

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

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD; WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH; RAMZI BINALSHIBH; ALI ABDUL AZIZ ALI; MUSTAFA AHMED ADAM AL HAWSAWI	AE 524-36 (GOV) Government Response To Motion for Extension of Time to File a Motion to Suppress in Accordance With AE 524LLL 29 April 2019
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1. Timeliness

The Prosecution timely files this Response pursuant to Military Commissions Trial Judiciary Rule of Court (“R.C.”) 3.7.

2. Relief Sought

The Prosecution respectfully requests that the Commission deny the requested relief set forth within AE 524-34 (MFL)(RBS), Motion for an Extension of Time to File a Motion to Suppress in Accordance with AE 524LLL, without oral argument.

3. Burden of Proof

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)–(2).

4. Facts

On September 11, 2001, a group of al Qaeda operatives hijacked four civilian airliners in the United States. After the hijackers killed or incapacitated the airline pilots, a pilot-hijacker deliberately crashed American Airlines Flight #11 into the North Tower of the World Trade Center in New York, New York. A second pilot-hijacker intentionally crashed United Airlines Flight #175 into the South Tower of the World Trade Center. Both towers collapsed soon thereafter. Hijackers also deliberately slammed a third airliner, American Airlines Flight #77,

into the Pentagon in Arlington, Virginia. A fourth hijacked airliner, United Airlines Flight #93, crashed into a field in Pennsylvania after passengers and crew fought to reclaim control of the aircraft. As a result of these attacks, 2,976 people were murdered, and numerous other civilians and military personnel were injured.

On 31 May 2011, charges of Conspiracy, Attacking Civilians, Attacking Civilian Objects,¹ Murder in Violation of the Law of War, Destruction of Property in Violation of the Law of War, Hijacking an Aircraft, Terrorism, and Intentionally Causing Serious Bodily Injury were sworn against Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin ‘Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi by an Army Warrant Officer subject to the U.C.M.J. alleging the charges were true to the best of his belief. These charges are all enumerated offenses contained in the 2009 M.C.A.

On 4 April 2012, sworn charges were all referred jointly to this capital Military Commission. All referred charges allege that the five Accused named in the charge sheet are persons subject to trial by military commission as alien unprivileged enemy belligerents (“AUEBs”). All of the referred charges allege that the Accused’s conduct was committed in the context of, and associated with, hostilities.

On 5 May 2012, the Accused were arraigned. At the time of arraignment, Mr. Binalshibh was represented by Mr. Harrington (his detailed Learned Counsel) as well as Lieutenant Commander Bogucki (his detailed military defense counsel). *See* Unofficial/Unauthenticated Transcript (“Tr.”) at 54.

On 12 November 2013, the Prosecution disclosed to the Defense an unclassified version of the statements that were made by Mr. Binalshibh to the Federal Bureau of Investigation (“FBI”) in 2007 and recorded on letterhead memoranda (hereinafter, “FBI LHMs”).²

¹ Attacking Civilian Objects and Destruction of Property in Violation of the Law of War were later dismissed by the Commission in AE 251J. The United States is currently appealing this decision to the U.S.C.M.C.R. *See United States v. Mohammad*, No. 17-003 (U.S.C.M.C.R.).

² The Prosecution disclosed a classified version of Mr. Binalshibh’s LHM to the Defense on 27 October 2015. This delay was due to the fact that Defense counsel for Mr. Binalshibh refused

On 28 December 2016, the Prosecution filed its notice of its intent to offer certain statements of the Accused pursuant to M.C.R.E. 304(c)(2)(B). *See* AE 477 (GOV Amended).

Within its notice the Prosecution formalized its intent to offer:

All statements made by the Accused during the course of law enforcement interviews by Special Agents with the Federal Bureau of Investigation (“FBI”) and the DoD’s Criminal Investigation Taskforce (“CITF”) at Naval Station Guantanamo Bay, Cuba between on or about 1 January 2007 and on or about 21 March 2008 as memorialized in FBI Letter Head Memoranda. *See* Bates Numbers MEA-LHM-00000114-MEA-LHM-00000163; MEA-LHM-00000035-MEA-LHM-00000045; MEA-LHM-00000771-MEA-LHM-00000835; MEA-LHM-00001133-MEA-LHM-00001153; MEA-LHM-00001267; MEA-LHM-00001268-MEA-LHM-00001275; MEA-LHM-00000502-MEA-LHM-00000546; MEA-LHM-00000001-MEA-LHM-00000032.

AE 477 (GOV Amended) at 1.

