's authority to establish procedures and vetting system for national security clearances); *see also*, *e.g.*, DoD Manual 5200.01 (Feb. 2012). Here, however, apparently dissatisfied with the considerable procedural rules and Executive powers already at its disposal, the Prosecution also argues that it can, in effect, amputate the defense teams as it sees fit, based on arbitrary determinations of its own -- without any due process, under no set rules, and devoid of judicial review.

The Prosecution's willingness to manipulate and disrupt the defense function is not limited to individual defense teams. Rather, the Prosecution has deliberately encroached upon the independence of the Military Commission's Defense Office itself by dictating what information the Chief Defense Counsel and Deputy Chief Defense Counsel can and cannot review in the course of carrying out their statutory and regulatory supervisory duties. *See* R.T.M.C. 9-1(a)(2)(instructing that the CDC "shall supervise all defense activities and the efforts of detailed defense counsel;" "ensure proper supervision and management of all personnel, and "facilitate the proper representation of all accused referred to trial before a military commission appointed pursuant to the M.C.A."); *see also, id.* at 9-1(a)(6)(K) (charging CDC with ensuring learned counsel adhere to M.C.A. and M.M.C.); 9-1(a)(8) (charging CDC to take measures that preclude defense counsel conflicts of interest); 9-1(a)(9) (charging CDC with ensuring defense counsel are capable of zealous representation and are not encumbered by conflicts of interest). The Prosecution's actions in controlling and shaping the scope of the CDC's function eradicate defense counsel's duty to consult with the CDC and Deputy, absent the Prosecution's specific consent. *See* R.M.C. 109(b) (Professional Responsibility Rules for Military Judges and Counsel, *Application of professional* 

responsibility rules to attorneys (directing that counsel "shall" bring conflicts of ethical responsibilities to the attention of the Chief Defense Counsel).

The Prosecution's arbitrary invocation of "need to know" requirements cuts off the MCDO leadership, and further acts to exclude Mr. al Hawsawi and his co-accused from the ability to defend their cases, even beyond the exclusion of the accused that is already built into the litigation of a national security case. The Prosecution's conduct has the very real impact of precluding Defense capabilities and resources whenever the Prosecution decrees for itself the power to interfere: while the Government publicly claims the system is affording the defense certain resources, in practice it does not because the Prosecution has proven that it can and will control the Military Commissions Defense Organization and the defense teams, from within.

These latest instances of Prosecution over-reaching and indiscriminate use of national security claims violate the Sixth Amendment right to the effective assistance of counsel, as they did in fact cut off defense resources for significant periods of the litigation and continue to subvert the flow of relevant information to the MCDO leadership. The Prosecution's position on these matters of defense access and judicial review also violate the Eighth Amendment and Fifth Amendment due process clause, as they impose an arbitrary limitation on the Defense, without judicial review, in a case where the prosecution seeks the ultimate punishment of death. The ability and intent of the Prosecution to reach into the MCDO and control defense teams, to preclude judicial review, all in the name of national security, further demonstrate that this case is not triable due to national security issues, and that this case should be dismissed.

B. The Prosecution's Arbitrary, Unjustified And Unilateral Redaction Of Unclassified Discovery Also Violates the Right to Effective Assistance of Counsel, Due Process and the Eighth Amendment, such that a Fair Trial Is Not Possible.

The Prosecution is prohibiting Mr. al Hawsawi from access to unclassified discovery related to his case, specifically unclassified Detainee Information Management System (DIMS) records.

Arbitrarily labeling documents as "releasable" and "non-releasable, the Prosecution is gerrymandering what Mr. al Hawsawi may review with his counsel in the preparation of his defense. (See Att. I, J, samples showing the two versions of the same records the Prosecution turns over.) The Prosecution is applying these labels without judicial oversight and without reference to any specific rules defining how it applies those markings. This unilateral and complete discretion which the Prosecution exercises excludes Mr. al Hawsawi from seeing broad swaths of unclassified evidence and destroys his ability to meaningfully participate in his defense.

Pursuant to this Commission's order in 18U, the Prosecution was charged with ensuring that discovery produced to the Defense would be marked as "releasable to detainee." The purpose of this labeling was to ensure that discovery documents in the possession of Mr. al Hawsawi or his coaccused would not be confused as contraband by guards who are not familiar with the specific discovery turned over to the defense. The labeling is not, and never was, intended to afford the Prosecution an unfettered ability, independent of classification rules, to preclude Mr. al Hawsawi from reviewing broad and critical aspects of unclassified discovery it produces. In essence, the Prosecution is engaging in another instance of extra-judicial control over production of discovery – discovery which it has deemed relevant and material, since it is turning it over at the outset.

With respect to DIMS records, the Prosecution is producing some aspects of this database to defense counsel; the portions turned over to counsel include dates and times for the system entries, showing, for instance, when Mr. al Hawsawi's cell underwent a routine search, or when he was permitted to leave his cell and for how long. The Prosecution marks these records as "Not Releasable to Detainee." *See* att. I. Separately, the Prosecution is producing the same records, without the dates and time; it marks these "Releasable to Detainee." *See* att. J. DIMS records contain information about Mr. al Hawsawi's day-to-day life, since his arrival at Guantanamo in September 2006; as such, they constitute important mitigation evidence that he and his counsel must review in

preparation of his defense. See Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976) (finding that the Eighth Amendment requires consideration of the character and record of the individual offender "as a constitutionally indispensable part of the process of inflicting the penalty of death.") Removal of the dates and times from these records, however, renders the documents useless for purposes of Mr. al Hawsawi's own analysis of them, as this information is necessary for meaningful review and discussion of this evidence. See Att. K, filed ex parte/under seal. This removal of information excludes Mr. al Hawsawi from access to relevant and material evidence in his case, without reference to any rules that might authorize such exclusion, and without any judicial oversight. The Prosecution is taking on a judicial function in the discovery process, maneuvering to control the preparation of the Defense. This exclusive Prosecution control over Mr. al Hawsawi's access to unclassified discovery destroys Mr. al Hawsawi's ability to meaningfully participate in his defense, and guts his right to the effective assistance of counsel.

Mr. al Hawsawi and his co-accused are already excluded from extensive parts of the case (among other matters: hearings under R.M.C. 505(h) and R.M.C. 806, as well as Top Secret and Secret classified discovery) because of the Government's invocation of national security; the military commission rules allow for that, and that is an inherent part of this system. The rules do not allow for the kind of Prosecution control that is being unilaterally exercised here. Notwithstanding the limitations of trying a national security case, in its opposition to this defense motion to dismiss, the Prosecution proclaimed that "the Accused in this case have been afforded access to (1) effective assistance of counsel; (2) relevant and material evidence; as well as (3) the ability to investigate and gather mitigating supporting evidence." These assertions are belied by the Prosecution's exclusive and arbitrary control over Mr. al Hawsawi's access to material, unclassified evidence: effective assistance of counsel is not possible, and due process cannot be achieved, where the Prosecution

<sup>8</sup> The Defense has challenged and continues to object to the use of national security grounds for exclusion of the accused from proceedings in this case. *See United States v. Mohammad, et al.*, AE 136 pleadings (Motion Regarding Accused's Presence During Closed Proceedings), and Order AE-136E, Jul. 15, 2013.

and unclassified, and which bears directly on his sentencing case. *See Gardner v. Florida*, 430 U.S. 349, (1977) (ruling that imposition of a death sentence violated Due Process required in a capital case where the sentencing authority considered information that was kept secret from the defendant); *see also*, American Bar Association Guidelines for the Performance of Counsel in Death Penalty Cases (2003), Guideline 10.7 (Investigation). The proceedings, moreover, cannot comply with the Eighth Amendment where they allow the Prosecution to keep secret from Mr. al Hawsawi information that is material to the preparation of his sentencing case. *See Lankford v. Idaho*, 500 U.S. 110, 125-26 (1991) (discussing *Gardner* and finding that lack of notice and withholding evidence from defendant violates 8<sup>th</sup> Amendment). The violation occurs under the Eighth Amendment because the reliability the Supreme Court demands in capital cases cannot be achieved with this sort of obfuscation of the evidence. *Id.* (imposition of death penalty fails to meet the need for reliability constitutionally required if information is kept from the defendant). Any possibility of a fair trial is extinguished because of this invasion of the Sixth and Eighth Amendment rights and the violations of Due Process.

