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

UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI	AE 120 Government Motion To Compel Production of Discovery Pursuant to R.M.C. 701(g) 6 July 2018
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1. Timeliness

This Motion is timely filed pursuant to Rule for Military Commissions (“R.M.C.”) 905(b), Military Commissions Trial Judiciary Rule of Court (“R.C.”) 3.7.c.(1), and AE 110.

2. Relief Sought

The Government respectfully requests the Commission to compel the Defense to produce discovery in compliance with R.M.C. 701(g).

3. Overview

Pursuant to R.M.C. 701(g), the Government moves to compel the Defense to produce any and all reciprocal discovery, including documents responsive to the Government’s Request for Discovery filed on 3 May 2018. Specifically, the Government requests the Defense produce or permit the Government to inspect, copy, or photograph, any names of witnesses and statements, notice of certain defenses, documents and tangible objects, and reports of examination and tests, as allowed by R.M.C. 701(g).

4. Burden of Proof/Persuasion

As the moving party, the Government has the burden to demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

5. Facts

To date, the Defense has submitted a total of 39 discovery requests to the Government. The Government has fulfilled all of its discovery obligations under R.M.C. 701 and provided materials that are relevant, necessary, and helpful to the preparation of the defense.

In response to various Defense discovery requests, the Government has requested reciprocal discovery pursuant to R.C.M. 701(g). Specifically, in its responses to the Defense requests of 11 June 2014, 12 April 2016, and 14 December 2016, the Government has also sought reciprocal discovery to the Defense's omnibus requests. *See* Attachments B, C, and D.

On 27 February 2018, this Commission mandated a list of deadlines in the Litigation Schedule, AE 110. In this Litigation Schedule, the Commission ordered the Defense to "provide its list of trial witnesses for findings, including fact and expert witnesses" and to "provide notice of any affirmative defenses" not later than 30 November 2018. AE 110 at 2.

On 3 May 2018, the Government submitted a Government Request for Discovery ICO *United States v. Abd Al Hadi Al-Iraqi*, in accordance with R.M.C. 701(g). *See* Attachment E. Specifically, per R.M.C. 701(g)(1), the Government requested "permission to examine written material the Defense intends to present at any potential presentencing proceedings." *Id.* Per R.M.C. 701(g)(2), the Government also requested "that the Defense notify the Government whether it intends to introduce the defense of alibi or lack of mental responsibility, or if it intends to introduce expert testimony as to the Accused's mental condition." *Id.* The Government also asked to provide notice of the place or places the Accused claim to have been at the time of the alleged offenses. *Id.* Lastly, per R.M.C. 701(g)(3)-(4), the Government requested reciprocal discovery and the permission to examine documents, tangible objects, and reports of examination and tests. *Id.*

The Defense has yet to respond to any Government requests for discovery.

6. Law and Argument

I. The Defense's Discovery Obligations Under R.M.C. 701(g)

The provisions under R.M.C. 701(g) make it clear that there are certain disclosures that the Defense needs to provide to the Government prior to trial. *See* R.M.C. 701(g). “Before the beginning of trial on the merits, the defense shall notify the trial counsel of the names of all witnesses, other than the accused, whom the defense intends to call during . . . case-in-chief.” R.M.C. 701(g)(1)(A). “*Upon the request* of the trial counsel, the defense *shall* also” provide names of any witnesses whom it intends to call at any presentencing proceedings, and permit the Government to examine any written material that will be presented at those same hearings. R.M.C. 701(g)(1)(B) (emphasis added).

Furthermore, the Defense needs to notify the trial counsel of “its intent to offer the defense of alibi or lack of mental responsibility, or its intent to introduce expert testimony as to the accused’s mental condition.” R.M.C. 701(g)(2); *see also, e.g., Williams v. Florida*, 399 U.S. 78 (1970) (upholding Florida’s notice-of-alibi rule); *Taylor v. Illinois*, 484 U.S. 400 (1988) (refusing to allow undisclosed defense witness to testify as sanction for failing to identify defense witness in response to pretrial discovery request upheld); *United States v. Clyde*, No. 91-00602-04, 1993 U.S. Dist. LEXIS 13572, at *10-11 (E.D. Pa. Aug. 12, 1993) (stating that there is no violation of defendant’s fundamental right to remain silent or testify in his own defense when the statute requires him to disclose pretrial elements of his defense).

Lastly, if the Government submits a reciprocal discovery request, the Defense “shall permit the trial counsel to examine books, papers, documents, photographs, tangible objects, . . . [and] results or reports of physical or mental examinations and of scientific tests or experiments” related to the case and in the possession, custody, or control of the Defense. *See* R.M.C. 701(g)(3)-(4).

II. The Government's Request for Discovery of 3 May 2018

On 3 May 2018, in accordance with R.M.C. 701(g)(1)-(4), the Government submitted a request for discovery and reciprocal discovery. The Defense has not responded to this request

nor provided any material responsive to it. The Government understands that there is a 30 November 2018 deadline, per this Commission's Litigation Schedule in AE 110, to provide the list of *trial* witnesses. Nevertheless, pursuant to R.M.C. 701(g)(1)(B), the Defense *shall* provide names of any witnesses whom it intends to call at *any presentencing proceedings*, and permit the Government to examine any written material that will be presented at those same hearings, based on the Government's request. R.M.C. 701(g)(1)(B). Additionally, while the 3 May 2018 request may cover material contemplated by AE 110, R.C.M. 701(g) *requires*¹ the Defense, independent of its duty to follow the Commission's orders, to provide the requested material to the Government *upon request*, not at some future date set by the Commission. *See* R.M.C. 701(g)(1)(B); R.M.C. 701(g)(3). Therefore, the Government, respectfully requests that this Commission order the Defense to provide those items contemplated in R.M.C. 701(g).