On 17 August 2018, following substantial litigation, the Commission issued Protective Order #4. *See* AE 524LL, Ruling. However, in doing so, the Military Judge *sua sponte* suppressed statements made by the five accused to the FBI in 2007–2008. As of that date, no Defense motion had been filed, no witnesses had been called regarding such interlocutory questions, no pre-trial testimony had been taken, and no evidentiary rulings under the standards of 10 U.S.C. § 948r and Military Commission Rule of Evidence (“M.C.R.E.”) 304 had been made regarding the FBI LHMs. Further, the Prosecution had been afforded no opportunity to submit briefs on these matters.

In light of this, on 22 August 2019, the Prosecution filed AE 524NN (GOV), Government Motion to Reconsider and Clarify AE 524LL, Ruling. In so doing, the Prosecution requested that “the Commission reconsider and clarify its ruling granting in part and denying in part the Government’s proposed protective order and suppressing the use of the statements made by the Accused to the [FBI].” AE 524NN (GOV) at 1.

On 3 April 2019, following substantial litigation, the Commission issued AE 524LLL, Ruling, Government Motion to Reconsider and Clarify AE 524LL, Ruling. Within its ruling, the

to sign the Memorandum of Understanding required under Protective Order #1 until October 2015.

Commission deemed the suppression of the FBI LHMs by the previous Military Judge as an “impromptu remedy” and determined that it was “premature.” *See* AE 524LLL at 10.

Consistent with this, the Commission suspended “the Commission’s ruling precluding the Government from introducing any [FBI LHM] from any of the Accused for any purpose,” and “directed an evidentiary hearing to address the voluntariness of the [FBI LHMs]”. *Id.* at 11. The Commission then established 10 May 2019 as the date upon which the Defense teams should file “[m]otions on the merits of the evidentiary hearing,” i.e., “any motions to suppress the [FBI LHMs] as involuntary.” *Id.* at 12.

On 17 April 2019, Defense counsel for Mr. Binalshibh filed the instant motion and requested “a 90-day extension of time to file a motion to suppress the FBI statements and to produce his witness list,” with the ability “to ask for more time if his attempts to talk to witnesses are delayed through no fault of his own.” AE 524-34 (MFL)(RBS) at 1. If granted, the Defense motions would not be due until 8 August 2019.

5. Law and Argument

The Defense motion for leave should be denied and this Commission should maintain its deadline for the Defense to file any suppression motions related to the FBI LHMs as established in AE 524LLL. As the timeline established above demonstrates, Mr. Harrington has been on this case for well over seven years. His team has been in possession of the classified LHM for nearly four years and has been in possession of the bulk of the CIA RDI discovery ordered in AE 397F, Trial Conduct Order, since September 2017. *See* AE 397G (GOV); AE 478CC (GOV). To argue now, that the Defense requires additional time to investigate and file a motion to suppress the LHMs strains credulity, and begs the question: why have Defense counsel not

prioritized review of the discovery the Prosecution has provided?³ This Commission should not continue to accept the dilatory tactics utilized by the Defense, but instead should maintain its established deadlines absent a demonstration of good cause.

The Defense attempts to argue within the instant motion for leave that their request for an extension be granted on the following grounds: (1) “much of the evidence that goes to the very heart of a voluntariness claim—especially regarding the involvement of the FBI in the RDI program—was only provided to the Defense in late 2018”;⁴ (2) “[t]he Defense remains unaware of whether it has actually had full access to all [CIA] witnesses who would be willing to speak to counsel”;⁵ (3) “Mr. Binalshibh only received the list of the names and contact information for JTF medical personnel contemplated in AE 523M (RUL) on 17 April [2019]”;⁶ and, (4) “Mr. Binalshibh’s team currently faces staffing issues that prevent the filing of such an important motion on such an expedited deadline.”⁷ However, an analysis of these arguments demonstrates that they warrant rejection and, as a result, the Defense extension request should be denied.

I. Defense Counsel for Mr. Binalshibh Have Been in Possession of “Much of the Evidence” Related to the Defense’s Theory⁸ of Voluntariness Since September 2017

Attempting to justify their request for delay, Defense counsel for Mr. Binalshibh first allege that “[d]espite the passage of more than a decade since the statements at issue, much of the

³ Remarkably, during a symposium at Fordham University on or about 22 February 2019, Mr. Harrington conceded that his team has identified, but not yet filed, numerous motions it is planning on filing that would normally be the subject of deadlines in typical military practice. Specifically, Mr. Harrington stated, “There are many more motions to come. We haven’t even addressed yet anything about the rules of evidence, anything about jury selection, anything about the real nuts and bolts of the trial. Those motions haven’t been filed.” *See* CNSFordhamLaw, Today’s Military Commissions, YouTube (Feb. 22, 2019), <https://www.youtube.com/watch?v=6Qeg-WjYT4Y> at 19:06–20:05.

