

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD,
WALID MUHAMMAD SALIH
MUBARAK BIN 'ATTASH,
RAMZI BIN AL SHAIBH,
AMMAR AL BALUCHI
("ALI ABDUL AZIZ ALI"),
MUSTAFA AHMED ADAM
AL HAWSAWI

AE 419(MAH)
Defense Motion to Compel Production of
Medical Records from
Mr. al Hawsawi's CIA Captivity

Filed: 5 April 2016

1. **Timeliness:** This Motion is timely filed.
2. **Relief sought:** Mr. al Hawsawi moves this Commission to compel the Prosecution to produce complete, un-redacted medical records from the three and a half years (March 1, 2003-September 6, 2006) he was imprisoned under the control of the U.S. Government.
3. **Burden and Standard of Proof:** The burden of persuasion on this motion for the production of discovery rests with the Defense by a preponderance of the evidence. R.C.M. 905(c)(2).
4. **Facts:**
 - a. As long ago as 16 August 2013, the Defense requested complete medical records for Mr. al Hawsawi, including the records from his CIA captivity. (att. B). The Government did not respond to that request.¹
 - b. The Defense renewed this request in an extensive memorandum submitted to the Government on 25 September 2013. This second request included a request for "Copies of all medical reports, notes, and records, regarding Mr. al Hawsawi, that have been

¹ On 13 October 2015, the Defense asked the Government to confirm by e-mail whether it had responded to this request (att. C). The Government never responded to this message.

generated since he was taken into custody in 2003.”

- c. The Government answered only generally, on 8 November 2013, when it said that it “could not provide” a detailed response because the Defense had not yet signed the Memorandum of Understanding for classified information (AE 260, att. C).
- d. Then, on 10 June 2015, the Government provided the Defense with unclassified records which purport to document aspects of Mr. al Hawsawi’s medical records, from some parts of the 2003 to 2006 period. These snippets are re-written medical records which, on information and belief, are drafted by non-medical personnel. They narrate certain aspects of Mr. al Hawsawi’s medical injuries and treatment, but omit actual medical details, such as *what* treatment was given, including what medications are prescribed, the causes of the injuries he experienced including torture techniques applied to him, the specific dates showing the intervals between medical treatments. These “records”, therefore, do not shed any light on the actions that led to his medical injuries and conditions, or on the resulting medical oversight he had; the medical concerns simply appear with no explanation.
- e. Since the Defense for Mr. al Hawsawi signed the MOU, in September 2015, the Government provided merely minimal additional summaries. Specifically, on 19 October 2015, the Government turned over a small set of classified snippets from the same period, 2003 to 2006. These “records,” which are not original medical records, likewise do not explain the origin of Mr. al Hawsawi’s medical issues or tell anything about the “enhanced interrogation techniques,” that is, torture methods, applied to him and that in all likelihood led to these injuries.
- f. On 12 February 2016, the Government provided a response to the Defense “omnibus”

request of 25 September 2013. *See* AE 260C, filed 15 February 2016, p. 2. This response claimed that the Government had already provided medical records, but did not even acknowledge that the underlying records related to the CIA summaries had not been provided.

- g. The Senate Torture Report chronicles a history of abuse and torture of Mr. al Hawsawi, and indicates serious and chronic resulting medical injuries which are experienced in some form still, to this date. Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Rendition, Detention, and Interrogation Program* (2014) (hereinafter "Torture Report"). No details of this abuse and torture, the causes of injuries he continues to experience, are included in any of the government's discovery, whether classified or unclassified.

5. **Discussion:**

A. The Rules for Military Commission and Supreme Court Capital Case Precedents Require Production of Records Documenting Imprisonment History.

R.M.C. 701(j) establishes: "Each party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence." In passing the Military Commissions Act (MCA) of 2009, Congress mandated this process. *See* 10 U.S.C. § 949j. The MCA further provides that "[t]he opportunity to obtain witnesses and 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." *Id.* Rule 701(c)(1) provides that "the Government *shall* permit the defense counsel to examine any books, paper, documents, photographs, tangible objects, buildings, or places so long as they are: (1) under the control of the government, and (2) material to the preparation of the defense or intended for use by the trial

counsel as evidence in the prosecution case-in-chief at trial.” *See* R.M.C. 701(c)(1)(emphasis added). In *United States v. Lloyd*, 992 F.2d 348 (D.C. Cir. 1998), the D.C. Circuit reiterated the existing discovery principle that demonstrating materiality in an Article III court “is not a heavy burden,” and that “evidence is material as long as there is a strong indication that it will ‘play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.’” *See id.* at 351, *quoting United States v. George*, 786 F.Supp. 56, 58 (D.D.C.1992).