III. To the Extent The Defense Will Assert Certain Defenses, The Government Seeks and Should Properly Notify the Government of Its Intent In Accordance of R.M.C. 701(g)(2)

"The defense shall notify the trial counsel before the beginning of trial on the merits of its intent to offer the defense of alibi or lack of mental responsibility, or its intent to introduce expert testimony as to the accused's mental condition...." R.M.C. 701(g)(2). Additionally, if the Defense were to raise an alibi defense, it is required to disclose "the place or places at which the defense claims the accused to have been at the time of the alleged offense" as well. *Id.*

The Commission's Litigation Schedule in AE 110 sets a deadline for "the Defense [to] provide any notice of any affirmative defenses" by 30 November 2018, which clearly covers the defenses of alibi and mental responsibility. AE 110 does not address the notice requirement of the Defense's intent to introduce expert testimony regarding the Accused's mental condition.

¹ The R.M.C. 701(g)(1)(B) requirement is not contingent on the Defense having submitted any discovery request. However, the requirements of R.M.C. 701(g)(3)-(4) for Defense disclosure take effect only upon the Defense having requested disclosure under R.M.C. 701(c). The Defense made such requests in multiple discovery requests. *See, e.g.,* Defense Discovery Requests dated 25 June 2013, 14 January 2015, 13 January 2017, 25 January 2017, 28 February 2017, 16 May 2017).

See R.M.C. 701(g)(2). While the rule gives no further specificity as to the timing of such notice beyond “before the beginning of trial,” the Government respectfully submits that in order for the Government to secure its own right to a fair trial, the Commission should require the Defense to file such notice contemporaneous with the other ordered notice requirements of R.M.C.

701(g)(2). R.M.C. 701(g)(2). Thus, the Government respectfully requests the Commission to compel the Defense to notify the Government of its intent to introduce expert testimony regarding the Accused’s mental condition not later than 30 November 2018.

IV. Reciprocal Discovery Requests have been asserted by the Government Pursuant to R.M.C. 701(g)(3) and (4)

Along with the abovementioned 3 May 2018 discovery request, the Government requested for reciprocal discovery on three prior occasions -- on 14 July 2014 in the *Government Response to Defense Request For Discovery Dated June 11, 2014*; on 2 June 2016 in *Government Response to Defense Request For Discovery Dated April 12, 2016*; and on 27 January 2017 in *Government Response to Defense Twelfth Supplemental Request For Discovery Dated December 14, 2016*. *See* Attachments B, C, and D.

Pursuant to R.M.C. 701(g)(3), the Government respectfully requests that the Commission order the Defense to produce or otherwise allow the Government “to examine books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief at trial.” R.M.C. 701(g)(3).

These documents and tangible items should include any items describing or purporting to establish the identity of the Accused as Nashwan al-Tamir. During the hearings held in May 2016, Civilian Defense Counsel, Mr. Brent Rushforth, started to refer to the Accused with a different name: “[W]e will refer to my client, our client, as Mr. Nashwan al Tamir. That’s his name.” Unofficial/Unauthenticated Transcript (“Tr.”) at 679. Mr. Rushforth went on to claim that

At some point, [the] prosecution is going to have to prove that . . . this fellow is the Mr. Hadi al-Iraqi that all of these allegations have been made against and they're going to have to prove that to the jury. But we intend to refer to him by his name, which Nashwan al Tamir.

Id. at 679-80. To the extent that this averment raises an argument of mistaken identity and the Defense intends to introduce it as evidence, the Commission should order the Defense to produce any items related to this argument.

Pursuant to R.M.C. 701(g)(4), the Government respectfully requests that the Commission order Defense to produce or otherwise allow the Government “to examine any results or reports of physical or mental examinations and of scientific tests or experiments made in conjunction with the particular case, or copies thereof, that are within the possession , custody , or control of the defense that hate defense intends to introduce as evidence in the defense case-in-chief at trial or that were prepared by a witness whom the defense intends to call at trial when the results or reports relate to that witness’ testimony.” R.M.C. 701(g)(4).

7. Conclusion

The Government respectfully requests the Commission to compel the Defense to produce any and all reciprocal discovery, including documents responsive to the Government’s Request for Discovery filed on 3 May 2018.

8. Oral Argument

The Government does not request oral argument; however, should the Commission grant oral argument, the Government respectfully requests an opportunity to be heard.

9. Witnesses and Evidence

None.

10. Certificate of Conference

The Government has conferred with the Defense in this case regarding the substance of this motion. The Defense did not respond to the conferencing request within 24 hours and is therefore presumed to object to the requested relief. R.C. 3.5.k.

11. Attachments

- A. Certificate of Service, dated 6 July 2018
- B. Government Response to Defense Request For Discovery Dated June 11, 2014
- C. Government Response to Defense Request For Discovery Dated April 12, 2016
- D. Government Response to Defense Twelfth Supplemental Request For Discovery
Dated December 14, 2016
- E. Government Request for Discovery ICO *United States v. Abd Al Hadi Al-Iraqi*, dated
3 May 2018

Respectfully submitted,

//s//

CDR Douglas J. Short, JAGC, USN
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Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT A

Filed with TJ
6 July 2018

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CERTIFICATE OF SERVICE

I certify that on the 6th day of July 2018, I filed AE 120, the **Government Motion To Compel Production of Discovery Pursuant to R.M.C. 701(g)**, with the Office of Military Commissions Trial Judiciary, and I served a copy on counsel of record.

//s//

CDR Douglas J. Short, JAGC, USN
Trial Counsel
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Office of Military Commissions

ATTACHMENT B

Filed with TJ
6 July 2018

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MILITARY COMMISSIONS TRIAL JUDICIARY

GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA	GOVERNMENT RESPONSE
v.	TO DEFENSE REQUEST FOR DISCOVERY DATED JUNE 11, 2014
ABD AL HADI AL-IRAQI	14 July 2014

1. The Government received the Defense Request for Discovery dated 11 June 2014 (“Defense Request”) and responds below in numbered paragraphs corresponding with the numbered paragraphs of the Defense Request:

2. The Government will produce, or make available for inspection, materials in the Government’s possession that are discoverable pursuant to the Military Commissions Act of 2009 (“M.C.A.”), 10 U.S.C. §§ 948a *et seq.*, and Rule for Military Commissions (“R.M.C.”) 701 (“Rule 701”).