# C. The Government's Continued After-the-Fact Classification of Evidence and Proceedings, Makes a Fair Trial of this Case Impossible.

The Government continues to arbitrarily apply classification rules to commission proceedings themselves, further solidifying the impossibility of a fair and just trial in this case. See AE-367 (MAH 2d Sup) (describing the Prosecution's classification of an entire transcript of proceedings of this case, held on Oct. 30, 2015). Its practices are confusing even to the Prosecution, such that the record in this case is irremediably marred.

At the last session of the commission, in February 2016, the Government transformed an entire open session of the commission into a classified secret. On February 23, 2016, after a day of open hearings, the Government announced that documents it had provided to the Defense as unclassified discovery were now considered classified. The documents (three memoranda from the

Department of Justice's Office of Legal Counsel released in Freedom of Information Act (FOIA) litigation years earlier) had been turned over to the Defense on February 5, 2016, and included as exhibits to a defense motion which was argued in open session on February 23rd. The Government's determination that the documents it had produced as unclassified were now actually classified led to the Government's redaction of parts of the transcript of that February 23rd public proceeding. As a result of this post hoc classification — documents which the Government *itself* properly released — the computers of every defense, judiciary and prosecution personnel who received the pleading and its attachments had to be scrubbed, leading to the loss of countless hours of work as personnel were left without use of their computers during the scrub process.

This is not the first time the Government decreed matters are classified even though it had allowed their release. <sup>10</sup> In this instance, however, the Government not only determined that an open proceeding where it did not object to the evidence's release, is classified – it decided that documents which it *affirmatively* released are now classified.

Apparently though, there is an unwritten Prosecution exception in military commissions that
allows it to single-handedly determine, as proceedings unfold, whether released information is
unclassified one day, and classified the next

Where the Government repeatedly classifies hearings after the proceedings occur in public,

<sup>&</sup>lt;sup>9</sup> See United States v. Mohammad, et al., AE-112, Defense Motion to Compel Discovery Related to White House and DOJ Consideration of the CIA Rendition, Detention and Interrogation Program (filed Dec. 27, 2012); exhibits 112K, L, M (filed Feb. 23, 2016).

<sup>&</sup>lt;sup>10</sup> See AE-367C (MAH 2d Sup), filed Feb. 4, 2016 (discussing the after-the-fact classification of a public hearing held on Oct. 30, 2015).

the established rules for handling classified information in military commissions are vitiated. See R.M.C. 505; R.M.C. 806. The Prosecution's conduct entirely circumvents the process the rules require for judicial proceedings involving classified information, giving the Government a complete Executive fiat over how proceedings are to be closed, and whether they are closed. See id. The Government's maneuverings do an end-run around congressional intent, which specifically demands public hearings, and imposes strict procedures for closing proceedings. See 10 U.S.C. § 949d(c); R.M.C. 806. The Government's conduct also eliminates the judicial review provided for in those rules. Its actions, moreover, go against its own earlier stance in this very litigation, when it concluded that "military commission proceedings must be held publicly unless a commission finds that closing a proceeding is necessary." See United States v. Mohammad, et al., AE 033, Government's Motion for Public Access, at 6. Finally, the erroneous classification of documents not only complicates litigation of this case, but generates significant delays. See, e.g., AE362E(AAA), Mr. al Baluchi's Motion to Modify Scheduling Order, filed March 10, 2016 (detailing the impact of the Prosecution's error in turning over as unclassified documents it later deemed classified, and seeking a continuance of proceedings in this case in part due to that impact). The Prosecution's error over the status of the documents it provided shows how arbitrary the classification process is; it is apparent that what one person deems classified, another does not.

If the Government wants to keep secrets to this extent, eliminating judicial review and circumventing congressional intent, then it cannot have a trial, even in the military commissions, because a fair trial is impossible under these circumstances. Litigation of this case has been rendered impossible because of the Government's conduct; this litigation cannot take place consistent with the rules set out for commissions, much less with notions of Due Process.

#### D. Conclusion.

Under the guise of national security concerns, the Prosecution is exercising unauthorized, arbitrary and extrajudicial control over the MCDO and individual defense team members' access to material evidence and resources. The Prosecution is also acting arbitrarily in barring Mr. al Hawsawi's access to material, unclassified discovery, without any legal basis or judicial review. Finally, the Government's persistent post hoc classification of previously open proceedings of this commission, and its misclassification of documents produced to the Defense, have warped the record in this case, and conclusively demonstrate the arbitrariness of the classification rules. Given these incurable circumstances that destroy any notion of a fair trial, a just criminal process cannot be achieved under these circumstances.

As the Commission has previously noted:

[T]he Government has to decide which path it chooses to take in the prosecution of these cases. While there are limitations on the permissible use of classified information, as in any trial involving such, the Government must be mindful that unwarranted or improper interference with the trial procedures of this or any court cannot be tolerated. If the Government believes the needs of national security trump the need for a just criminal proceeding, the means are available to accomplish this. Rule for Military Commission (R.M.C.) 604 permits the withdrawal of charges "for any reason;" and, when taken in consideration of R.M.C. 407(b), a proper reason is a determination of harm to national security.

AE 292QQ(Amended) (filed Dec. 16, 2014) at 32-33.

The latest proceedings of this commission make even clearer that this case should be dismissed with prejudice, as it cannot be tried due to national security concerns.

- 6. Request for Oral Argument: The Defense does not request oral argument on this motion.
- 7. Certificate of Conference: The Prosecution does not oppose this supplement.

# 8. Attachments:

- A. Certificate of Service;
- B. Classified (Top Secret/SCI) attachment to this Supplement in support of AE 367,
   Defense Motion to Dismiss on National Security Grounds;
- C. Prosecution Memorandum for Defense Counsel for Ali Abd al Aziz Ali (Mr. al Baluchi), Additional Request for Provision of Classified Information to Chief Defense Counsel, Mar. 23, 2016;
- D. Mr. al Hawsawi's Request for Discovery, DR-0051-MAH, Dec. 2, 2015;
- E. Prosecution Response to Mr. al Hawsawi's Request for Discovery DR-0051, Dec. 17, 2015;
- F. Mr. al Hawsawi Renewed Request for Discovery, DR-0052-MAH, Dec. 22, 2015;
- G. Prosecution Response to Mr. al Hawsawi's Request for Discovery DR-0052, Jan. 15, 2016;
- H. Prosecution email to Defense, February 23, 2016;
- Sample Detainee Information Management System record ("Not Releasable to Detainee");
- J. Sample Detainee Information Management System record ("Releasable to Detainee");
- K. Ex Parte, Under Seal Attachment.

Mr. al Hawsawi

Detailed Defense Counsel for

Mr. al Hawsawi



# CERTIFICATE OF SERVICE

I certify that on the 4<sup>th</sup> day of April 2016, I electronically filed the **AE 367C(MAH 3<sup>rd</sup> Sup)**, **Mr. al Hawsawi's Supplement to Defense Motion to Dismiss on National Security Grounds.**, with the Clerk of the Court and served the foregoing on all counsel of record by e-mail.

//s//

WALTER B. RUIZ Learned Defense Counsel for Mr. al Hawsawi

В

United States v. KSM et al.

# APPELLATE EXHIBIT 367C (MAH 3rd Sup)

(Pages 20 - 83)

# Classified

# Attachment B

APPELLATE EXHIBIT 367C (MAH 3rd Sup) is located in the classified annex of the original record of trial.

POC: Chief, Office of Court Administration Office of Military Commissions

United States v. KSM et al.