Documents material to the preparation of the defense are not limited to exculpatory evidence. *See United States v. Marshall*, 132 F.3d 63, 67 (D.C. Cir. 1998); *United States v. Libby*, 429 F. Supp. 2d 1, 7 (D.D.C. 2006). The “language and spirit of the Rule [Fed. R. Crim. P. 16] are designed to provide to a criminal defendant, in the interests of fairness, the widest possible opportunity to inspect and receive such materials in the possession of the government as may aid him in presenting his side of the case.” *United States v. Poindexter*, 727 F. Supp. 1470, 1473 (D.D.C. 1989). The scope of materiality is also not limited by admissible evidence alone, since documents and information that are not themselves admissible in evidence may nonetheless lead to admissible information and evidence. *See Lloyd*, 992 F.2d at 351 (finding materiality “as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.”). Additionally, the scope of materiality is not limited to information that is favorable to the defense, but also includes information that is unfavorable, because “a defendant in possession of such evidence may alter the quantum of proof in his favor in several ways: by preparing a strategy to confront the damaging evidence at trial; by conducting an investigation to

attempt to discredit that evidence; or by not presenting a defense which is undercut by such evidence.” *See Marshall*, 132 F.3d at 68.

In a death penalty case, the need for reliability in fact-finding is enhanced under the Fifth, Sixth, and Eighth Amendments to the United States Constitution. Discovery and the Government’s obligation to produce that discovery are a major component of fact-finding, especially in a case like this one, where the Government so tightly controls so much information that is inaccessible to the Defense, except through the discovery process. The Commission should be “particularly sensitive to ensure that every safeguard is observed” before a death sentence can be imposed. *See Gregg v. Georgia*, 428 U.S. 153, 192 (1976). In that vein, it should ensure that the accused has the full benefit of effective counsel. *See Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003) (finding counsel ineffective under the Sixth Amendment because he failed to acquire sufficient information about his client’s background and prior suffering). Effective counsel under the Sixth Amendment includes having “access to the raw materials integral to the building of an effective defense.” *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (recognizing, for indigent defendants, that “mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process,” but that the Defense must have the “access to the raw materials integral to the building of an effective defense.”). In the capital context also, an accused has the right, under the Eighth Amendment and Fifth Amendment’s Due Process clause, to present “all relevant facets of his character and record,” including the record of his life in prison. *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986). The Defense, moreover, has a duty to examine the details of an accused’s behavior during every phase of his confinement, to determine whether his behavior, even under extreme provocation, should be presented as mitigation. *See id.* at 4. How an accused experiences and adjusts to life in prison

“unquestionably goes to a feature of the defendant’s character that is highly relevant to a jury’s sentencing determination.” *Id.* at 7, n. 2 (finding that evidence of adjustability to life in prison is necessary to a jury’s sentencing determination). The Rules for Military Commission and the relevant constitutional case law, therefore, require that the Government’s discovery obligations be stringently enforced.

B. Mr. al Hawsawi has a Right for his Defense Team to Review Original Medical Records Documenting the History of his Health Treatment during his Imprisonment.

The materiality of the requested records is beyond question. The release of the Senate Select Committee on Intelligence’s (SSCI) report documents aspects of his torture. Complete medical records will shed light on the details of this torture, which can serve as powerful sentencing evidence, in the event he is convicted. The Senate Torture Report shows that Mr. al Hawsawi suffered terrible injuries, during his imprisonment from 2003 to 2006. Torture Report, at 100, n.584 (showing chronic hemorrhoids, rectal prolapse, and anal fissure in the context of brutal “rectal feeding” and similar techniques). Also, the Senate Select Committee on Intelligence found that Mr. al Hawsawi needed some kind of emergency care from a host country while he was in CIA captivity, but the host country refused to give it. Torture Report, at 154. The snippets provided do not explain what type of emergency Mr. al Hawsawi suffered, what caused it, what kind of treatment if any he received, and the results of whatever treatment it may have been.

