

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY**

**UNITED STATES OF AMERICA**

v.

**KHALID SHAIKH MOHAMMAD,  
WALID MUHAMMAD SALIH MUBARAK  
BIN 'ATTASH, RAMZI BIN AL SHIBH,  
ALI ABDUL-AZIZ ALI, MUSTAFA  
AHMED ADAM AL HAWSAWI**

**AE 697(WBA)**

**Defense Motion** to Compel Discovery  
Related to Persons Who Had Contact with  
Mr. bin 'Atash between  
1 September 2006 – 29 February 2008

**13 January 2020**

**1. Timeliness:**

This filing is timely. RC 3.7(b) and R.M.C. 905(b), 906(a).

**2. Relief Sought:**

Mr. bin 'Atash moves this Military Commission to compel the production of discovery concerning persons who had contact with Mr. bin 'Atash between 1 September 2006 until 29 February 2008. This motion to compel is part of the ongoing effort by Defense Counsel for Mr. bin 'Atash to obtain vital information related to the FBI's 2007 and 2008 interrogations of Mr. bin 'Atash at Naval Station-Guantanamo Bay, which were subsequently memorialized as the Letterhead Memoranda ("LHMs").<sup>1</sup>

**3. Burden of Proof:**

As the moving party, the defense bears the burden of persuasion; the standard of proof is a preponderance of the evidence. R.M.C. 905(c)(1).

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<sup>1</sup> Rather than following the regular FBI practice of documenting Mr. bin 'Atash's interrogation on an FD-302, the FBI documented it in an originally classified LHM format, as used by the CIA.

**4. Facts:**

a. Mr. bin 'Atash was seized in Karachi, Pakistan on or about [REDACTED] April 2003. Shortly thereafter, Mr. bin 'Atash was rendered by the United States Government to a number of "black sites" where, over the course of more than three years, he was held incommunicado, brutally tortured, and subjected to all manner of cruel, inhumane, and degrading treatment.

b. In September 2006, Mr. bin 'Atash was transferred to Naval Station-Guantanamo Bay, Cuba. In 2007 and 2008, Mr. bin 'Atash was then interrogated by FBI and CITF agents and allegedly made statements. The Prosecution now seeks to introduce these statements at trial.

c. During the course of the 9-27 September 2019 pretrial hearings, the Commission heard testimony from witnesses related to AE 628(AAA), Mr. al Baluchi's Motion to Suppress Alleged Statements as Involuntary and Obtained by Torture. Mr. bin 'Atash was not joined to Mr. al Baluchi's Motion and did not question the Government's witnesses during this hearing.<sup>2</sup>

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<sup>2</sup> On 3 April 2019, Military Judge Keith Parrella ordered Mr. bin 'Atash to file "any motion to suppress the FBI Clean Team Statements as involuntary" by May 2019. (AE 524LLL(RUL) at ¶ 6.a.(1)). On 15 May 2019 Mr. bin 'Atash requested an extension of this deadline until no earlier than 1 December 2019 because: (1) Defense Counsel for Mr. bin 'Atash were burdened by conflict and there was a pending motion for information before the Military Judge in AE 615BB(WBA); (2) the Government had not completed the provision of discovery germane to the issues raised in a motion to suppress; and (3) the Convening Authority had prohibited three expert consultants (named Alpha, Bravo, and Charlie) necessary for the preparation of the motion to suppress from assisting Defense Counsel on matters related to the so-called FBI Clean Team Statements. (AE 631(WBA) at 1-3). Judge Parrella extended the deadline to just 1 July 2019. (AE 631A(ORD) at ¶4). As the 1 July 2019 deadline approached, the antecedents necessary for Defense Counsel for Mr. bin 'Atash did not substantially improve. Consequently, on 26 June 2019, Mr. bin 'Atash filed a second motion to extend the deadline to file his motion to suppress. (AE 631B(WBA)). Due to the late-provision of discovery by the Prosecution—this Military Judge agreed that an extension of the deadline was necessary and extended the deadline to 19 August 2019. (AE 639(TCO) at ¶3.b). On 20 September 2019, this Military Judge ruled on AE 631D(WBA), granting an extension of the deadline to file an initial motion to suppress the LHM statements for voluntariness until 18 October 2019. (AE 631I(RUL) at ¶4). Despite the extension of the deadline until 18 October 2019, Defense