In addition to the materials specifically itemized at R.M.C. 701, the Government must disclose materials that are “material to the preparation of the defense.” R.M.C. 701(c)(1)-(3). Such materials are only subject to disclosure if they are actually relevant and helpful, not merely theoretically relevant. *See* R.M.C. 701, Discussion (citing *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989) as authoritative). Further, to the extent discoverable materials are classified, they are only discoverable if “noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal for the prosecution’s case, or sentencing.” 10 U.S.C. § 949-p.

Finally, on 7 and 9 July 2014 respectively, the Government filed motions for protective orders governing classified information (AE 013) and sensitive but unclassified information (AE 014). To the extent any discoverable materials are subject to the privileges found at Military Commissions Rule of Evidence (“M.C.R.E.”) 505 or 506, or otherwise subject to the protective orders the Government has requested, the Government will file a pleading with the Commission to avail itself of the remedies of M.C.R.E. 505 or 506 when appropriate. It will not disclose materials subject to either rule prior to the Commission entering appropriate protective orders.

3. Potentially Exculpatory Evidence.

- a. The Government will produce discoverable materials in a timely manner.
- b. The Government will produce discoverable materials in a timely manner.
- c. The Government will produce discoverable materials in a timely manner.

4. Mandatory R.M.C. 701(b)(1) disclosure.
 - a. Copies of all papers which accompanied the charges sent to the military commissions Convening Authority are contained in the Referral Binders. The Referral Binders will be produced in both electronic and hard copy versions, exactly duplicating the version provided to the Convening Authority.
 - b. The convening order has already been produced.
 - c. The Government will produce discoverable materials.
5. Mandatory R.M.C. 701(b)(2) disclosure. The Government will produce the names of the witnesses it intends to call in a timely manner.
6. Mandatory R.M.C. 701(b)(3) disclosure. The Government is presently unaware of any prior convictions of the Accused, and does not intend to offer any such evidence. Should the Government become aware of any prior convictions of the Accused it intends to offer, it will timely produce those to the Defense.
7. Mandatory R.M.C. 701(c)(1) disclosure. The Government will produce or make available for inspection all discoverable books, papers, documents, photographs, or copies or portions thereof and the opportunity to inspect tangible objects, buildings, or places. Additional items determined to be “material to the preparation of the defense” will be produced on an on-going basis in accordance with the Government’s discovery obligations. With respect to the items specifically requested:
 - a. The Government will produce discoverable information relating to the locations where the Accused has been confined that are within the control of the U.S. Government;
 - b. The Government will produce copies of discoverable photographs of all locations where the Accused has been confined that are within the control of the U.S. Government. Photographs provided to another defense counsel in another prosecution are not relevant to, or discoverable in, this prosecution;
 - c. The Government will make available for inspection or provide photographs of discoverable items, should any exist;
 - d. The Government will provide or make available discoverable items for inspection, should any exist;
 - e. The Government will make available for inspection or provide photographs of all discoverable items within the Government’s possession that were taken from the Accused at the time he entered U.S. custody, should any exist;

- f. The Government will make available for inspection or provide photographs of all discoverable items within the Government's possession that were taken from the Accused's family at the time of the Accused's entering U.S. custody, should any exist;
- g. The discovery produced in another proceeding is not relevant to this prosecution or discoverable;
- h. The stipulations and admissions made by other parties in another proceeding are not relevant to this prosecution or discoverable;
- i. The correspondence from and to the Office of the Judge Advocate General of the Navy regarding the appearance of military commissions defense counsel in habeas corpus cases is not relevant or discoverable;
- j. The Government will produce information relevant to mitigation in sentencing in a timely manner, to include documentation from all instances in which information provided by the Accused has been used by the United States Government in criminal or habeas corpus proceedings, if any such documentation exists;
- k. The discovery produced in another proceeding is not relevant to this prosecution or discoverable;
- l. The names of all participants in the Combatant Status Review Tribunal (CSRT) hearings of the Accused's, and named and unnamed co-conspirators', including the President, Reporter, Recorder, translators, Personal Representative, and Members is not discoverable. Defense counsel will have opportunity to appropriately challenge potential panel members for bias in the *voir dire* process;
- m. The names of all Criminal Investigative Task Force (CITF) and Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC) members who worked on the Accused's, and his co-conspirators', cases is not discoverable. Defense counsel will have opportunity to appropriately challenge potential panel members for bias in the *voir dire* process;
- n. The Government will produce any discoverable materials contained in the CSRT, CITF, or OARDEC files pertaining to the Accused and his co-conspirators;
- o. The names of all participants in the 2009 Guantanamo Review Task Force who worked on the Accused's and his co-conspirators' cases is not discoverable. Defense counsel will have opportunity to appropriately challenge potential panel members for bias in the *voir dire* process;
- p. The Defense is aware of detailed Trial Counsel and relevant commission personnel. The names of all prosecutors, prosecution staff, interpreters, reporters,

escorts, clerks, guards being used in the Accused's current military commission are not discoverable;

- q. This request is overbroad. Please provide a name or a description of, and a relevant timeframe for, particular personnel who interacted with the Accused during his confinement that the Accused believes may be actually relevant and helpful;
- r. The Government will produce any discoverable law enforcement or intelligence reports and/or agent notes;
- s. The Government will produce any discoverable law enforcement and/or intelligence interview reports and related agent notes from interviews of the Accused and his co-conspirators;
- t. The Government will produce any discoverable correspondence, evidence, and other information reviewed by law enforcement officials or agents of the United States prior to their interviews of the Accused and his co-conspirators;
- u. The Government will produce any discoverable materials relating to the interrogation and debriefing of the Accused and his co-conspirators;
- v. The Government will produce discoverable information to the extent it exists, or file for appropriate relief with the military commission pursuant to M.C.R.E 505 or 506;
- w. The Government will produce all proper witness impeachment information as required by M.C.R.E. 701(e)(2);
- x. The Government will produce all proper witness impeachment information as required by M.C.R.E. 701(e)(2);
- y. The Government will produce all proper witness impeachment information as required by M.C.R.E. 701(e)(2);
- z. The Government will produce any discoverable materials regarding identifications of the Accused;
- aa. The Government will produce any discoverable photographs shown to any witness;
- bb. The Government will produce any discoverable materials related to the Accused entering into U.S. custody and treatment since that time;
- cc. The Accused's "status" as determined by the United States or its agents in other contexts is not relevant to this prosecution or discoverable;