APPELLATE EXHIBIT 367C (MAH 3rd Sup)





# **DEPARTMENT OF DEFENSE**

OFFICE OF THE CHIEF PROSECUTOR OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

23 March 2016

MEMORANDUM FOR Defense Counsel for Ali Abd al Aziz Ali

SUBJECT: ADDITIONAL REQUEST FOR PROVISION OF CLASSIFIED INFORMATION TO CHIEF DEFENSE COUNSEL DATED 21 MARCH 2016.

- 1. On 15 February 2016, the Prosecution authorized the Defense to discuss classified matters associated with AE 373 with the Chief Defense Counsel and/or the Deputy Chief Defense Counsel, based on defense counsel articulating a need to do so to discharge its ethical obligations. In regard to AE 052, the Prosecution indicated that, in light of the subject matter surrounding AE 052, and the recent ruling by the Military Judge, it was not intuitive to the Prosecution how this pleading could cause an ethical matter to arise. As such, the Prosecution did not authorize the release of classified information to BGen Baker or CAPT Filbert in relation to AE 052 based on that request. Prosecution invited the Defense to articulate with more particularity why it believed BGen Baker or CAPT Filbert had a need-to-know this information for purposes of the Defense's ethical obligations if it wanted the Prosecution to reconsider the request.
- 2. On 21 March 2016, defense counsel sent a memoranda to the Prosecution with further justification for its request to provide classified information to the Chief Defense Counsel (CDC). Specifically, the Defense cited to RTMC §§ 9-1(a)(6)(H) and 9-4, which makes the CDC primarily responsible for providing defense teams, including learned counsel, with personnel and other resources. There was no additional justification regarding the purported ethical concerns raised in the first request. It is on this additional basis that the Defense re-requests that the Prosecution "authorize us to provide and discuss classified information relating to AE052 so that we can explain the basis of our intention to seek extraordinary relief from the Court of Military Commissions Review and D.C. Circuit, as necessary, and our corresponding need for additional personnel and other resources."

3. Assuming that this request is still necessary in light of the Military Judge's recent ruling in AE 051H/AE 052MM/AE 114P, the Prosecution again declines to authorize the release of classified information relating to AE 052 to the Chief Defense Counsel of Deputy Chief Defense Counsel. The justification that that the CDC is primarily responsible for providing defense teams, including learned counsel, with personnel and other resources, and that you therefore must share extremely sensitive classified information with him in order for him to do so, has no reasonable limit in its application; would require the Prosecution to authorize classified disclosure of information to a non-party in every instance; and is not sufficient to justify a need-to-know.

/S/
Clay Trivett
Managing Trial Counsel
U.S. v. Mohammad, et al.





# DEPARTMENT OF DEFENSE OFFICE OF THE CHIEF DEFENSE COUNSEL

2 Dec 2015

From: Defense Counsel for Mr. Hawsawi, United States v. Khalid Shaikh Mohammad, et al.

To: Trial Counsel

Subj: REQUEST FOR DISCOVERY ICO UNITED STATES v. MOHAMMED, et al.

- On 25 September 2013, the Defense requested "[u]nredacted copies of all detention records pertaining to Mr. Hawsawi while at Guantanamo, including, but not limited to, all data maintained in DIMS, guard force logbook entries not incorporated into DIMS, all visitor logs, cell block records, and use-of-force reports."
- 2. The Government initially declined to turn over records, based on its belief that the Defense had to first sign a Memorandum of Understanding addressing the handling of classified information. See AE 260A. Since then, the Prosecution has subsequently provided some Detainee Information Management System (DIMS) records. However, the dates and times are redacted from each of the entries in these records. These dates and times are necessary for the Defense to analyze the data contained in the records, and thereby prepare Mr. al Hawsawi's defense and any potential case in mitigation.
- 3. The Defense therefore renews its request for unredacted copies of all detention records pertaining to Mr. al Hawsawi while at Guantanamo, including, but not limited to, all data maintained in DIMS, guard force logbook entries not incorporated into DIMS, all visitor logs, cell block records, and use-of-force reports. This request includes a demand for updated records to the present date, and subsequent records which may be generated between now and the end of the trial in this case.
- 4. The Defense further requests that, to the maximum extent possible, the records sought here be declassified (if they have previously been classified), and that they be marked as releasable to Mr. al Hawsawi.
- 5. The Defense for Mr. al Hawsawi seeks a response to this renewed request no later than December 11, 2015. Should you require further information regarding this discovery request, please contact LtCol Sean Gleason at (703) 588-0406, or <a href="mailto:sean.gleason">sean.gleason</a>

//s//
Sean M. Gleason
LtCol, USMC

Detailed Defense Counsel

Filed with TJ

5 April 2016

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# DEPARTMENT OF DEFENSE

OFFICE OF THE CHIEF PROSECUTOR OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON. DC 20301-1610

17 December 2015

MEMORANDUM FOR Defense Counsel for Mr. Hawsawi

SUBJECT: Prosecution Response to 2 December 2015 Request for Discovery (DR-0051-MAH)

- 1. The Prosecution received the Defense request for discovery on 2 December 2015. The Prosecution hereby responds to the Defense request, below, in bold:
- 2. The Defense asserts and requests:

On 25 September 2013, the Defense requested "[u]nredacted copies of all detention records pertaining to Mr. Hawsawi while at Guantanamo, including, but not limited to, all data maintained in DIMS, guard force logbook entries not incorporated into DIMS, all visitor logs, cell block records, and use-of-force reports."

The Government initially declined to turn over records, based on its belief that the Defense had to first sign a Memorandum of Understanding addressing the handling of classified information. See AE 260A. Since then, the Prosecution has subsequently provided some Detainee Information Management System (DIMS) records. However, the dates and times are redacted from each of the entries in these records. These dates and times are necessary for the Defense to analyze the data contained in the records, and thereby prepare Mr. al Hawsawi's defense and any potential case in mitigation.

The Defense therefore renews its request for unredacted copies of all detention records pertaining to Mr. al Hawsawi while at Guantanamo, including, but not limited to, all data maintained in DIMS, guard force logbook entries not incorporated into DIMS, all visitor logs, cell block records, and use-of-force reports. This request includes a demand for updated records to the present date, and subsequent records which may be generated between now and the end of the trial in this case.

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The Defense further requests that, to the maximum extent possible, the records sought here be declassified (if they have previously been classified), and that they be marked as releasable to Mr. al Hawsawi.

The Prosecution has provided redacted DIMS to you dating through 8 Jun 2015, and will continue to provide these reports to you on a rolling basis.

In the past, due to the fact that your team had not yet signed the MOU in order to receive classified information, the Prosecution would provide two redacted versions of the DIMS reports to get the report down to an unclassified level so it could provide it to you. The version with more redactions was releasable to your client, and marked as such. The less-redacted, unclassified version did not have the dates and times of the entries redacted, and were provided to counsel only.

For future DIMS disclosures, the Prosecution will provide a classified version to the defense, and an unclassified version releasable to your client that will have the same information redacted as the previous versions provided that were marked releasable to the Accused. The Prosecution will also be providing classified versions of the previously-provided unclassified, and therefore redacted, DIMS reports now that the MOU has been signed.

Regarding the Defense request for guard force logbook entries not incorporated into DIMS, all visitor logs, cell block records, and use-of-force reports, this request is overbroad and the Defense does not cite to any specific theory of relevance that would reasonably warrant production of the requested information, nor does the Defense request appear to be material to the preparation of the defense, pursuant to R.M.C. 701. Therefore, the Prosecution respectfully declines to produce the requested information at this time.

If the Defense can cite to specific incidents, supported with a reasonable theory of relevance for the requested information for this part of their request, the Prosecution would reconsider such requests on a one-by-one basis.

Respectfully submitted,

//s//

Clay Trivett Managing Trial Counsel

Nicole A. Tate Assistant Trial Counsel





# DEPARTMENT OF DEFENSE MILITARY COMMISSIONS DEFENSE ORGANIZATION 1620 DEFENSE PENTAGON WASHINGTON, DC 20301-1620

22 December 2015

From: Defense Counsel for Mr. Hawsawi, United States v. Khalid Shaikh Mohammad, et al.