Nevertheless, the Government elicited testimony from Judge Bernard Delury aimed at suggesting that Mr. bin 'Atash's 2007-2008 statements to Government interrogators were voluntary.

d. Judge Delury's testimony centered on the time Mr. bin 'Atash appeared before Judge Delury on 12 March 2007 during a Combatant Status Review Tribunal ("CSRT") proceeding. Specifically, Judge Delury was questioned as to what he observed about Mr. bin 'Atash, including Mr. bin 'Atash's demeanor.<sup>3</sup> Judge Delury's testimony regarding Mr. bin 'Atash went as follows:

[Mr. Ryan] Q. Were you able to observe him as well?

[Judge Delury] A. I was.

[Mr. Ryan] Q. Were you satisfied that any answers he gave during the course of the hearing were voluntary in nature?

[Judge Delury] A. Yes, sir. They appeared to be.

[Mr. Ryan] Q. And throughout the course of the proceedings, did you observe anything that caused concern on your part for the accused's physical or mental or emotional well-being or condition?

[Judge Delury] A. Nothing at all. Again, he appeared alert and oriented and responsive to the tribunal.<sup>4</sup>

e. On 1 November 2019, the Camp VII Commander testified.<sup>5</sup> Similar to the testimony solicited from Judge Delury, the Government sought evidence purporting to support a determination that Mr. bin 'Atash's statements to the Government in 2007 and 2008 were voluntary. For example, the Camp VII Commander testified about Camp VII's general conditions

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Counsel were still unprepared to file any competently pleaded motion to suppress statements. Instead, on 18 October 2019, Defense Counsel were forced to file a Notice of Intent to Move to Suppress Purported Statements as Involuntary.

<sup>3</sup> Tr. at 26909.

<sup>4</sup> Tr. at 26910:21-26911:8.

<sup>5</sup> Tr. at 28581. Defense Counsel notes that this testimony is subject to being stricken by the Military Judge due to the Government failing to provide the Accused by 13 January 2020 with an unclassified summary of the classified facts sufficient to allow the Defense to cross-examine the Camp VII Commander in open session. (AE 692(ORD) at ¶ 4). Defense Counsel uses this testimony for the limited purpose of demonstrating that additional discovery is warranted.

of confinement<sup>6</sup>; visits from the International Committee of the Red Cross<sup>7</sup>; the type of contact the Camp VII guard force had with the detainees<sup>8</sup>; the type of contact he personally had with the detainees<sup>9</sup>; the circumstances at the time the LHM interviews were conducted<sup>10</sup>; and the circumstances surrounding the statements allegedly provided by Mr. bin ‘Atash’s between September 2006 and February 2008.<sup>11</sup>

f. In light of the testimony of Judge Delury and the Camp VII Commander and the expected testimony of upcoming Government witnesses regarding Mr. bin ‘Atash’s demeanor before and after his 2006-2008 statements, Defense Counsel must be permitted to interview persons who observed or had personal contact with Mr. bin ‘Atash during the relevant timeframe. These witnesses’ observations will inform the examination of Government witnesses and lead to evidence that Mr. bin ‘Atash’s 2006-2008 statements were not voluntary.

g. To date, the Prosecution has refused to provide names and contact information of witnesses who had personal interaction and/or observed Mr. bin ‘Atash from 1 September 2006 through 29 February 2008.

h. On 18 October 2019, Mr. bin ‘Atash filed a discovery request with the Prosecution entitled “Request for Discovery – Persons Who Had Contact with Mr. bin ‘Atash between 1 September 2006 – 29 February 2008.”<sup>12</sup> In his request, Mr. bin ‘Atash sought:

Names, job descriptions, and contact information of all persons who observed or had personal contact with Mr. bin ‘Atash between 1 September 2006 and 29

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<sup>6</sup> Tr. at 28586-28592.

<sup>7</sup> Tr. at 28590-28591.