- dd. To the extent final reports of investigations conducted for locations where the Accused has been confined in U.S. custody exist, the Government will review them and produce discoverable information, should any exist;
- ee. The Government will attempt to obtain the requested information and review it for discoverable information;
- ff. The Government will attempt to obtain the requested information and review it for discoverable information;
- gg. The Government will attempt to obtain the requested information and review it for discoverable information;
- hh. The Government will attempt to obtain the requested information and review it for discoverable information;
- ii. The Accused's or his co-conspirators' status as determined by other United States government agencies in other contexts is not relevant to this prosecution or discoverable;
- jj. The Government will produce any discoverable information;
- kk. The Government will produce any discoverable information;
- ll. The Government will produce any discoverable information;
- mm. The Government will produce any discoverable information;
- nn. To the Government's knowledge, the Convening Authority is not subject to a contract. The Convening Authority's posted job description and resume/biography are available in open source materials. Materials related to prior, or other, Convening Authorities are not relevant to this military commission and are not discoverable;
- oo. The Government will produce the Legal Advisor's written legal advice to the Convening Authority for the charges referred on 2 June 2014 in the Referral Binder;
- pp. Prosecution requests submitted to the Convening Authority, the Legal Advisor's written legal advice to the Convening Authority regarding each such request, and the Convening Authority's response to each such request are not discoverable;
- qq. The Government will produce all discoverable information reviewed by the Accused's accuser prior to swearing of the charges. All such materials are contained in the Referral Binder;

- rr. The Government will produce all discoverable information reviewed by the Convening Authority prior to making his referral decision against the Accused. All such materials are contained in the Referral Binder;
- ss. The Government will produce all discoverable information reviewed by the Convening Authority prior to making his referral decision against the Accused. All such materials are contained in the Referral Binder;
- tt. The Government will not produce a copy of the agreement entitled “Determination of Guantanamo Cases Referred for Prosecution,” entered into between the Department of Justice and the Department of Defense, as that document is not discoverable;
- uu. Correspondence between the Attorney General and Secretary of Defense discussing whether charges will be brought against the Accused and his co-conspirators is not discoverable;
- vv. The Government will produce all discoverable materials, should any exist;
- ww. The Government will provide a list of witnesses as required under R.M.C. 701(b)(2) in a timely manner;
- xx. The Government will produce any discoverable materials;
- yy. The Government will make available for inspection, or provide photographs of, any discoverable physical evidence seized relating to the alleged overt acts committed in furtherance of the charges;
- zz. The Government will produce any discoverable handwritten statements prepared by the Accused and his co-conspirators;
- aaa. The Government will produce any discoverable video or audio recordings of the Accused and his co-conspirators;
- bbb. The Government will produce any discoverable oral statements or utterances allegedly made by the Accused and his co-conspirators while in the custody of the U.S. Government;
- ccc. The Government will produce any discoverable materials related to the Accused, his co-conspirators, or other witnesses related to their treatment after entering into U.S. custody;
- ddd. The Government will produce all proper witness impeachment information as required by M.C.R.E. 701(e)(2);

- eee. The Government will produce all discoverable medical reports, notes, or records regarding the Accused generated while he was in U.S custody;
 - fff. The Government will produce any discoverable materials related to the Accused's and his co-conspirators' treatment after entering into U.S. custody;
 - ggg. Original Classification Authority (OCA) declarations for documents or information over which the prosecution is asserting the classified information privilege, and copies of the classification guides the OCA relied upon in issuing such declarations, are not discoverable;
 - hhh. Signed statements from the responsible counsel or officials from each concerned OCA indicating that all potentially relevant information to the prosecution of commissions cases has been produced to the prosecution and/or, if information has been withheld, identifying the information and the reasons for withholding is not discoverable;
 - iii. Correspondence between the Department of Defense and the ICRC regarding the Accused's and his co-conspirators' conditions of confinement is not discoverable;
 - jjj. The Government will produce all discoverable chain-of-custody documents and litigation packets generated by any law enforcement or military agency in conjunction with the taking or testing of evidence during the investigation of the alleged offenses;
 - kkk. The Government is unaware of any Inspector General investigations conducted regarding alleged misconduct by the Office of the Convening Authority or the prosecution. Should the Government become aware of any such investigation, it will seek to review it and produce any discoverable materials.
8. R.M.C. 701(c)(2) disclosure. The Government will produce copies of, or make available for inspection, any discoverable results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, that are within the possession, custody, or control of the government, the existence of which is known or by the exercise of due diligence may become known to the prosecution, and which are material to the preparation of the defense or are intended for use by the prosecution as evidence in the prosecution case-in-chief, or were prepared by an expert whom the prosecution intends to call as a witness. The Government specifically responds to the Defense's specific requests the for production pursuant to R.M.C. 701(c)(2) as follows:
- a. The Government will produce copies of discoverable records of any and all medical screenings, surgeries, treatments, medications, physicals, examinations, mental health evaluations, as well as discoverable 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 the Accused, or spoken to him for the purpose of assessing such condition, at any time since entering into U.S. custody;