Mr. al Hawsawi’s sufferings in captivity, all of which arise directly from the accusations against him and the Government’s reaction to those accusations, are “highly relevant” to sentencing. *See Skipper*, 476 U.S. at 7, n. 2. The release of the Senate Torture Report drastically changed the landscape of discovery in this case, as the Government itself has conceded in its

pleadings seeking more time to review the volumes of information now available due to this report's release. Now, the Defense can draw the reasonable inference from available documents that Mr. al Hawsawi's medical conditions (some of which continue to this day) were the result of his torture between 2003 and 2006. The fact that the Government has chosen to provide only carefully parsed snippets of those documents instead of actual medical records further confirms that inference, since the Government would be seeking to conceal any records that would show the source of Mr. al Hawsawi's egregious injuries and ailments – just as it strove to conceal the Torture Report itself. *See* Huffington Post, “Lawmakers Insist On Release of CIA Torture Report, Despite Administration’s Objections,” Dec. 5, 2014.² The Government’s interest, however, in maintaining a cloak of secrecy over this relevant evidence does not diminish from the materiality that these medical records have now taken on: that Government interest may only determine whether the evidence should be classified, not whether it should be produced to the Defense. The Government’s interest cannot supersede the Fifth, Sixth and Eighth Amendment rights to Defense access to this evidence in this capital case. *See Gregg*, 428 U.S. at 192; *Wiggins*, 539 U.S. at 524-25; *Ake*, 470 U.S. at 77; *Skipper*, 476 U.S. at 7-8. If the Government wishes to hide its secrets, there are safeguards in place in the Military Commissions rules which would ensure these medical records are protected when turned over to cleared defense counsel who have now signed the Government’s M.O.U. *See* R.M.C. 505, 701 (f). Restricting the Defense to work off records snippets created by Government intelligence personnel is neither required by these rules, nor constitutionally permissible. Indeed, a failure to explore the effects of Mr. al Hawsawi’s trauma likely amounts to ineffective assistance of counsel. *See United States v. Doss*, 57 M.J. 182, 186 (C.A.A.F. 2002) (defense counsel’s failure to present evidence of psychological trauma, as evinced by partial records that might have been “only the tip of the

² Available at http://www.huffingtonpost.com/2014/12/05/cia-kerry-report_n_6278242.html.

iceberg,” required reversal); *Holsomback v. White*, 133 F.3d 1382, 1386-87 (11th Cir. 2014) (defense counsel was ineffective for his failure to obtain medical records and otherwise investigate the accused’s abuse); *Perkins v. Quarterman*, No. 07-70010, 254 Fed. Appx. 366, 372-73 (5th Cir. Nov. 15, 2007) (defense counsel held effective, in part because he *did* obtain medical records and investigate the accused’s abuse); *see also Lambright v. Schriro*, 490 F.3d 1103, 1117 (9th Cir. 2007) (“When ‘tantalizing indications in the record’ suggest that certain mitigating evidence may be available, those leads must be pursued”).

The Defense has an obvious need to see the complete medical records to analyze his experiences while imprisoned and interrogated, to discover the links between Mr. al Hawsawi’s specific injuries and his abuse while under U.S. Government control, and to determine what evidence it may want to use at trial to document and corroborate those experiences. Because the Government refuses to turn over the complete records, the Commission should order it to do so.

C. Conclusion.

A failure to afford the Defense the requested medical records documenting Mr. al Hawsawi’s medical condition and imprisonment conditions from 2003 to 2006 would violate the Fifth, Sixth and Eighth Amendments. The Commission should order the Government to produce complete, unredacted medical records for Mr. al Hawsawi from the entire period of his captivity (March 1, 2003—September 6, 2006).

6. **Request for Oral Argument:** The Defense requests oral argument on this motion.
7. **Conference with Opposing Counsel:** A conference request was emailed to the Prosecution on 4 April 2016 at 10:56 AM. As of the time of this filing they have failed to respond within the required 24 hour timeframe.
8. **Witnesses:** None.