<sup>8</sup> Tr. at 28594.

<sup>9</sup> Tr. at 28594.

<sup>10</sup> Tr. at 28597.

<sup>11</sup> Tr. at 28607-28612.

<sup>12</sup> Attach. B.

February 2008. These persons include but are not limited to the following categories:

- i. Flight personnel involved in the trip to Guantanamo Bay;
  - ii. Camp 7 personnel regardless of job description;
  - iii. Camp 7 guards;
  - iv. Medical personnel; and
  - v. International Committee of the Red Cross (ICRC) personnel.<sup>13</sup>
- i. On 1 November 2019, the Prosecution responded. In their response the Prosecution stated:

In accordance with AE 639M(AMEND) the Prosecution, “has produced to all Accused the names, military email addresses, and military telephone numbers for all known persons identified by [Unique Medical Identifier (UMI)] pseudonym in the Accused’s medical records provided in discovery, which the Government has been able to ascertain via due diligence.” AE 639M, Attach. A.

The Prosecution continues to disclose additional information within this category through the pendency of these proceedings in accordance with AE 523J and AE 639M(AMEND). On 28 October 2019 the Prosecution provided the Defense MEA-AE523-000015-17. Any additional requests for, “Names, job descriptions, and contact information of all persons who observed or had personal contact with Mr. bin ‘Atash between 1 September 2006 and 29 February 2008” is overly broad and the Prosecution respectfully declines your request.<sup>14</sup>

j. Mr. bin ‘Atash requests the Military Commission to compel the previously requested discovery from the Prosecution.

##### **5. Law and Argument:**

Mr. bin ‘Atash’s motion to suppress his statements on voluntariness grounds is currently pending before the Military Commission. (AE 631L(WBA)). The Government has asserted that it will prove that the statements were given under non-coercive conditions and that they were fully attenuated from earlier interrogations and statements that it concedes were involuntary. In support of this assertion, and in an attempt to carry their burden, the Government has already elicited

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<sup>13</sup> Attach B.

<sup>14</sup> Attach. C.

information about Mr. bin 'Atash's conditions of confinement and his demeanor during the relevant LHM timeframe from 2006-2008 from Judge Delury and the Camp VII Commander. When discussing Mr. bin 'Atash, these witnesses testified that they did not observe anything that would have caused concern for the accused's physical, mental, or emotional well-being.

In order to challenge and rebut the Government's theory of voluntariness, Mr. bin 'Atash seeks access to witnesses other than persons who saw Mr. bin 'Atash during the relevant time period for only one day (Judge Delury) or one who had intermittent contact with Mr. bin 'Atash (Camp VII Camp Commander). The ability of Mr. bin 'Atash to interview and present as witnesses other persons with greater familiarity and access to Mr. bin 'Atash between September 2006 and February 2008 is of great import. For example, entities not associated with the United States—for example personnel from the International Committee of the Red Cross—are neutral and detached and could provide an unbiased account of how Mr. bin 'Atash was behaving, what his demeanor was, and what his concerns with his confinement conditions were. Once provided with that information Defense Counsel would be able to use it to challenge the voluntariness of Mr. bin 'Atash's LHMs and present mitigation evidence. Another example is the Camp VII guards who had daily interactions with Mr. bin 'Atash; the Camp VII Commander who only had interactions with the accused "each time SOPs change[d]" is not an adequate substitute for the guards who observed Mr. bin 'Atash on a daily basis, were familiar with his routine, and had extended periods of first-hand contact with Mr. bin 'Atash.

The requested discovery contains information about all persons whom observed or had personal contact with Mr. bin 'Atash between 1 September 2006 and 29 February 2008. The requested discovery meets the standard for production in R.M.C. 701(c) because it is material to

the preparation of the defense and assists Defense Counsel in refuting the Government claims of voluntariness.

**a. The Government must produce all evidence material to the preparation of the defense that is in its possession, known by the Government or reasonably may be known.**

Every accused defendant has a right to a robust factual record, to obtain witnesses and evidence, and to present a complete defense.<sup>15</sup> Mr. bin 'Atash's right to a complete defense includes the right to obtain all evidence against him, to receive any incriminating statements purported to be by him or by his co-accused, to review any exculpatory information relating to him or his co-accused, to receive and to use any mitigating evidence, and to identify and reveal any outrageous government conduct.