- b. The Government will produce all discoverable computer forensic reports pertaining to computer hard drives belonging to the Accused and his co-conspirators;
 - c. The Government will produce any discoverable materials.
9. R.M.C. 701(c)(3) disclosure. The Government will produce copies of, or make available for inspection, all relevant statements, oral, written, or recorded, which were made by the Accused, and any discoverable statements made his co-conspirators that have been adopted by the Accused, that are within the possession, custody, or control of the government, the existence of which is known or by the exercise of due diligence may become known to the prosecution, and are material to the preparation of the defense, or are intended for use by trial counsel as evidence in the prosecution case-in-chief at trial.
 10. R.M.C. 701(d)(1) disclosure. The Government will produce copies of, or make available for inspection, all discoverable written material that will be presented by the prosecution at the presentencing proceedings. The Government will do so in a timely manner.
 11. R.M.C. 701(d)(2) disclosure. The Government will produce the names of the witnesses the prosecution intends to call at the presentencing proceedings. The Government will do so in a timely manner.
 12. R.M.C. 703(c) reciprocal discovery disclosure. The Government will respond as required under R.M.C. 701(b)(2).
 13. R.M.C. 707(c) disclosure. The Government is unaware of any present request for pretrial delay. The Government understands that the Defense may make such a request in the near term.
 14. R.M.C. 914(a) disclosure. The Government will produce discoverable oral and written statements made by a planned in-court witness or out-of-court declarant that relates to the subject matter for which the witness is called to testify or which their out-of-court statements is used.
 15. R.M.C. 1004(b)(1) disclosure. This request is not applicable in this case, as it was referred non-capital.
 16. M.C.R.E. 404(b) disclosure. The Government will produce timely written notice of all evidence of other crimes, wrongs, or acts of the Accused it intends to introduce at trial.
 17. M.C.R.E. 406 disclosure. The Government will produce all discoverable evidence of the habit of the Accused, and of the routine practice of an organization, to include al Qaeda, which the prosecution intends to offer at any stage of the legal proceedings.
 18. M.C.R.E. 505(h)(2)(A) disclosure. In accord with 505(h)(2), before any hearing is conducted pursuant to a request by the trial counsel under M.C.R.E. 505(h)(1), the Government will provide written notice to the Defense of the classified information at issue.

19. M.C.R.E. 608 disclosure: The Government will provide timely written notice to the Defense of any evidence it intends to offer against the Accused under Rule 608.
20. M.C.R.E. 609(b) disclosure. The Government will provide timely written notice to the Defense should it intend to impeach any witness with a conviction older than ten years.
21. M.C.R.E. 612 disclosure. Should the Government seek to refresh a witness' memory with a writing, the Government will produce the writing consistent with M.C.RE. 612.
22. M.C.R.E. 803 disclosure. The Government will comply in a timely manner with the requirements of M.C.R.E. 803.
23. M.C.R.E. 912 disclosure. The Government will comply with the requirements of R.M.C. 912(a)(2).
24. M.C.R.E. 701-706 disclosure. The Government will produce the curriculum vitae for any expert it intends to call as a witness, a statement of the opinion(s) the expert will express and the basis for them, and any exhibits that will be used to summarize or support them.
25. The Government will produce all discoverable evidence pertaining to the sixty-three common allegations.
26. Related to Charges I – V, the Government will produce discoverable information related to:
 - a. The Accused being Abd al Hadi al-Iraqi;
 - b. The Accused being subject to trial by military commission;
 - c. The Accused being an alien unprivileged enemy belligerent;
 - d. The Accused's engagement in hostilities against the United States and its coalition partners;
 - e. The Accused's support of hostilities against the United States and its coalition partners;
 - f. The Accused's membership in al Qaeda.
27. The Government will produce discoverable information.
28. The Government will produce discoverable information.
29. The Government will produce discoverable information.
30. The Government will produce discoverable information.
31. The Government will produce discoverable information.
32. The Government will produce discoverable information.
33. The Government will produce discoverable information.

34. With respect to Charge I, the Government will produce discoverable information in its possession relating to the underlying facts, specifically:
- a. That from in or about 2003 to in or about 2004, at multiple locations in and around Afghanistan and Pakistan, in the context of and associated with hostilities, the Accused was in position of effective command and control over subordinate forces;
 - b. That the Accused declared, ordered, and otherwise indicated to those forces that there shall be no survivors, when it was foreseeable that circumstances would be such that a practicable and reasonable ability to accept surrender would exist;
 - c. That the Accused intended to conduct hostilities such that there would be no survivors; and
 - d. To the extent there were instances in which the Accused and/or his subordinates denied quarter to an individual, the Government will produce discoverable materials.
35. For Charge I, the Government will produce discoverable information regarding the position of effective command and control the Accused had; the manner in which he declared, ordered, or otherwise indicated that there should be no survivors; whether this order was received by subordinate forces; and whether this order was carried out by subordinate forces.
36. With respect to Charge II, the Government will produce discoverable information in its possession relating to the underlying facts, specifically:
- a. The Accused's and his co-conspirators' actions on or about 29 September 2003, at or near Shkin, Afghanistan, relating to the unlawful attack on a military medical helicopter;
 - b. Information relating to the military helicopter's status as protected property under the laws of war as a military medical aircraft bearing the emblem and distinctive sign of the Medical Service of armed forces, to wit: the red cross on a white ground (to the extent the request seeks privileged legal analysis, such information is not discoverable);
 - c. That the Accused's and his co-conspirators' fired at said helicopter;
 - d. That the Accused and his co-conspirators fired at the military medical helicopter as it attempted to evacuate a United States military casualty from the battlefield;
 - e. That the military medical helicopter was the object of the Accused's and his co-conspirators' attack; and
 - f. That the Accused's and his co-conspirator's knew or reasonably should have known of the factual circumstances that established the military medical helicopter's protected status.