9. **Attachments:**

- A. Certificate of Service;
- B. Discovery request dated 16 August 2013
- C. E-mail request re: discovery request of 16 August 2013

//s//

SEAN M. GLEASON
LtCol, USMC
Detailed Defense Counsel for
Mr. al Hawsawi

//s//

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

//s//

JENNIFER N. WILLIAMS
LTC, JA, USAR
Detailed Defense Counsel for
Mr. al Hawsawi

//s//

SUZANNE M. LACHELIER
Detailed Defense Counsel for
Mr. al Hawsawi

A

CERTIFICATE OF SERVICE

I certify that on the 5th day of April 2016, I electronically filed the **AE 416(MAH),
Motion to Compel Production of Medical Records from Mr. al Hawsawi's CIA
Captivity**, 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

B



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**DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS**

16 August 2013

URGENT

From: Defense Counsel for Mr. Hawsawi

To: Trial Counsel

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

Ref: (a) R.M.C. 701

1. Pursuant to the reference, Defense Counsel for Mr. Hawsawi requests the production of un-redacted copies of the following documents:

a. For immediate use (within the next 48 hours), any and all medical reports, notes or records, to include but not limited to doctors' notes, nurses' notes, laboratory requests and results, x-ray requests and results, and recommendations for ongoing treatment or care, that have been created or generated in the past 12 months, from 16 August 2012 to the present date. This request includes all photographs, video recordings, medications, and medical and mental health records regarding Mr. Hawsawi, created or generated during this period of time. It is essential that this information be made available to the Defense, as a written request from Defense Counsel to consult with Mr. Hawsawi's medical doctor was refused. See attached e-mail correspondence dated 14-15 August 2013. The consultation with Mr. Hawsawi's medical doctor was requested to review Mr. Hawsawi's present complaints of chronic medical conditions that may impact his ability to safely participate in Commission proceedings scheduled for 19-23 August 2013.

b. Within the next 30 days, any and all medical reports, notes or records regarding Mr. Hawsawi, generated since he has been in custody, whether at Guantanamo or elsewhere. This request includes all photographs, video recordings, medications, and medical and mental health records regarding Mr. Hawsawi, generated from the time of his capture to the present, as well as all reports and notes of all psychological baseline assessments conducted on him. It also includes a request for all records, notes, x-rays, laboratory tests related to, and names and contact information for medical personnel involved in, the surgery referred to in notes from medical personnel who examined Mr. Hawsawi at

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Guantanamo. If any such reports, notes, records or recordings have been destroyed, the dates they were destroyed, and a description of the items destroyed, are also requested.

c. Within the next 30 days, copies of the records, to include video, audio, and photographs, of any and all medical screenings, surgeries, treatments, medications, physicals, examinations, mental health evaluations, as well as notes prepared by any treating physician, physician's assistant, medic, psychiatrist, psychologist, chaplain, counselor, or other person who has examined the mental or physical condition of Mr. Hawsawi, or spoken to him for the purpose of assessing such condition, at any time since his capture.

d. Once a complete copy of Mr. Hawsawi's medical reports, notes and records is received by Defense Counsel, it is requested that medical records and reports be provided to the Defense every 6 weeks (42 days) to ensure Defense Counsel remain apprised of Mr. Hawsawi's medical condition and needs.

e. In addition, Defense Counsel requests immediate access (as soon as possible, but no later than 48 hours after the medical visit) to medical reports, notes and records that document an urgent need for medical treatment or care or a need for the defendant to be forcibly feed or forcibly provided nutrition.

2. These documents are material to determining Mr. Hawsawi's ability to safely participate in Commission proceeding scheduled for 19-23 August 2013 and for the preparation of the Defense.

3. Should you require further information, please contact CDR Walter Ruiz, presently on island at ext. [REDACTED] or ext. [REDACTED], or walter.ruiz [REDACTED]

//s//

WALTER B. RUIZ
CDR, JAGC, USN
Detailed Learned Counsel for Mr. Hawsawi

-----Original Message-----

From: Romero, Joseph CDR USSOUTHCOM JTFGTMO
Sent: Thursday, August 15, 2013 5:27 PM
To: Ruiz, Walter B, CDR OSD OMC Defense
Cc: [REDACTED] Capt USSOUTHCOM JTFGTMO; Swann, Robert CIV OSD OMC
Prosecution; Massucco, George A LtCDR USSOUTHCOM JTFGTMO
Subject: Request for meeting with medical doctor ICO ISN 10011

~~(UNCLASSIFIED)~~

~~Classification: UNCLASSIFIED~~

~~Exemptions: NONE~~

CDR Ruiz, Thank you for your email.