In the Military Commissions Act of 2009, Congress specifically and consciously recognized the importance of discovery and production when it directed 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.”<sup>16</sup> Although often confused, pretrial discovery is distinct from the production of witnesses and evidence for use at trial. For example, when it comes to the examination of documents in discovery, rather than the production of documents for use at trial, both Article III and military courts have consistently applied a “materiality” rather than relevance or admissibility standard.<sup>17</sup>

The materiality standard is not a heavy burden and the requested information should be disclosed as long as there is an indication it will “play an important role in uncovering admissible

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<sup>15</sup> Washington v. Texas, 388 U.S. 14, 19 (1967); 10 U.S.C. § 949j(a)(1) (2018).

<sup>16</sup> 10 U.S.C. § 949j(a)(1).

<sup>17</sup> R.M.C. 701(c)(1)-(3); Fed. R. Crim. P. 16(a)(1)(E) (permitting the examination of documents “material” to the preparation of the defense).

evidence, aiding witness preparation, corroborating testimony, or assisting in impeachment or rebuttal.” United States v. Lloyd, 992 F.2d 348, 351 (D.C. Cir. 1993) (applying Fed. R. Crim. P. 16(a)(1)(C)—re-lettered in 2002 as Fed. R. Crim. P. 16(a)(1)(E)—which requires the discovery of information “material to preparing the defense”). Military Judge Lanny Acosta has found that, given the MCA of 2009’s “requirement that an accused’s discovery rights mirror those of a federal criminal defendant, federal-court interpretations are generally more persuasive than military case law interpreting Article 46, UCMJ, and its implementing regulations.” (United States v. Abd Al Rahim Al-Nashiri, AE 399F(RUL) at ¶ 3.b). Because the court of review in the military commissions is the United States Court of Appeals for the District of Columbia Circuit, the law of the D.C. Circuit is controlling precedent in this case. See 10 U.S.C. § 950g.

The production of material and information is also guaranteed under international law. Common Article 3 of the Geneva Conventions of 1949 prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” Geneva Convention (Third) Relative to the Treatment of Prisoners of War, art. 3(1)(d), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. The right to present a defense is one of those indispensable judicial guarantees. See Hamdan v. Rumsfeld, 548 U.S. 557, 633 (2006) (recognizing the Convention for the Protection of Victims of International Armed Conflicts (Protocol I), art. 75, Jun. 8, 1977, 1125 U.N.T.S. 3 (“Protocol I”), which provides that any procedure “shall afford the accused before and during his trial all necessary rights and means of defence”); see also United Nations International Covenant on Civil and Political Rights, art. 14(3), Dec. 16, 1966, 999

U.N.T.S. 171 (recognizing right to the preparation of the defense in a criminal proceeding as a “minimum guarantee”).

Trial Counsel must produce any evidence in possession of the Government known by trial counsel, or may be known through the exercise of due diligence, which is material to the preparation of the defense or is intended for use by Trial Counsel as evidence in their case-in-chief. R.M.C. 701(c). The standard for what is discoverable is broad, liberal, and is “not focused solely upon evidence known to be admissible at trial.”<sup>18</sup> The Government must also produce to the Defense, without being asked, all tangible objects or pieces of information that are exculpatory to the defense, impeach the credibility of a Government witness, or reduce the punishment of Mr. bin ‘Atash.<sup>19</sup> Mr. bin ‘Atash is entitled to the discovery as it contains information about all persons whom observed or had personal contact with Mr. bin ‘Atash between 1 September 2006 and 29 February 2008 and because these records are material to the preparation of the defense.<sup>20</sup>

**b. The requested information will aid Mr. bin ‘Atash’s challenges to his alleged statements as involuntary.**

The details that would be known by those persons who observed or had personal contact with Mr. bin ‘Atash between 1 September 2006 and 29 February 2008 would refute the testimony of the Judge Delury and The Camp VII Commander. Any information that may come from those persons whom observed Mr. bin ‘Atash between 1 September 2006 and 29 February 2008 is material to the defense. Such information will inform the Military Judge in pretrial motions to suppress Mr. bin ‘Atash’s statements to the FBI and CITF as involuntary. The Rules for Military

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<sup>18</sup> United States v. Roberts, 59 M.J. 323, 325 (C.A.A.F. 2004) (discussing the Rule for Courts Martial 701 which the Rule for Military Commission 701 was based).