To: Trial Counsel

Ref: a. Mr. Hawsawi's Discovery Request dtd 2 December 2015

 b. Prosecution's Response to 2 December 2015 Request for Discovery (DR-0051-MAH) dtd 17 December 2015

Subj: MR. Al HAWSAWI'S RENEWED REQUEST FOR DISCOVERY ICO UNITED STATES v. MOHAMMED, et al.

- On 2 December 2015, the Defense for Mr. al Hawsawi requested certain detention records. Ref. a. In your response of 17 December 2015, you indicated that detention records marked "releasable to detainee" were produced, as well as detention records marked not releasable to detainee."
- 2. The Defense's 2 December request includes a request for production of detention records that contain the dates and times of the entries in those records, and that are releasable to Mr. al Hawsawi. As the Defense wrote in the request for discovery, dates and times for the detention record entries are necessary to assist Mr. al Hawsawi and his Defense team in analyzing the data contained in those records. This additional information, made available to Mr. al Hawsawi, is needed to defend him, which includes responding to any allegations contained in the records, and preparing any potential case in mitigation. Accordingly, the Defense for Mr. al Hawsawi underscores its initial request for dated detention records that can be released to him.
- 3. Additionally, in your response to the 2 December discovery request, you indicated that you have produced releasable and non-releasable versions of detention records. We have reviewed the records in our possession, and note the discrepancies listed below. We request production of these records, while awaiting full production of dated records releasable to Mr. al Hawsawi:
  - a. Bates # MEA-10011-00004057 through 00006671, produced to the Defense on 15 October 2015, are marked "releasable to detainee." However, no dated records and no records marked "non-releasable to detainee," have been produced.
  - b. Bates # MEA-10011-00003722 through 3759, produced to the Defense on 31 March 2015, are marked "non-releasable to detainee." There has been no production of these records as releasable to Mr. al Hawsawi.
  - c. Bates # MEA-20011-00003799-3850, produced 4 May 2015, are marked "releasable to detainee." There has been no production of these records as

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4.	The Defense for Mr. al Hawsawi seeks a response to this request no later than Jan				January	
	11, 2016.	Should you require further	information re	regarding this	discovery	request
	please conta	ct Suzanne Lachelier	O	or <u>Suzanne.lac</u>	helier	777
			<i>a</i>		8	

releasable to Mr. al Hawsawi.

//s//
Suzanne M. Lachelier
Detailed Civilian Defense Counsel

DR-0052-MAH

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# DEPARTMENT OF DEFENSE

OFFICE OF THE CHIEF PROSECUTOR OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON. DC 20301-1610

15 January 2016

MEMORANDUM FOR Defense Counsel for Mr. Hawsawi

SUBJECT: Prosecution Final Response to 22 December 2015 Request for Discovery (DR-0052-MAH)

- 1. The Prosecution received the Defense request for discovery on 22 December 2015. The Prosecution hereby responds to the Defense request, below, in bold:
- 2. The Defense asserts and requests the following:

On 2 December 2015, the Defense for Mr. al Hawsawi requested certain detention records. Ref. a. In your response of 17 December 2015, you indicated that detention records marked "releasable to detainee" were produced, as well as detention records marked not releasable to detainee."

The Defense's 2 December request includes a request for production of detention records that contain the dates and times of the entries in those records, and that are releasable to Mr. al Hawsawi. As the Defense wrote in the request for discovery, dates and times for the detention record entries are necessary to assist Mr. al Hawsawi and his Defense team in analyzing the data contained in those records. This additional information, made available to Mr. al Hawsawi, is needed to defend him, which includes responding to any allegations contained in the records, and preparing any potential case in mitigation. Accordingly, the Defense for Mr. al Hawsawi underscores its initial request for dated detention records that can be released to him.

Additionally, in your response to the 2 December discovery request, you indicated that you have produced releasable and non-releasable versions of detention records. We have reviewed the records in our possession, and note the discrepancies listed below. We request production of these records, while awaiting full production of dated records releasable to Mr. al Hawsawi:

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a. Bates # MEA-10011-00004057 through 00006671, produced to the Defense on 15 October 2015, are marked "releasable to detainee." However, no dated records and no records marked "non-releasable to detainee," have been produced.

The Prosecution will provide a version of these records for Defense Counsel, non-releasable to Mr. Hawsawi. As to a version of any of the detention records releasable to Mr. Hawsawi that includes dates and times, due to sensitive force protection concerns, that information cannot be provided as releasable to the detainee.

b. Bates # MEA-10011-00003722 through 3759, produced to the Defense on 31 March 2015, are marked "non-releasable to detainee." There has been no production of these records as releasable to Mr. al Hawsawi.

Attached please find a version of these records releasable to Mr. Hawsawi.

c. Bates # MEA-20011-00003799-3850, produced 4 May 2015, are marked "releasable to detainee." There has been no production of these records as releasable to Mr. al Hawsawi.

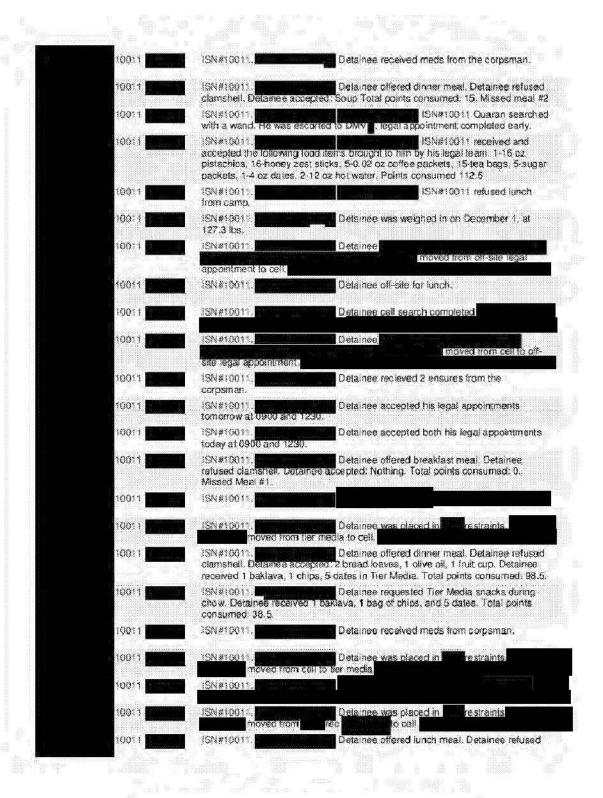
The version produced to the Defense on 4 May 2015 was marked "non-releasable to detainee." The Prosecution believes it is the intent of the Defense to ask for a version of these records that is releasable to the detainee and therefore has attached a version releasable to Mr. Hawsawi. If this is not the intention of the Defense, please advise the Prosecution.