I am afraid we will be unable to support your request for an interview of the medical doctor. Our practice mirrors that of Bureau of Prisons, to wit: medical staff are not at liberty to discuss information with a detainee's attorney related to that detainee's medical condition. Attorneys are encouraged to seek such information directly from their clients.

Naturally, if you wish to obtain copies of your client's medical records for your evaluation or other medical information, you are free to submit that request via the normal discovery channels.

Thank you. VR,

CDR Joseph Romero, JAGC, USN
Staff Judge Advocate
JTF-GTMO/SJA

-----Original Message-----

From: Ruiz, Walter B, CDR OSD OMC Defense [<mailto:Walter.Ruiz>] [REDACTED]
Sent: Thursday, August 15, 2013 3:04 PM
To: Massucco, George A LtCDR USSOUTHCOM JTFGTMO; Romero, Joseph CDR USSOUTHCOM JTFGTMO
Cc: [REDACTED] Capt USSOUTHCOM JTFGTMO
Subject: RE: Request for meeting with medical doctor ICO ISN 10011

CDR Romero,

I am the learned counsel for ISN 10011. Yesterday I submitted the request

enclosed herein to LCDR Massucco. I understand from speaking from Captain [REDACTED] that LCDR Massucco is tied up this afternoon with some other matters. Captain [REDACTED] also indicated that he believed there may be an answer to this

request and that the answer was to route the request through the prosecution.

Captain [REDACTED] did not appear certain that the official response had indeed been sent. I have checked my communications and I have received no official response to my inquiry.

Accordingly, I am following up requesting a formal response to my request. This is a time sensitive matter as I need to make a timely application to the court if necessary but in order to do that, I need to first obtain as much information as possible.

Please note, that I am concerned about any procedure that requires me to seek the permission of the prosecution in order to consult with my client's attending physician about his medical status. I have been given explicit authority to discuss my client's medical issues with his doctor and my client remains ready to execute any waiver that may be deemed necessary to effectuate that communication.

I appreciate your assistance in this matter.

Regards,

CDR Walter Ruiz.

From: Ruiz, Walter B, CDR OSD OMC Defense
Sent: Wednesday, August 14, 2013 9:29 PM
To: Massucco, George A LtCDR USSOUTCHCOM JTFGTMO
Subject: Request for meeting with medical doctor ICO ISN 10011

LCDR Massucco,

Per our discussion today, I am following up on my request to meet with Mr. al Hawsawi's medical doctor. At today's meeting I learned of several chronic medical issues which may impact Mr. al Hawsawi's attendance at next week's hearings of the military commissions. In order to provide the court with the best information available, I believe it is not only prudent but necessary to speak with Mr. al Hawsawi's doctor.

I would appreciate your prompt attention to this matter.

Regards,

CDR Walter Ruiz,

Learned Counsel for Mr. al Hawsawi

~~Classification: UNCLASSIFIED~~
~~Caveats: NONE~~

C

Wilkinson, Joseph D II MAJ OSD OMC Defense

From: [REDACTED] SFC OSD OMC-Defense
Sent: Tuesday, October 13, 2015 9:55 AM
To: Cox, Dale; Cox, Dale J CIV OSD OCP (US)
Cc: [REDACTED] PO1 OSD OMC Defense; [REDACTED] PO1 OSD OMC Defense; Wilkinson, Joseph D II MAJ OSD OMC Defense
Subject: Seeking Out Old Discovery Responses
Attachments: 20130816 MAH Disc Req re Medical Records.pdf
Signed By: [REDACTED]

Mr. Cox,

Could please check your records and let me know if the prosecution responded to this request? If so could you send me a copy of said response. I appreciate you time in this matter.

V/R

SFC [REDACTED]
DEFENSE PARALEGAL
OFFICE OF THE CHIEF DEFENSE COUNSEL - MILITARY COMMISSIONS
1620 Defense Pentagon
Washington, D.C. 20301-1620
[REDACTED]

"If your actions inspire others to dream more, learn more, do more and become more, you are a leader." - John Quincy Adams