<sup>19</sup> R.M.C. 701(e)(1)-(3); Brady v. Maryland, 373 U.S. 83, 87-90 (1963).

<sup>20</sup> R.M.C. 701(c).

Commission state that an accused's statement may only be admitted if the military judge makes a finding that, the statement "was voluntarily given."<sup>21</sup>

The persons sought by Mr. bin 'Atash will provide information as to his treatment, confinement conditions, or mental state between September 2006 and February 2008. This is material as it provides Defense Counsel the ability to refute the evidence of voluntariness presented by the Government most recently with Judge Delury and the Camp VII Commander. (Tr. at 26909-26910, 28594-28612). Without access to other witnesses and evidence who have personal knowledge of the conditions of confinement during which the LHMs were created, this Military Judge will only hear from individuals such as Judge Delury (who saw Mr. bin 'Atash during the relevant time period at a singular CSRT proceeding on 12 March 2007)<sup>22</sup> and/or the Camp VII Commander (who had intermittent contact with Mr. bin 'Atash from September 2006 to March 2008).<sup>23</sup> Mr. bin 'Atash therefore requests that this Commission compel the Prosecution to produce all of the names, job descriptions, and contact information of all persons who observed or had personal contact with Mr. bin 'Atash between 1 September 2006 and 29 February 2008.

**6. Oral Argument:**

Oral argument is requested.

**7. Conference with Opposing Counsel:**

The Government opposes this motion.

**8. Attachments:**

A. Certificate of Service (1 page). (U).

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<sup>21</sup> R.M.C. 304(a)(2).

<sup>22</sup> Tr. at 26909.

<sup>23</sup> Tr. at 28582, 28592-28595.

B. Defense Discovery Request, DR-400-WBA, dtd 18 October 2019 (3 pages). (U//FOUO).

C. Prosecution Response to Defense Discovery Request, dtd 1 November 2019 (1 page). (U).

**9. Signatures:**

/s/  
CHERYL T. BORMANN  
Learned Counsel

/s/  
WILLIAM MONTROSS  
Detailed Defense Counsel

/s/  
EDWIN A. PERRY  
Detailed Defense Counsel

/s/  
SIMON M. CAINE  
Captain, USAF  
Detailed Military Counsel

/s/  
JAY S. PEER  
Captain, USAF  
Detailed Military Counsel

# Attachment A

**CERTIFICATE OF SERVICE**

I certify that on 13 January 2020, I electronically filed, via email, the attached AE 697(WBA), Defense Motion to Compel Discovery Related to Persons Who Had Contact with Mr. bin 'Atash between 1 September 2006 – 29 February 2008, with the Trial Judiciary and served a copy to all parties.

/s/  
CHERYL T. BORMANN  
Learned Counsel

# **Attachment B**



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

18 October 2019

MEMORANDUM FOR Office of the Chief Prosecutor, Office of Military Commissions

SUBJECT: ~~(U)~~ Request for Discovery – Persons Who Had Contact with Mr. bin ‘Atash between 1 September 2006 – 29 February 2008

