

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

<p>UNITED STATES OF AMERICA</p> <p style="margin-top: 20px;">v.</p> <p>ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI</p>	<p>AE 335I</p> <p style="margin-top: 20px;">Government Notice in Compliance with AE 335H</p> <p style="margin-top: 20px;">30 October 2020</p>
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1. Timeliness

This Notice is timely pursuant to the Commission's AE 335H, Interim Order.

2. Notice

Pursuant to the Commission's Interim Order in AE 335H, the Government hereby provides notice concerning (1) whether the Government intends to introduce the statements made by Mr. Ahmed Al-Darbi between 24 August and 3 September 2002 that form the basis of the defense motion to suppress in AE 335 into evidence at trial, for any purpose – including rebuttal, and if so (2) whether the Government intends to dispute, at a hearing on the motion to suppress, the defense allegation that Mr. Al-Darbi's 2002 statements were obtained through the use of torture or cruel, inhumane, or degrading treatment.

A. Statements.

At this time, the Government intends to admit the sworn deposition testimony of Mr. Al Darbi, should Mr. Al Darbi be unavailable to provide live in-person testimony at trial. If Mr. Al Darbi is available at trial, the Government intends to offer his sworn testimony. However, should the testimony of Mr. Al Darbi be unavailable at trial, either through live in-court testimony or by deposition, the Government then will seek to admit the statements of Mr. Al Darbi cited in the defense motion, that is, the statements he made to investigating agents between

24 August and 3 September 2002. A compilation of these statements, dated 29 November 2007, has previously been provided to defense counsel in Bates Numbers 10015-00000756 – 10015-00000810. Additionally, should live or deposition testimony be unavailable, the Government provides notice that it will also seek to introduce the previously disclosed statements made by Mr. Al Darbi to various investigating agents identified in the Attached Exhibit B. In addition to the affirmative use of Mr. Al Darbi's statements, the Government believes that both parties may use statements of Mr. Al Darbi in a collateral manner as allowed under the M.C.R.E. *See generally* Military Commissions Rule of Evidence (M.R.C.E.) 607, 608, 612, 613 and 801(d)(1). Indeed, the Government intends to use such statements should the need arise during the scope of Mr. Al Darbi's live testimony.

B. *Admissibility Pursuant to M.C.R.E. 304(a)(3).*

The Government intends to dispute the defense allegations and to offer the following evidence to establish the admissibility of Mr. Al Darbi's statements and testimony pursuant to M.C.R.E. 304(a)(3)¹:

¹ The defense also seeks to suppress "all derivative evidence obtained as a result of these statements." Mot. at 1-2. The plain reading of M.C.R.E. 304(a)(5) prohibits the admissibility of evidence derived from an improperly induced statement made by an accused. The rule states: "Evidence derived from a statement that would be excluded under [M.C.R.E. 304(a)(1)] may not be received in evidence *against an accused who made the statement . . .*" M.C.R.E. 304(a)(5) (emphasis added). Accordingly, the Accused may challenge the admissibility of evidence derived from *his* improperly induced statements, but the Accused may not challenge the admissibility of and evidence derived from Al Darbi even if the initial source was induced by torture. Thus, Mr. Al Darbi's deposition testimony as well as any post 3 September 2002 statements are not barred as evidence at trial under M.C.R.E. 304(a)(5). M.C.R.E. 304(a)(5) is consistent with federal, state and military precedent which bars criminal defendants from asserting the constitutional rights of third parties. *See Alderman v. United States*, 394 U.S. 165, 174 (1969); *United States v. Erwin*, 875 F.2d 268, 270 (10th Cir. 1989) (Fourth Amendment rights are personal and therefore, "a defendant cannot claim a violation of his Fourth Amendment rights based only on the introduction of evidence procured through an illegal search and seizure of a third person's property or premises."); *Bellis v. United States*, 417 U.S. 85, 89–90 (1974) ("The privilege against compulsory self-incrimination should be limited to its historic