⁴ AE 524-34 (MFL)(RBS) at 5.

⁵ *Id.* at 5.

⁶ *Id.* at 6.

⁷ *Id.* at 6.

⁸ As it has previously stated, the Prosecution concedes prior coercion during CIA RDI custody for purposes of any suppression motion, and once previous coercion is conceded for purposes of the litigation, the Commission’s inquiry should primarily focus on the attenuation

evidence that goes to the very heart of a voluntariness claim—especially regarding the involvement of the FBI in the RDI program—was only provided to the Defense in late 2018.” AE 524-34 (MFL)(RBS) at 5. The Defense makes this claim despite the fact that it has been in possession of the overwhelming majority of the CIA RDI discovery (over 11,000 pages with over 40 percent of it unclassified) related to Mr. Binalshibh since September 2017. While the Prosecution will continue to trickle whatever amount of RDI-discovery is left pursuant to its continuing duties under R.M.C. 701(a)(5) and R.M.C. 701(i), this material is proportionally miniscule and largely cumulative with previously produced information.⁹ Indeed, the nominal RDI-discovery provided since September 2017 largely stems from the Prosecution’s proactive quality control measures to confirm the completeness of its discovery efforts, especially in light of the questions raised and litigation instigated by the Defense.¹⁰ As such, despite argument otherwise, Defense counsel for Mr. Binalshibh have been in possession of “much of the evidence” that the Defense will claim is relevant to the voluntariness of the LHMs, especially as it relates to the CIA’s former RDI Program, since September 2017.

aspect of the January 2007 statements, and not every last detail of the Accused’s former treatment in the RDI program (although the Prosecution will be providing “rich and vivid” proposed written stipulations to the five Accused acknowledging all of the facts surrounding his previous detention).

⁹ See Memorandum from David W. Ogden, Deputy Attorney Gen., Dep. Of Justice, to Dep. Prosecutors, subj: “Guidance for Prosecutors Regarding Criminal Discovery” (Jan. 4, 2010) (encouraging prosecutors to provide discovery “broader and more comprehensive than the discovery obligations” to, *inter alia*, promote truth-seeking and to provide “for a margin of error in case the prosecutor’s good faith determination of the scope of appropriate discovery is in error”).

¹⁰ See AE 478CC (GOV). The Prosecution once again states that it has completed affirmative pre-trial discovery, including production of its case-in-chief evidence, and has fulfilled its responsibilities under the AE 397F, Trial Conduct Order, to provide ten categories of information related to the Central Intelligence Agency’s (CIA) former Rendition, Detention, and Interrogation (RDI) program. In doing so, the Prosecution has mined the known reservoirs of information within the possession, custody, and control of the Government. What negligible material remains trickles now from the Prosecution’s continuing and trial discovery, which by the nature of this case will persist until the trial itself: (i) finalizing production of witness-specific and R.M.C. 701(d) sentencing information; (ii) finalizing responses to legitimate Defense discovery requests; (iii) and adhering to its R.M.C. 701(a)(5)/R.M.C. 701(i) duty. See Tr. at 16665, 16667–70.

In addition to the discovery provided regarding the CIA RDI Program, the Prosecution also provided the Defense with certain information pertaining to the FBI's involvement in the RDI Program consisting of approximately 984 pages. In doing so, the Prosecution does not concede that such information bears on the voluntariness of the Accused's statements when he was interviewed by the FBI in 2007. *See* 10 U.S.C. §948r(d); M.C.R.E. 304(a)(4); *Oregon v. Elstad* 470 U.S. 298, 310 (1985). While the Prosecution acknowledges that the Defense may desire to utilize such information in order to seek suppression under 10 U.S.C. § 948r(a), such additional grounds do not justify delay of the Commission's deadline where the discovery will merely supplement, and does not materially alter, any argument pertaining to the voluntariness of the Accused's FBI LHM. Given this, and where his defense counsel have had ample opportunity to analyze and digest both the discovery related to the CIA RDI Program, and the discovery regarding the FBI's involvement with it, the Commission should deny the Defense motion for an extension to file their motion to suppress the Accused's FBI LHMs.