1. ~~(U)~~ Pursuant to R.M.C. 701, 10 U.S.C. § 949j, the Fifth, Sixth, and Eighth Amendments to the United States Constitution, and international law, Mr. bin ‘Atash requests that the Government provide the following information in discovery. Failure to provide the requested information will deprive Mr. bin ‘Atash of his right to the due process of law, the effective assistance of counsel, a fair, speedy, and public trial, and to be free from cruel and unusual punishment.
2. ~~(U//FOUO)~~ Mr. bin ‘Atash was captured on or about [REDACTED] April 2003. For years thereafter, until September 2006, Mr. bin ‘Atash was subjected to a number of torture techniques (known as both “standard” and “enhanced” interrogation techniques) as well as conditions of confinement that could be considered torture.<sup>1</sup> These techniques individually and cumulatively are known to cause cognitive and psychological issues – evidenced, in part, by the apparent interest of doctors in Mr. bin ‘Atash’s symptoms during his captivity in black sites.<sup>2</sup> Despite his torture at the hands of the Government, Mr. bin ‘Atash was subjected to additional interrogation by Government agents between 2007 and 2008 at NS-Guantanamo Bay, Cuba. The Prosecution seeks to introduce the fruits of the 2007 and 2008 interrogation at trial, which have inaptly been labeled the “FBI Clean Team Statements.”
3. ~~(U)~~ During the 9-27 September 2019 pretrial hearing, the Commission heard testimony from Government witnesses related to AE 628 (AAA), Mr. al Baluchi’s Motion to Suppress Alleged Statements as Involuntary and Obtained by Torture. Mr. bin ‘Atash did not join Mr. al Baluchi’s Motion and did not question the Government’s witnesses during this hearing. Nonetheless, the Government elicited testimony from Judge Bernard Delury aimed at suggesting that Mr. bin ‘Atash’s 2007-2008 statements to Government interrogators were voluntary.
4. ~~(U)~~ Specifically, Judge Delury testified that based on his experience as a Navy JAG Corps trial counsel, defense counsel, and military judge, as well as his time on the bench as a trial court judge in the State of New Jersey, he was qualified to ascertain whether an accused’s waiver of rights and admission of guilt were voluntary. The Prosecution sought Judge Delury’s opinion regarding the demeanor of Mr. bin ‘Atash. Mr. bin ‘Atash appeared before Judge Delury on 12 March 2007. Judge Delury testified that:
  - a. ~~(U)~~ Mr. bin ‘Atash understood the proceedings;
  - b. ~~(U)~~ Mr. bin ‘Atash appeared alert, oriented, and responsive to the tribunal;

<sup>1</sup> ~~(U)~~ Mr. bin ‘Atash does not concede that conditions of confinement that could be considered torture concluded upon his arrival at Guantanamo Bay during or about the first week of September 2006.

<sup>2</sup> ~~(U//FOUO)~~ For example, medical providers assessed [REDACTED]

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SUBJECT: Request for Discovery – Persons Who Had Contact with Mr. bin ‘Atash between 1 September 2006 – 29 February 2008

- c. ~~(U)~~ Mr. bin ‘Atash answered questions voluntarily; and
  - d. ~~(U)~~ He did not observe anything that caused concern on his part for Mr. bin ‘Atash’s physical, mental, or emotional well-being or condition.<sup>3</sup>
5. ~~(U)~~ The Defense expects the Government to call additional witnesses, such as the Camp 7 OIC, to testify about Mr. bin ‘Atash’s demeanor in the immediate timeframe preceding and following Mr. bin ‘Atash’s statements to Government interrogators in 2007-2008 – with the goal of demonstrating to the Commission that such statements were voluntary.
  6. ~~(U)~~ In light of Judge Delury’s testimony and the testimony of upcoming Government witnesses regarding Mr. bin ‘Atash’s demeanor before and after his 2007-2008 statements, Defense Counsel must be permitted to interview any and all persons who observed or had personal contact with Mr. bin ‘Atash during the relevant timeframe. These witnesses’ observations will inform examination of Government witnesses such as Judge Delury and the Camp 7 OIC and lead to evidence that Mr. bin ‘Atash’s 2007-2008 statements were not voluntary.
  7. ~~(U)~~ To date, the Prosecution has refused to provide names and contact information of witnesses who had personal interaction and/or observed Mr. bin ‘Atash from 1 September through 29 February 2008. Therefore, Mr. bin ‘Atash respectfully requests:
    - a. ~~(U)~~ Names, job descriptions, and contact information of all persons who observed or had personal contact with Mr. bin ‘Atash between 1 September 2006 and 29 February 2008. These persons include but are not limited to the following categories:<sup>4</sup>
      - i. ~~(U)~~ Flight personnel involved in the trip to Guantanamo Bay;
      - ii. ~~(U)~~ Camp 7 personnel regardless of job description;
      - iii. ~~(U)~~ Camp 7 guards;
      - iv. ~~(U)~~ Medical personnel; and
      - v. ~~(U)~~ International Committee of the Red Cross (ICRC) personnel;
    - b. ~~(U)~~ Disclosure whether any of the above materials have been lost or destroyed; and
    - c. ~~(U)~~ If the Prosecution claims that such information has been previously disclosed, please identify it by Bates number.
  8. ~~(U)~~ The Government must produce information that is “material to the preparation of the defense” where the information is “within the possession, custody, or control of the Government.” R.M.C. 701(c); R.M.C. 703(c)(2) & (f)(4)(B). Trial Counsel’s duty with respect to discovery goes far beyond their files; they are required to affirmatively look for

