

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

UNITED STATES OF AMERICA v. ABD AL-HADI AL-IRAQI	AE 079D RULING Defense Motion to Compel Discovery Of Sixteenth Supplemental Request for Discovery dated 25 January 2017 4 August 2017
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1. Background

a. In AE 079, the Defense requested the Commission compel the production of “discovery contained within the Defense Sixteenth Supplemental Request for discovery dated 25 January 2017.” (AE 079 at 1).

b. The Government response argued, “Based upon the Government’s interpretation of what the Defense is requesting in its overly broad requests, the Government believes that any discoverable information the Defense requests has already been produced as part of the over 51,000 pages [of discovery produced to date].” (AE 079A at 1–2).

c. The Defense replied in AE 079B.

d. The Commission heard oral argument on 25 April 2017.¹

2. Discussion

a. In a military commission the Government has the responsibility to determine what information it must disclose in discovery. Rule for Military Commissions (R.M.C.) 701(b)-(c); *United States v. Briggs*, 48 M.J. 143 (C.A.A.F. 1998); *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987). “Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court’s attention, the prosecutor’s decision on disclosure is final. Defense counsel

¹ See Unofficial/Unauthenticated Transcript of the Abd al Hadi al-Iraqi Motions Hearing (Transcript) dated 25 April 2017 from 2:04 P.M. to 2:36 P.M. at pp. 1328–49.

has no constitutional right to conduct his own search of the State's files to argue relevance.” *Ritchie*, 480 U.S. at 59. It is incumbent upon the Prosecution to execute this duty faithfully, because the consequences are dire if it fails to do so. *See United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015) (finding no abuse of discretion in military judge's dismissal with prejudice of charges due to a Prosecution discovery violation); *United States v. Bowser*, 73 M.J. 889 (A.F.Ct.Crim.App. 2014), *summarily aff'd* 74 M.J. 326 (C.A.A.F. 2015) (same).

b. The Defense's Sixteenth Supplemental Request includes a wide range of material related to “the al Qaeda command structure; the terrorist training camps; the guest house and the structure of senior advisory council for al Qaeda to include its terrorist policies and objectives.” The Commission agrees, to the extent such material may exist; much of it would be discoverable. However, the Government asserts it has already provided all the relevant material responsive to the defense request in the 51,000 pages of discovery provided to date. In addition, the Government indicates that there may be additional material responsive to the Defense request pending review and production pursuant to Military Commission Rule of Evidence (MCRE) 505. As pointed out during oral argument, the Defense request² for the Government to identify what previously provided discovery falls within the specific categories of information requested is not a traditional discovery obligation. However, because there is still discovery pending the MCRE 505 review process, the Defense motion is not ripe at this time.

² “11. If the Government believes that it has provided any of the specific items, information or evidence, throughout the course of the discovery process, the Defense request the Government identify in writing those items, information or evidence by Bates number and production date.” (AE 079, Att. B at 11).

3. **Ruling.** Defense Motion to Compel Discovery of Sixteenth Supplemental Request for Discovery dated 25 January 2017 is **DEFERRED**.

So **ORDERED** this 4th day of August, 2017.

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P. S. RUBIN
Col, USMC
Military Judge