37. With respect to Charge II, the Government will produce discoverable information in its possession regarding the manner in which the Accused aided, abetted, counseled, commanded, or procured the commission of the offense. With respect to the targeting of this particular helicopter, the Government will produce discoverable information regarding the identity of the alleged co-conspirators, the nature of the common plan and conspiracy, when this common plan or conspiracy was created, and the Accused's knowledge and role in this common plan or conspiracy.
38. With respect to Charge III, Specification 1, the Government will produce discoverable information in its possession relating the underlying facts, specifically:
- a. The Accused's and his co-conspirators' actions on or about 7 June 2003, at or near Kabul, Afghanistan, relating to the unlawful use of treachery or perfidy;
 - b. That the Accused and his co-conspirators invited this confidence through the use of a vehicle that appeared to be a civilian vehicle;
 - c. That the Accused and his co-conspirators used this vehicle to intentionally betray that confidence and belief;
 - d. That the Accused and his co-conspirators made use of that confidence and belief to detonate explosives;
 - e. That the above-referenced detonation occurred alongside a bus carrying German military members, resulting in death and injury to at least one person;
 - f. The identity of all known persons whose confidence was obtained;
 - g. The identity of all known persons who were injured; and
 - h. The identity of all known persons who were killed.
39. With respect to Charge III, Specification 2, the Government will produce discoverable information in its possession relating the underlying facts, specifically:
- a. The Accused's and his co-conspirators' actions on or about 27 January 2004, at or near Kabul, Afghanistan, relating to the unlawful use of treachery or perfidy;
 - b. That the Accused and his co-conspirators invited this confidence through the use of a hidden suicide vest;
 - c. That the Accused and his co-conspirators used this hidden suicide vest to intentionally betray that confidence and belief;
 - d. That the Accused and his co-conspirators made use of that confidence and belief to detonate explosives;
 - e. That the above-referenced detonation occurred alongside a coalition convoy carrying Canadian military members, resulting in death and injury to at least one person;

- f. The identity of all known persons whose confidence was obtained;
- g. The identity of all known persons who were injured; and
- h. The identity of all known persons who were killed.

40. With respect to Charge III, Specification 3, the Government will produce discoverable information in its possession relating the underlying facts, specifically:

- a. The Accused's and his co-conspirators' actions on or about 28 January 2004, at or near Kabul, Afghanistan, relating to the unlawful use of treachery or perfidy;
- b. That the Accused and his co-conspirators invited this confidence through the use of a vehicle that appeared to be a civilian vehicle;
- c. That the Accused and his co-conspirators used this vehicle to intentionally betray that confidence and belief;
- d. That the Accused and his co-conspirators made use of that confidence and belief to detonate explosives;
- e. That the above-referenced detonation occurred alongside a coalition convoy carrying British and Estonian military members, resulting in death and injury to at least one person;
- f. The identity of all known persons whose confidence was obtained;
- g. The identity of all known persons who were injured; and
- h. The identity of all known persons who were killed.

41. With respect to charge IV, the Government will produce discoverable information in its possession relating to the underlying facts, specifically:

- a. The Accused's and his co-conspirators' actions, on or about 29 March 2004, at or near Jalalabad, Afghanistan, relating to the unlawful use of treachery or perfidy;
- b. The Accused's and his co-conspirators' intent to commit the offense of Using Treachery or Perfidy (10 U.S.C. § 950t(17));
- c. That the Accused and his co-conspirators invited this confidence through the use of a vehicle that appeared to be a civilian vehicle;
- d. That the Accused and his co-conspirators used this vehicle to intentionally betray that confidence and belief;
- e. That the Accused and his co-conspirators made use of that confidence and belief by attempting to detonate explosives;
- f. That the Accused and his co-conspirators intended to kill and injure at least one person in a coalition convoy carrying United States military members;

- g. The identity of all known persons whose confidence was obtained; and
- h. The identity of all known persons who were injured or killed.

42. The Government will produce discoverable information.

43. In support of charges II through IV, the Government will produce all discoverable information regarding the Accused as a principal (as defined at 10 U.S.C. § 950q), a co-conspirator, and a participant in the common plan, as set forth in the section entitled “Common Allegations.”

44. In support of charge V, the Government will produce all discoverable materials in support of the conspiracy charge and the 63 “Common Allegations.” To the extent this request seeks the Government’s legal analysis or other privileged information, such information is not discoverable.

45. Communications regarding the timing of referral in this case and the prisoner exchange for SGT Bowe Bergdahl, to the extent such communications exist, are not relevant or discoverable.

46. The Government acknowledges the on-going nature of its discovery obligation.

47. To the extent it is required by the applicable statutes, rules, or other governing authorities, the Government will provide notice of any items that have been lost or destroyed that would have otherwise been discoverable in this prosecution.

Finally, the Government requests reciprocal discovery from the defense in accordance with R.C.M. 701(g).

//s//

Mikeal M. Clayton
Trial Counsel
David J. Long, LTC, USA
Assistant Trial Counsel
Office of the Chief Prosecutor
Military Commissions

ATTACHMENT C

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

UNITED STATES OF AMERICA

v.

ABD AL HADI AL-IRAQI

GOVERNMENT RESPONSE

**TO DEFENSE REQUEST FOR
DISCOVERY DATED
APRIL 12, 2016**

2 June 2016

References: a. Defense Discovery Request dtd 11 April 2016
b. Defense Discovery Request dtd 25 June 2013
c. Defense Discovery Request dtd 9 and 11 June 2014
d. Defense Discovery Request dtd 30 June 2014
e. Defense Discovery Request dtd 20 Oct 2014
f. Defense Discovery Request dtd 22 October 2014
g. Defense Discovery Request dtd 4 November 2014
h. Defense Discovery Request dtd 5 November 2014
i. Defense Discovery Request dtd 21 November 2014
j. Defense Discovery Request dtd 14 January 2015
k. Government Response to Defense Request For Discovery
dtd 11 June 2014

1. The Government has received the Defense Request for Discovery dated 11 April 2016, reference (a), and responds below in paragraphs 2-4.

2. The Government has produced, and will continue to produce, or make available for inspection, material in the Government's possession that are discoverable pursuant to the Military Commissions Act of 2009 ("M.C.A."), 10 U.S.C. §§ 948a et seq., and Rule for Military Commissions ("R.M.C.") 701.

a. The Government has already provided voluminous information responsive to reference (a) based on the Government's affirmative discovery obligations and the Government's responses to references (b)-(j).

b. In addition to the material specifically itemized in R.M.C. 701, the Government recognizes its discovery obligations and will continue to disclose material that is "material to the preparation of the defense." R.M.C. 701(c)(1)-(3).

c. Discoverable material that is classified is only discoverable if it is "noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal for the prosecution's case, or sentencing." 10 U.S.C. § 949-p. Such material is only subject to disclosure if it is actually

relevant and helpful, not of mere theoretical relevance. *See* R.M.C. 701, Discussion (citing *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989) as authoritative).