<sup>3</sup> ~~(U)~~ See Unofficial/Unauthenticated Transcript at pp. 26835-26911.

<sup>4</sup> ~~(U)~~ This list of categories may not be exhaustive. The Defense is likely not aware of the entire universe of persons who may have had contact with Mr. bin ‘Atash between 1 September 2006 and 29 February 2008 due to the Prosecution’s ongoing lack of discovery. The Defense specifically requests that the Prosecution does not omit those persons who may not fit into any of the listed categories. Failure of a person to fit neatly into one of these categories does not diminish that person’s materiality to the preparation of Mr. bin ‘Atash’s defense.

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SUBJECT: Request for Discovery – Persons Who Had Contact with Mr. bin ‘Atash between 1 September 2006 – 29 February 2008

discoverable materials in the possession of other Government agencies. See Kyles v. Whitley, 514 U.S. 419, 437 (1995); United States v. Williams, 50 M.J. 436, 441 (C.A.A.F. 1999). Information that can be used to prove that Mr. bin ‘Atash’s statements in interrogation were not voluntary is material to the preparation of the defense. This information may be used in motions to suppress the 2007-2008 statements of Mr. bin ‘Atash and/or undermine the reliability of these statements before a panel at trial. This information may also be used in mitigation, and will lead to other discoverable information such as other investigations, witnesses, and evidence. Failure to provide these materials in an expedited manner will cause further delays in this case.

9. (U) POC: Mr. Michael J. Garber, [REDACTED]

/s/  
CHERYL T. BORMANN  
Learned Counsel

/s/  
EDWIN A. PERRY  
Detailed Defense Counsel

/s/  
WILLIAM R. MONTROSS  
Detailed Defense Counsel

/s/  
SIMON M. CAINE  
Captain, USAF  
Detailed Military Counsel

/s/  
JAY S. PEER  
Captain, USAF  
Detailed Military Counsel

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# Attachment C



OFFICE OF THE  
CHIEF PROSECUTOR

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

1 November 2019

MEMORANDUM FOR Defense Counsel for Mr. bin 'Attash, *United States v. Mohammad, et al.*

SUBJECT: Prosecution Final Response to:

18 October 2019 Request for Discovery (DR-400-WBA)

The Prosecution received the following Defense request for discovery. The Prosecution hereby provides this final response to this request.

In accordance with AE 639M(AMEND) the Prosecution, "has produced to all Accused the names, military email addresses, and military telephone numbers for all known persons identified by [Unique Medical Identifier (UMI)] pseudonym in the Accused's medical records provided in discovery, which the Government has been able to ascertain via due diligence." AE 639M, Attach. A. The Prosecution continues to disclose additional information within this category through the pendency of these proceedings in accordance with AE 523J and AE 639M(AMEND). On 28 October 2019 the Prosecution provided the Defense MEA-AE523-000015-17.

Any additional requests for, "Names, job descriptions, and contact information of all persons who observed or had personal contact with Mr. bin 'Atash between 1 September 2006 and 29 February 2008" is overly broad and the Prosecution respectfully declines your request.

Respectfully submitted,

\_\_\_\_\_  
//s//  
Clay Trivett  
Managing Trial Counsel

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