Respectfully submitted,

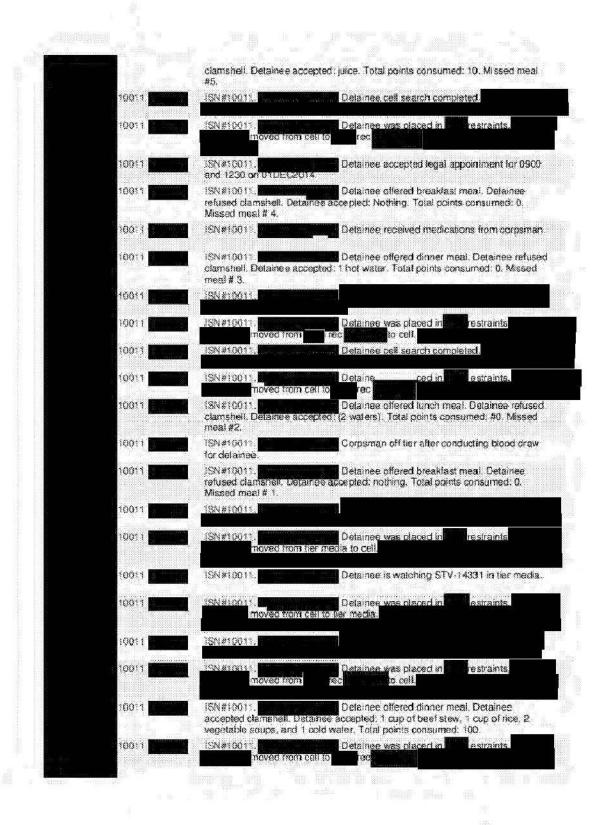
//s//

Nicole A. Tate

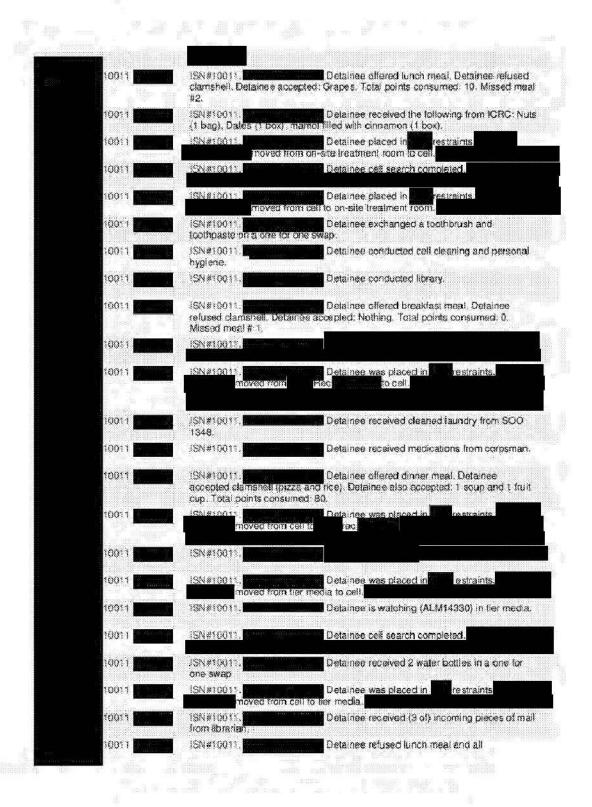
Assistant Trial Counsel



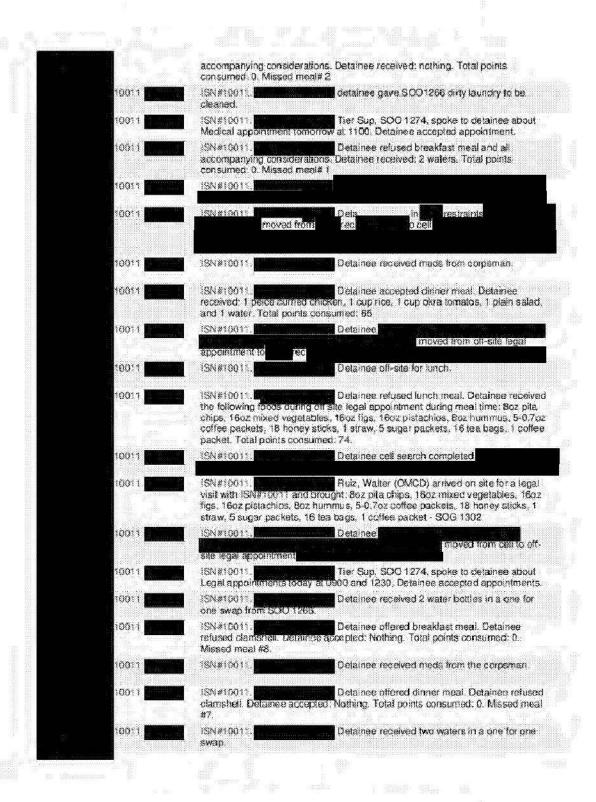
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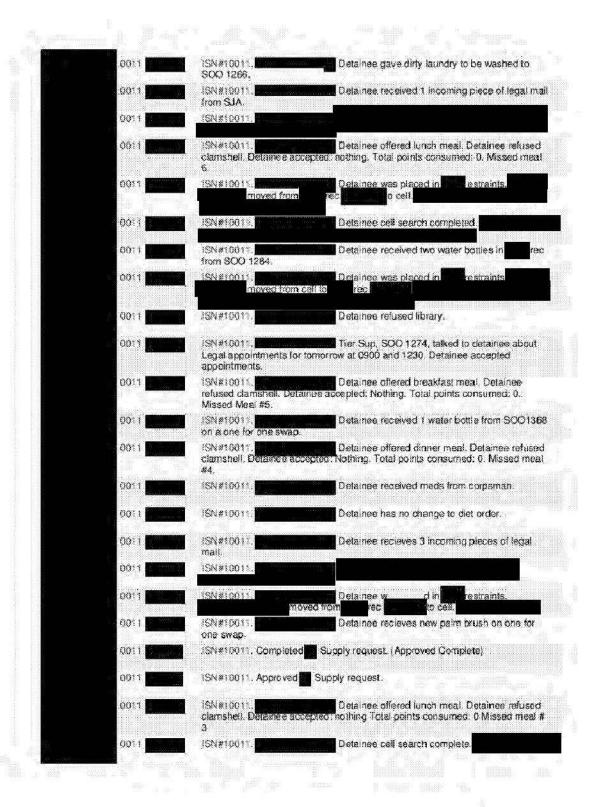
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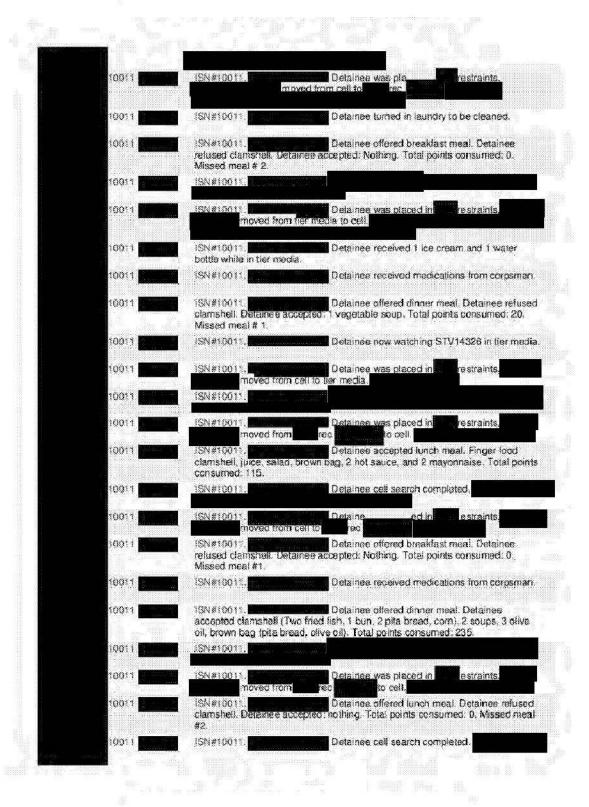
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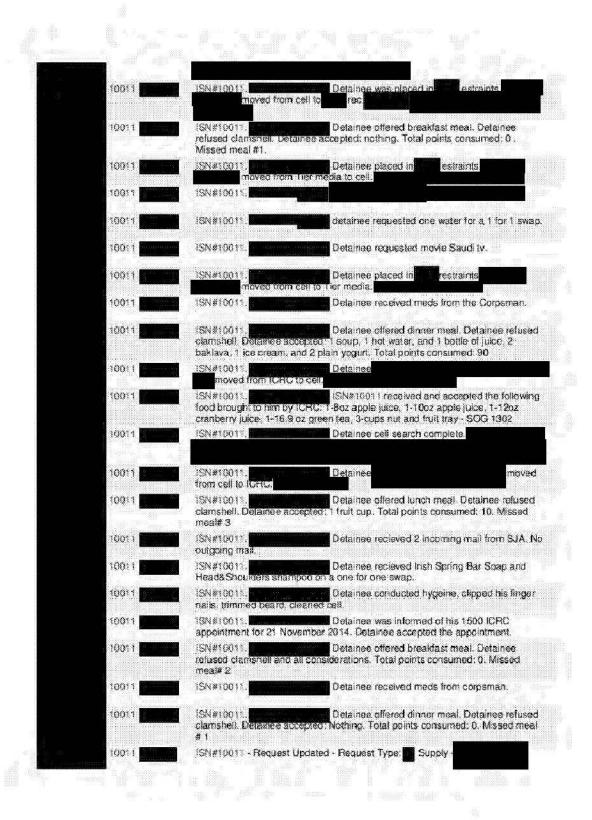