d. Discoverable material that is subject to the privileges found at Military Commissions Rule of Evidence (“M.C.R.E.”) 505 or 506, or otherwise subject to the protective orders issued by the Commission will be handled in accordance with the procedures set forth in M.C.R.E. 505 or 506.

i. The Government will not disclose material that is subject to the privileges found at M.C.R.E. 505 or 506 prior to the Commission entering appropriate protective orders. Additionally, the Government will not disclose materials subject to any other applicable privilege.

ii. Be advised that some material identified in this response and/or references (a)-(j) may be subject to pending or forthcoming AE 023 series motions. If that is the case, the material will be provided upon issuance of a protective order and subject to the limitations in M.C.R.E. 505.

e. The Government continues to review material in its possession and will provide discovery in fulfillment of its obligations detailed in paragraph 2 above and also responsive to references (a)-(j).

f. The Government hereby incorporates by reference its 14 June 2014 Response, reference (k), as responsive herein as most of the information requested in reference (a) is duplicative in substance to material requested in reference (c) and responded to in reference (k).

3. The Government objects to reference (a) in its entirety to the extent that it requests material that is:

a. Not subject to discovery, not relevant, and/or simply unidentifiable based on vague and/or convoluted requests;

b. Overbroad;

c. Not known to exist after a reasonable and diligent search;

d. Covered by privilege; and/or

e. Already provided in discovery by the Government.

4. Subject to paragraphs 2 and 3, above, the Government specifically and additionally responds to reference (a) as follows:

- a. Paragraphs (1-32, 34, 36-40, 41¹, 43², 44-47, 49-55, 57-61³, 78-83, 86-94, 97-101, 102, 105-193, 195, 198-202, 204-211, 214-224): These requests, as written, are denied as they do not seek information that is relevant, “material to the preparation of the defense” and/or relevant to a “legally cognizable defense,” in accordance with applicable statutes, rules, and case law. The Government will continue to produce discoverable information in a timely manner.
- b. Paragraph (26): The Government continues to investigate and review material in its possession and will respond to this request, and provide any discoverable information that is responsive this request, if obtained, in a timely manner upon completion of said investigation/review.
- c. Paragraph (48): The request, as written, is denied in that information sought is overbroad, cumulative with other requests sought within references (a)-(j), and because the request is otherwise incomprehensible.
- d. Paragraphs (62-77): The Government will continue to produce discoverable information in a timely manner.
- e. Paragraph (194): The Government is unable to determine if this paragraph is actually requesting any material.
- f. Paragraphs (196-197): These requests are cumulative in their entirety with other requests in reference (a).
- g. Paragraph (203): To the extent this request is relevant, if at all, the request is denied because the material is equally available to the Defense from public sources.
- h. Paragraph (212): The request is denied as vague (the term “the unit” is undefined).
- i. Paragraph (225): In addition to the objections stated in previous paragraphs see Commission Ruling AE 021DD (denying AE 021, Emergency Defense Motion For Appropriate Relief to Cease Physical Contact With Female Guards).

¹ While the Defense refers to the “*Tu Quoque* defense” in footnote 65, the Government disputes the viability of it as a legally cognizable defense. See Ruling, AE 0290B, *United States v. Al Nashiri* (Mil. Comm’n 22 August 2014); See also International Military Tribunal (Nuremberg) Judgment of 1 October 1946, pp 508-510 last accessed at [http://crimeofaggression.info/documents/6/1946 Nuremberg Judgement.pdf](http://crimeofaggression.info/documents/6/1946%20Nuremberg%20Judgement.pdf) on 20 April 2016 (holding that Grand Admiral Karl Dönitz’s use of unrestricted submarine warfare was not a violation of international law because it had become customary international law at the time of World War II—the “*Tu Quoque*” defense was not given weight.). The Government is further unaware of any alleged “U.S. training principles” that are subject of the charges against the Accused.

² See FN 1.

³ See FN 1.

CDR Kevin L. Flynn, JAGC, USN
LCDR Vaughn Spencer, JAGC, USN
Maj Kristy N. Milton, USMC
Assistant Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT D



OFFICE OF THE
CHIEF PROSECUTOR

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

27 January 2017

MEMORANDUM FOR Defense Counsel ICO *United States v. Abd Al Hadi al-Iraqi*

SUBJECT: Government Response to Defense Twelfth Supplemental Request for Discovery
Dated 14 December 2016

1. References:

- a. Defense Twelfth Supplemental Request for Discovery dated 14 December 2016
 - b. *United States v. Abd Al Rahim Hussayn Muhammad Al Nashiri* - AE 368A Government Response To Defense Motion To Compel Production Of Discoverable Evidence Pertaining To The Special Trial Counsel dated 14 December 2016
2. The Government has received the Defense Supplemental Request for Discovery dated 14 December 2016, reference (a), and responds below in paragraphs 2-4 based on information and belief.
3. The Government has produced, and will continue to produce or make available for inspection material in the Government's possession that is discoverable pursuant to the Military Commissions Act of 2009 ("M.C.A."), 10 U.S.C. §§ 948a *et seq.*, and Rule for Military Commissions ("R.M.C.") 701.
- a. In addition to the material specifically itemized in R.M.C. 701, the Government recognizes its continuing discovery obligations and will disclose any additional discoverable material that is found in the future. R.M.C. 701(c)(1)-(3).
 - b. Classified material is only discoverable if it is "noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal for the prosecution's case, or sentencing." 10 U.S.C. § 949-p. Such material is only subject to disclosure if it is actually relevant and helpful, not of mere theoretical relevance. *See* R.M.C. 701, Discussion (citing *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989) as authoritative).
 - c. Material that is subject to the privileges found at Military Commissions Rule of Evidence ("M.C.R.E.") 505, or otherwise subject to protective orders issued by the Commission will be handled in accordance with the procedures set forth in M.C.R.E. 505. The Government will not disclose material that is subject to the privileges found at M.C.R.E. 505 prior to the Commission entering appropriate orders. Additionally, the Government will not disclose materials subject to any other applicable privilege.