II. The Defense Have Had Full Access to CIA Witnesses Consistent with Protective Order #4

Defense counsel for Mr. Binalshibh next state that a delay is justified "because of the investigative hurdles the defense have faced in preparing for this issue." AE 524-34 (MFL)(RBS) at 5. Specifically, they assert that "[t]he Defense remains unaware of whether it has actually had full access to all the witnesses who would be willing to speak to counsel" and that "Mr. Binalshibh continues to face challenges in setting up interviews under the strictures of PO#4. . . ." ¹¹ *Id.* at 5. However, in reviewing this Defense justification for delay, it is important to note that the Prosecution offered to facilitate interviews with CIA Persons as early 6 September 2017. *See* AE 524 (AAA), Attach. C at 2. Since that time, the Prosecution has

¹¹ Of note, the Defense points to a singular interview request as demonstrative of the challenges Mr. Binalshibh has faced with setting up interviews. *See* AE 524-34 (MFL)(RBS) at 4 ¶ k. While the Prosecution acknowledges that it could have kept the Defense better informed of its due diligence efforts in that instance, it also cannot control the availability of the witness to meet with the Defense. In the instance cited by the Defense, the Prosecution notified the Defense as soon as it reasonably could regarding the witness's availability and did not in any way seek to impede and/or slow Defense access.

appropriately relayed all requests, and arranged for Defense interviews of CIA Persons consistent with Protective Order #4 as well as its obligation to protect national security information. With that said, to the extent Defense counsel for Mr. Binalshibh have requested to interview a certain CIA Person, their request was appropriately relayed, and they were already notified as to whether the CIA Person consented to an interview. Thus, the Prosecution can assure this Commission that the Defense have had full access to all CIA Persons subject to paragraph 9 of Protective Order #4, and the Defense is fully aware of those individuals who were willing to speak to counsel. Given this, the Commission should reject this justification for delay.

III. The Defense Have Been Able to Interview JTF-GTMO Personnel Since Arraignment

In addition to previously stated reasons, Defense counsel for Mr. Binalshibh also argue that “[m]edical personnel who provided care to Mr. Binalshibh [can] provide relevant testimony about his ability to give the statement at issue voluntarily as well as relevant testimony about any lingering effects of his treatment in the RDI program.” AE 524-34 (MFL)(RBS) at 6. Consistent with this, the Defense asserts that because “Mr. Binalshibh only received the list of names and contact information for JTF medical personnel contemplated in AE 523M (RUL) on 17 April [2019],” “Mr. Binalshibh should have additional time to investigate and develop this evidence before he has to file a motion to suppress and a witness list.” *Id.* at 6. However, much like in Section III above, in reviewing this Defense justification for delay, it is important to note that at all times during the pendency of these proceedings, Defense counsel for Mr. Binalshibh were able to submit a request through the Prosecution or JTF-GTMO to determine whether a certain JTF-GTMO medical provider would agree to an interview.

The fact that the Defense were just now provided all the names and relevant contact information pursuant to this Commission’s order in AE 523J, does not in any way establish that they were prevented from interviewing such persons over the last seven years. On the contrary, prior to the issuance of AE 523J, in addition to facilitating Defense interviews of JTF-GTMO personnel, the Prosecution maintained that “should the Defense articulate the reason a particular

healthcare provider's true identity is required to be disclosed under R.M.C. 701 . . . [it] will consider such requests on a case-by-case basis." AE 523G (GOV) at 3. As evidence of this, the Prosecution provided the true names and contact information for Dr. 1, Dr. 10 and Dr. 21 following a sufficiently detailed request as part of the AE 502 motion series litigation. *See id.* at 3. Thus, without question, the Defense have had seven years to discover, access, and interview JTF-GTMO medical providers and its strategic choice not to do so should not now serve as a legitimate justification for delay. As such, the Commission should deny the Defense request for extension to file its motion to suppress.

IV. "Staffing Issues" Are Not a Valid Basis for Seeking Delay in a Case that Has Already Lasted Over Seven Years

Finally, the Defense asserts that "Mr. Binalshibh's team currently faces staffing issues that prevent the filing of such an important motion on such an expedited deadline." AE 524-34 (MFL)(RBS) at 6. In doing so, they point to the fact that Mr. Feeler only received his TS/SCI clearance on 19 December 2018 and two uncleared civilian attorneys have been offered positions on Mr. Binalshibh's defense team, but will not begin working until after the middle of May at the earliest. *Id.* at 6. However, absent from the Defense argument is acknowledgement of the fact that Mr. Harrington, Mr. Binalshibh's learned and lead counsel, has been on the case since at least 2012,¹² and Ms. Wichner, who is still detailed counsel of record, has been on the case since 2015.^{13,14} Given this, the Accused simply cannot argue, nor provide a legally satisfactory justification, that his team faces "staffing issues" preventing him from meeting the Commission's deadline and that they require additional time "to enable [them] to thoroughly analyze the extensive evidence required to litigate this question and to draft a motion" to

¹² *See* AE 004D (RBS).