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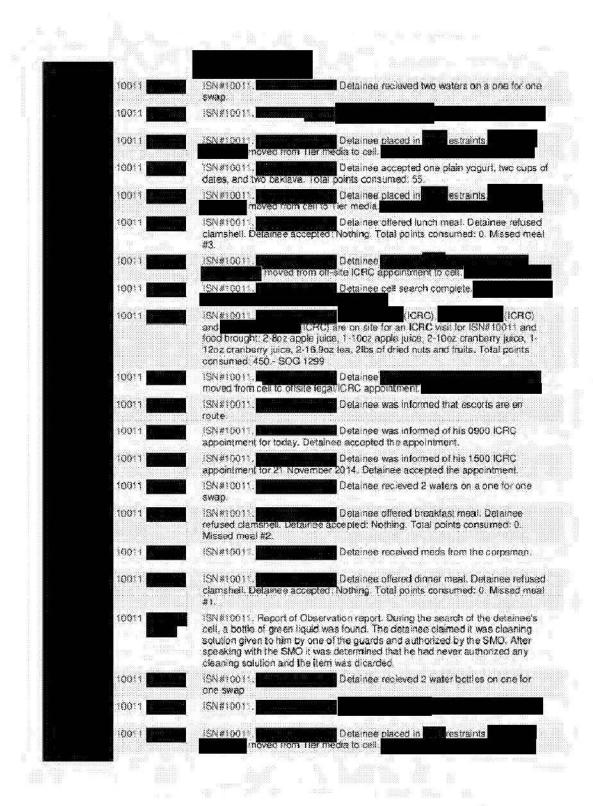
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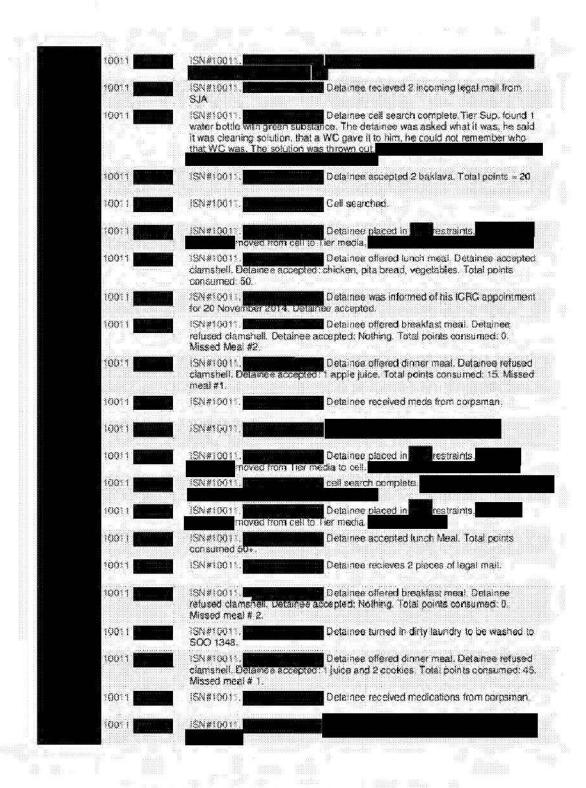
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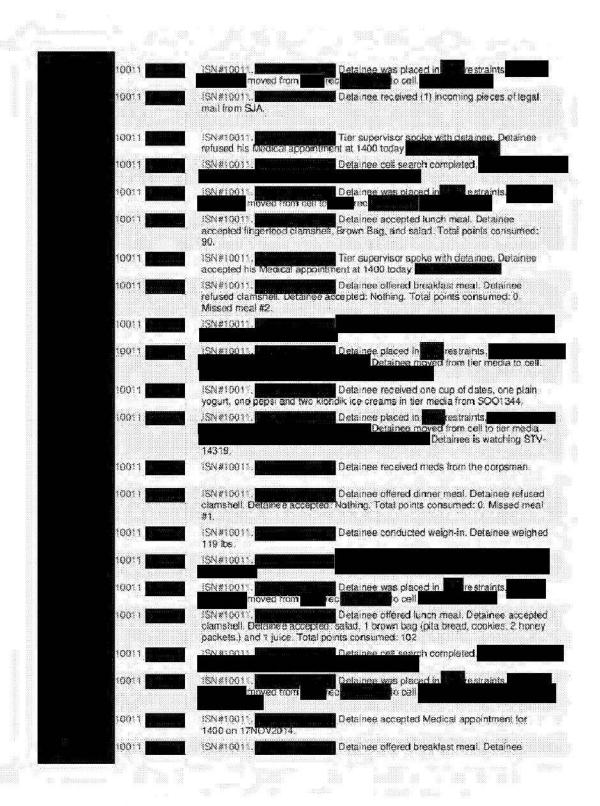
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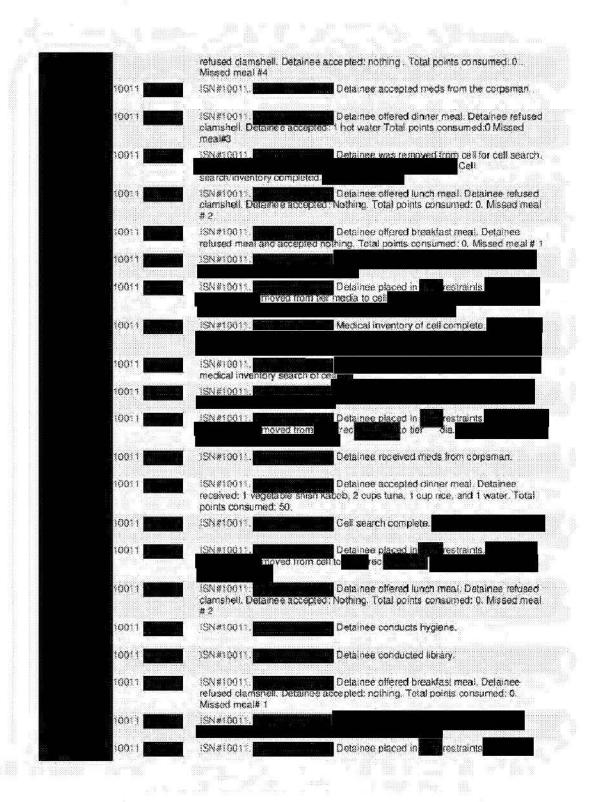
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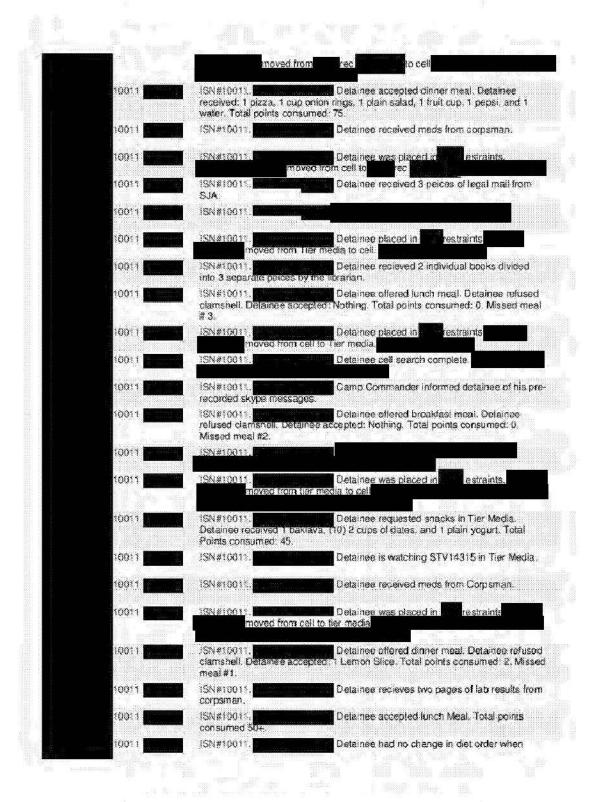