SUBJECT: Government Response to Defense Supplemental Request for Discovery Dated 14 December 2016

4. Subject to paragraphs 2 and 3, above, the Government specifically and additionally responds, in bold, to paragraph 7 of reference (a) as follows:

- a. Any and all underlying authority granting the Chief Prosecutor the ability to appoint STC.

This request is moot. *See* Military Judge's ruling on page 978 of the Unofficial/Unauthenticated Transcript dated 9 January 2017.

- b. All communications between any member of the Office of the Chief Prosecutor (OCP) and Karen Hecker or MAJ Lebowitz, Office of the Convening Authority, DoD OGC, and any other party concerning the appointment of STC to this case.

The requested information is not subject to discovery nor relevant under R.M.C. 701.

- c. Any reports or communications between the STC and OCP regarding information or status updates on the remediation matters and investigations results in this case.

Neither Ms. Hecker nor Major Lebowitz has communicated to any person in the OCP the substance of any matters falling within any Defense Team privileges, and no members of the Prosecution Team in *United States v. Abd Al Hadi Al-Iraqi* have become aware of any matters falling within any Defense Team privileges.

- d. Any electronic mail, memorandum, or direction addressing the measures taken to segregate the STC from the OCP, or any other prophylactic measures taken to ensure a division exists between the OCP and STC.

The Chief Prosecutor averred, as an officer of the court, in reference (b) that:

Neither MAJ Lebowitz nor Ms. Hecker work in the normal Prosecution workplaces (while in the continental United States or while on Naval Station Guantanamo Bay) and appropriate measures have been undertaken to physically separate them from other Prosecution personnel to avoid contact;

If there is occasion or need to discuss administrative matters, such is undertaken in the company of an attorney third party who ensures the discussions never reach and indeed never come close to any privileged matters;

These measures are taken seriously so as to prevent the regular Prosecution Team and other Office of the Chief Prosecutor personnel from coming into contact with Defense privileged information;

SUBJECT: Government Response to Defense Supplemental Request for Discovery Dated 14 December 2016

These measures are the same as the measures that have been used in connection with the Special Review Team that represents the United States before the United States v. Mohammad, et al. Commission in connection with the AE 292 litigation;

An additional measure in the AE 292 litigation in the Mohammad, et al. Commission and this litigation is that all communications between and among the Parties and the Commission are undertaken using an email address list that substitutes Special Review Team Counsel for the regular Prosecution Team. The Prosecution has requested that the Trial Judiciary, the defense, and Special Trial Counsel similarly institute this measure in the present case.

e. The supervisory system in place for both STC, to include the names of the senior rater and intermediary supervisors.

The requested information is not subject to discovery nor relevant under R.M.C. 701. Additionally, the Chief Prosecutor averred in reference (b) that, “While not conceding that such is legally required for the function for which Special Trial Counsel are detailed, as of 24 June 2016, the Chief Prosecutor has neither evaluated nor contributed to the evaluation of MAJ Lebowitz, has never and is not now evaluating or participating in the evaluation of Ms. Hecker, and does not intend to participate in the future evaluation of these individuals.”

f. The complete list of duties and responsibilities for both STC at the Office of Military Commissions (OMC) prior to being appointed as STC in this case:

(1) With respect to MAJ Lebowitz, this includes any participation at any stage of this case or cases involving potential witnesses or co-conspirators, and prior fitness reports while assigned to OMC;

With respect to MAJ Lebowitz’s prior participation, see AE 003G. With respect to MAJ Lebowitz’s prior fitness reports, that information is not relevant under R.M.C. **701**.

(2) With respect to Ms. Hecker, this includes any duties performed for the CA’s office, particularly involving potential witnesses or co-conspirators.

Mrs. Hecker has not worked for the OCP, and any duties performed for the CA’s office, if any, are not relevant under R.M.C. 701.

g. A complete list of STC’s responsibilities and investigative powers as STC in this case, including who they report to on these matters.

SUBJECT: Government Response to Defense Supplemental Request for Discovery Dated 14 December 2016

See reference (b) for the applicable laws and regulations that detail the responsibilities and investigative powers of the Special Trial Counsel. Regarding to whom the STC's report, the Defense fails to establish how the information sought is required to be discovered under R.M.C. 701.

5. Finally, the Government requests reciprocal discovery from the Defense in accordance with R.C.M. 701(g).

//signed//
DOUGLAS J. SHORT
Commander, JAGC
Trial Counsel

ATTACHMENT E

Filed with TJ
6 July 2018

Appellate Exhibit 120 (al Hadi)
Page 34 of 35



OFFICE OF THE
CHIEF PROSECUTOR

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

3 May 2018

MEMORANDUM FOR Defense Counsel ICO *United States v. Abd al Hadi al-Iraqi*

SUBJECT: Government Request for Discovery ICO *United States v. Abd al Hadi al-Iraqi*

1. Reference: Rules for Military Commissions (R.M.C.) 701(g)
2. In accordance with the Reference, the Government requests that the Defense produce or permit the Government to inspect, copy, or photograph each of the items listed in paragraphs 3–6, below.
3. In accordance with R.M.C. 701(g)(1)(B)(ii), the Government requests permission to examine any written material the Defense intends to present at any potential presentencing proceedings.
4. In accordance with R.M.C. 701(g)(2), the Government requests that the Defense notify the Government if it intends to introduce the defense of alibi or lack of mental responsibility, or if it intends to introduce expert testimony as to the Accused's mental condition. Additionally, the Government requests the Defense provide notice of the "place or places at which the Defense claims the Accused to have been at the time of the alleged offense[s]." R.M.C. 701(g)(2).
5. In accordance with R.M.C. 701(g)(3), The Government requests permission to examine any and all "books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the Defense and which the Defense intends to introduce as evidence in the Defense's case-in-chief at trial."
6. In accordance with R.M.C. 701(g)(4), the Government requests permission to examine "any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are within the possession, custody, or control of the Defense that the Defense intends to introduce as evidence in the Defense case-in-chief at trial or that were prepared by a witness whom the Defense intends to call at trial when the results or reports relate to that witness' testimony."

//signed//
DOUGLAS J. SHORT
Commander, JAGC
Trial Counsel