¹³ *See* AE 004H (RBS).

¹⁴ Notably, while the Defense asserts that "[i]n February 2019, Ms. Alaina Wichner, civilian counsel, began transitioning off the team, as approved by Mr. Binalshibh and BGen Baker," this Commission has not yet approved her excusal as required under R.C. 4.2.b and R.C. 4.4.b. AE 524-34 (MFL)(RBS) at 3–4. As the Defense cite to her impending departure as a reason they cannot meet a Commission deadline, the Prosecution will object to any request for her excusal at this time.

suppress. *Id.* at 6. Furthermore, the Defense filing itself need not include every piece of evidence it intends to rely upon during the hearing itself, and the Defense counsel have all already formulated their various theories of how the RDI program has rendered the subsequent statements to law enforcement involuntary sufficient to raise the issue and switch the burden to the Prosecution. This is especially true where the two primary attorneys representing him since at least 2015 remain on the case and have had access to a vast majority of the RDI-related evidence since at least September 2017. Thus, the Accused has had sufficient time and resources to meet the Commission’s deadline to file his motion to suppress the LHM’s;¹⁵ something the Defense should have anticipated as it “one of the most important issues in this pre-trial litigation.” AE 524-34 (MFL)(RBS) at 4.

Of course it is important to note, that the Chief Defense Counsel is charged with the “supervision and management of all personnel and resources assigned to the Military Commissions Defense Organization, and facilitat[ing] the proper representation of all accused referred to trial before a military commission.” Regulation for Trial by Military Commission (“R.T.M.C.”) 9-1.a.2. As such, he is responsible for ensuring that Mr. Binalshibh’s defense team is appropriately resourced at all relevant times and preventing any perceived “staffing issues” that may lead to a delay of these proceedings. That said, the Chief Defense Counsel has taken the position that “[a]s the detailing authority, [he] is . . . responsible for determining whether good cause exists to excuse a detailed, associate, or assistant defense counsel who have formed an attorney client relation.” AE 380 (CDC) at 2. By taking this position, he is stating to the Commission that detailed defense counsel do not need the permission of the Military Judge to be excused from this case. While the Chief Defense Counsel has so far not exercised this perceived authority in this case (*see* footnote 4), the Prosecution asserts that the excusal and replacement of

¹⁵ *See United States v. Burton*, 584 F.2d 485, 490 (D.C. Cir. 1978) (“Once a fair and reasonable initial opportunity to retain counsel has been provided, and adequate counsel obtained, the court, mindful of the accused’s interest in having counsel in whom he has confidence, is free to deny a continuance to obtain additional counsel if, upon evaluation of the totality of the circumstances, it reasonably concludes that the delay would be unreasonable in the context of the particular case.”).

assistant defense counsel by the Chief Defense Counsel should not serve as a valid basis for delay in these proceedings. As the Commission has stated in its rulings time and time again, excusal of counsel “shall not constitute justification for a delay in the proceedings.” *See, e.g.*, AE 006M; AE 006H; AE 006F; AE 004AA. In this case, the Commission must and should remain true to this position and deny the instant Defense request for extension to file their motion to suppress the LHMs.

6. Conclusion

For the above stated reasons, and because the Defense have had seven years to investigate the circumstances under which the FBI LHMs were taken—something it represents is “one of the most important issues in this pre-trial litigation”—the Commission should reject any additional delay in this case and should deny the Defense request for a 90-day extension to file their suppression motion.

7. Oral Argument

The Prosecution does not request oral argument. Further, the Prosecution strongly posits that this Commission should dispense with oral argument as the facts and legal contentions are adequately presented in the material now before the Commission and argument would not add to the decisional process. However, if the Military Commission decides to grant oral argument to the Defense, the Prosecution requests an opportunity to respond.

8. Witnesses and Evidence

The Prosecution will not rely on any witnesses or additional evidence in support of this motion.

9. Additional Information

The Prosecution has no additional information.

10. Attachments

A. Certificate of Service, dated 29 April 2019

Respectfully submitted,

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Clay Trivett
Managing Trial Counsel

Christopher M. Dykstra
Major, USAF
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Mark Martins
Chief Prosecutor
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ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 29th day of April 2019, I filed AE 524-36 (GOV), Government Response To Motion for Extension of Time to File a Motion to Suppress in Accordance With AE 524LLL with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//

Christopher Dykstra
Major, USAF
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