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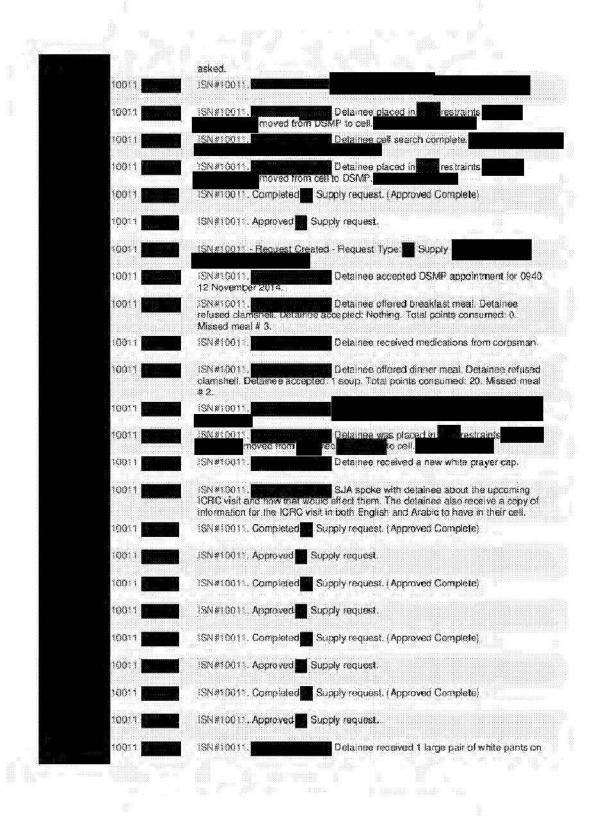
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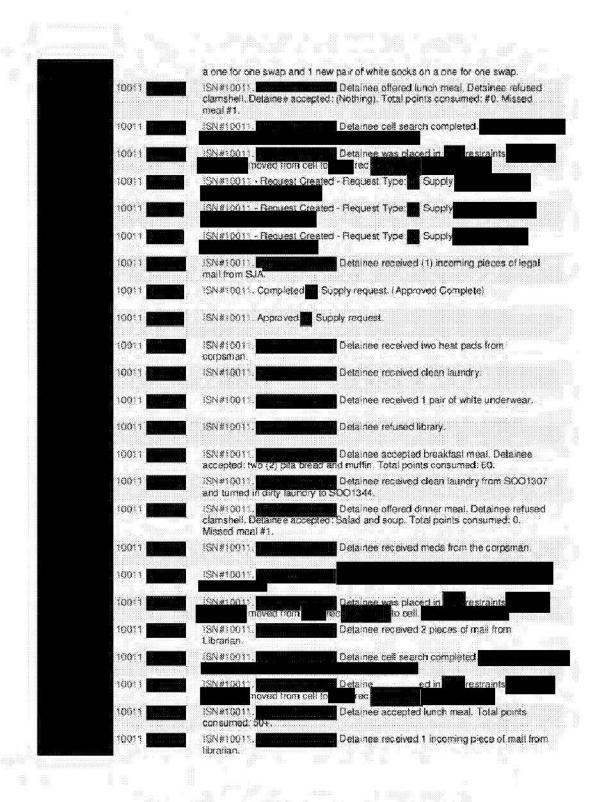
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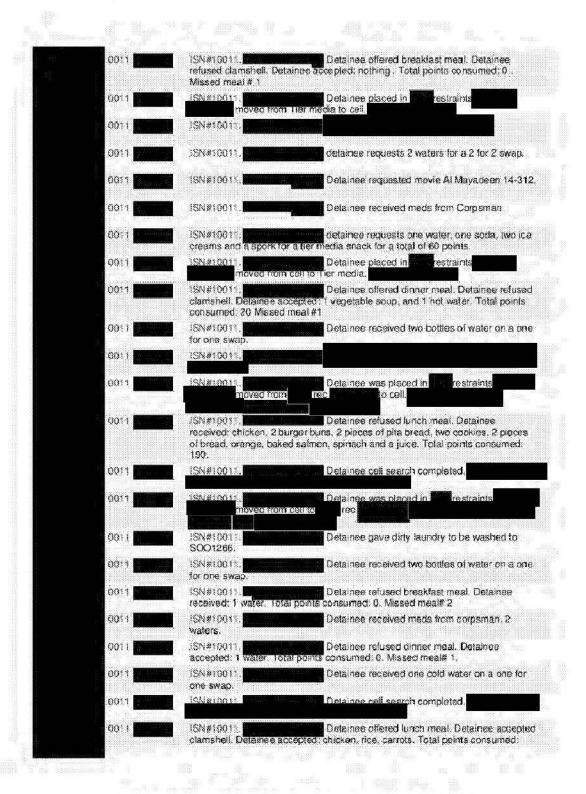
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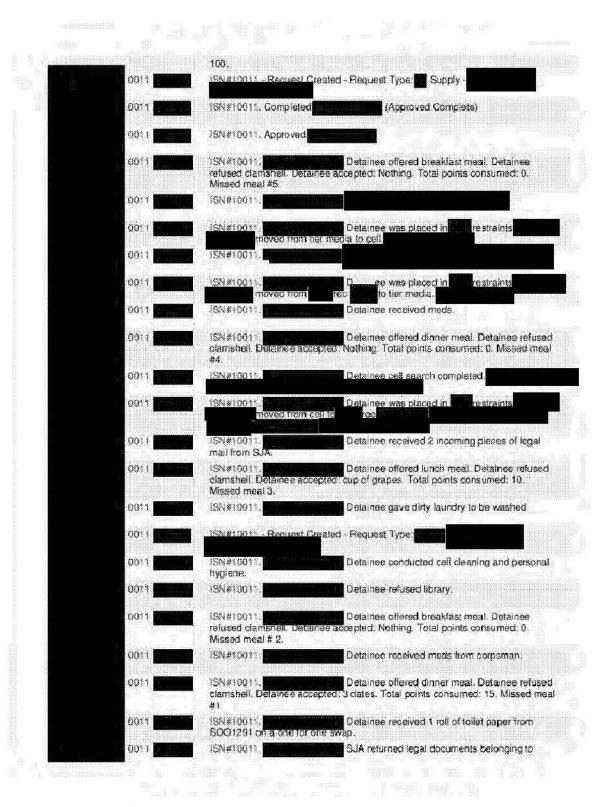
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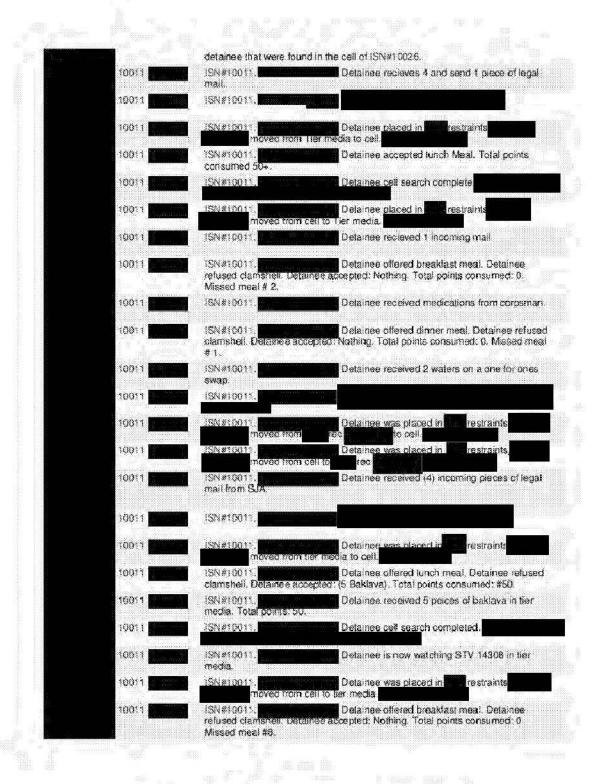
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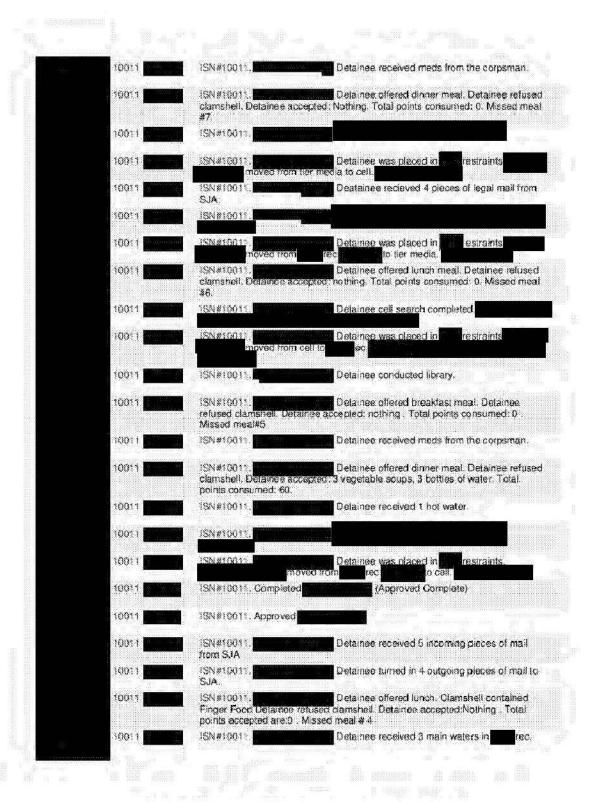
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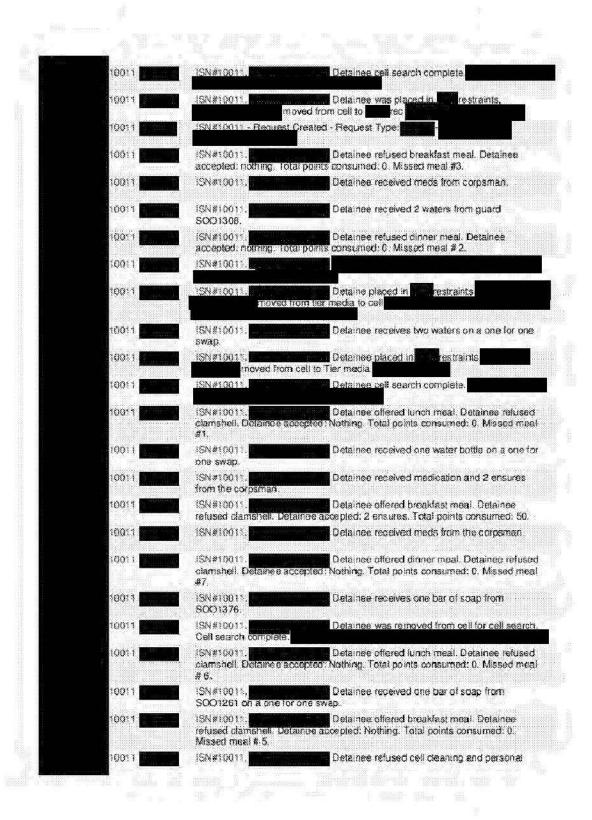
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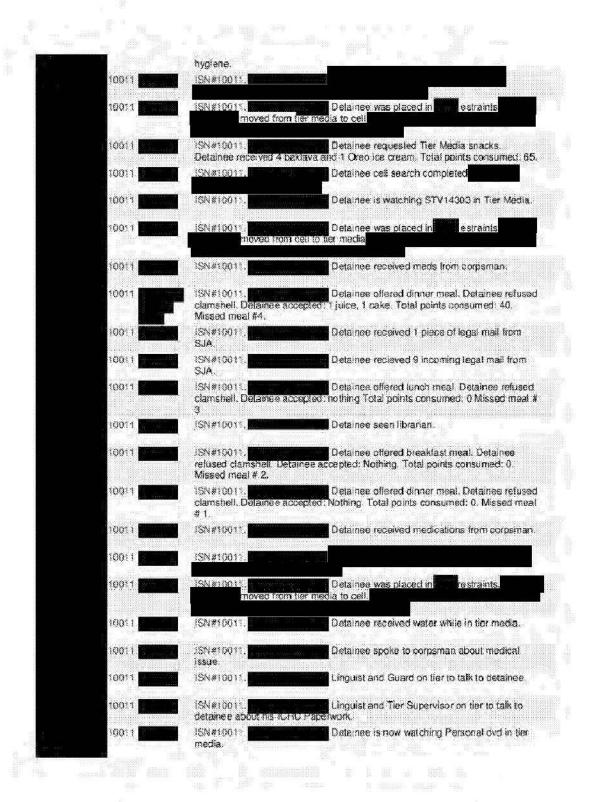
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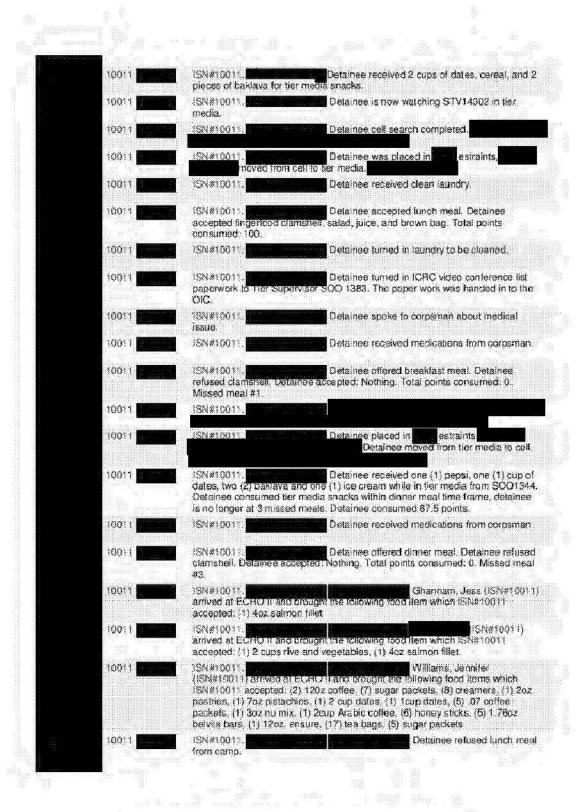
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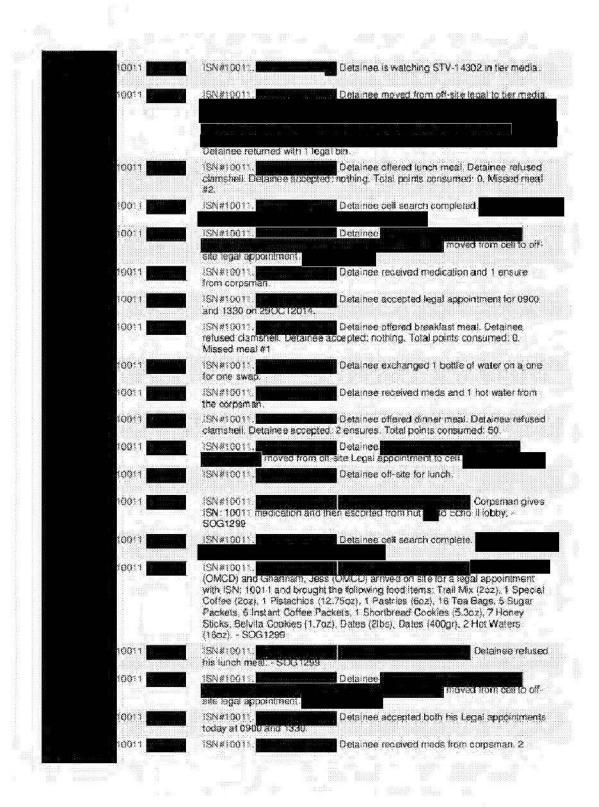
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