- 1) testimony of Mr. Al Darbi, if available;

function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records . . . “the Fifth Amendment privilege is a purely personal one,” which is a “fundamental policy limiting the scope of the privilege.”); *United States v. Kember*, 648 F.2d 1348, 1354, 1365 (D.C. Cir. 1980) (“As to the first question, the Supreme Court has made clear in recent years that a defendant has no standing to object to the introduction of evidence illegally seized from a third party”); *United States v. Fortna*, 796 F.2d 724, 732 (5th Cir. 1985); *United States v. Ward*, 989 F.2d 1015, 1020 (9th Cir. 1992) (concluding that defendant “ha[d] no standing to assert the . . . Fifth Amendment rights of others”; *United States v. Jones*, 52 M.J. 60, 64 (CAAF 1999); *People v. Badgett*, 895 P.2d 877, 883-84 (Cal. en banc 1995) (“In deciding whether defendants had standing to bring their motion, it is important to recall that defendants must allege a violation of their own rights in order to have standing to argue that testimony of a third party should be excluded because it is coerced. It is settled that the accused has no standing to object to a violation of another's Fifth Amendment privilege against self-incrimination.”). Coconspirators and codefendants have been accorded “no special standing.” *Alderman*, 394 U.S. at 172. More specifically, courts have held that evidence derived from an unlawfully obtained third-party statement should not be suppressed as fruit of the poisonous tree. *Gissendanner v. Wainwright*, 482 F.2d 1293, 1296 (5th Cir. 1973); *Jacobs v. Warden, Md. Penitentiary*, 367 F.2d 321, 323 (4th Cir. 1966); *State v. Hawkins*, 490 So.2d 594 (La. App. 1986) ((holding that the defendant did not have standing to allege that statements used to support search warrants were obtained in violation of third party's Fifth Amendment rights); *State v. Baum*, 972 A.2d 1127, 1132-34 (N.J. 2009); *Hill v. Oklahoma*, 500 P.2d 1080, 1090 (Okla. App. 1972); *State v. Ducharme*, 601 A.2d 937, 941 (R.I. 1991) (“One may not complain about compulsion that may be applied to another, even though that application may result in the production of evidence that may be used against a defendant.”); *State v. Shuffelen*, 208 P.3d 1167, 1172 (Wash. App. 2009). Consistent with the plain language of the rule, and the practice developed in federal and state courts, the Commission should deny the defense motion to suppress. The Defense attempts to recast the rule, stating it specifically prohibits any evidence derived from statements obtained by torture or cruel, inhuman, or degrading treatment. AE 335 at 2 (emphasis added). The plain reading of M.C.R.E. 304(a)(5), however, is narrower, in that it only precludes the use of derivative evidence when derived from an improperly induced statement made *by the accused*. (emphasis added). Rule 304(a)(5) states: “Evidence derived from a statement that would be excluded under [Rule 304(a)(1)] may not be received in evidence against an accused who made the statement” M.C.R.E. 304(a)(5) (emphasis added). Simply put, the Accused only has standing to challenge the admissibility of evidence derived from his own statements, but does not have standing to challenge the admissibility of evidence derived from a third party like Mr. Al-Darbi. The Defense provides no legal authority to depart from the plain language of the rule. The Defense, relies on *United States v. Ghailani*, where the federal district court suppressed testimony derived from statements of the accused assumed for the purposes of that litigation to have been improperly obtained. 743 F. Supp. 2d 261, 287-88 (S.D.N.Y. 2010). The *Ghailani* holding is consistent with M.C.R.E. 304(a)(5). Unlike *Ghailani*, the Defense here seeks to suppress evidence purportedly derived from someone other than the Accused, i.e., Al-Darbi. The Defense offered no rule or case that would support its strained interpretation of the rule.

- 2) the statements listed in Attachment B;
- 3) the testimony of the various investigating agents who took the statements listed in Attachment B;
- 4) the Offer for Pretrial Agreement with appendix, dated 20 December 2013, signed by Mr. Al Darbi and his counsel (Bates Nos. 10015-00206894 – 10015-00206901 and 10015-00151512 – 10015-00151513) in *United States v. Al Darbi*;
- 5) the Stipulation of Fact with exhibits, dated 20 December 2013, signed by Mr. Al Darbi and his counsel (Bates No. 10015-00126773-10015-00126872) in *United States v. Al Darbi*;
- 6) the transcript of Mr. Al Darbi's guilty plea providence inquiry in *United States v. Al Darbi* at Unofficial/Unauthenticated Transcript ("Tr.") 1-85, dated 20 February 2014 from 0912 to 1127 hours (Bates No. 10015-00151514 – 10015-00151598);
- 7) the transcript and video with exhibits of the deposition testimony of Mr. Al Darbi from 15-16 August 2017 and 10-11 February 2018 in *United States v. Abd Al Hadi Al-Iraqi* (currently under limited use authority for discovery) (Bates Nos. 10015-00161182 – 10015-00161213 and 10015-00167161 – 10015-00167313);
- 8) the transcript and video with exhibits of the deposition testimony of Mr. Al Darbi from 1-4 August 2017 and 7 November 2017 (presently under seal) in *United States v. Abd Al-Rahim Hussayn Muhammad Al Nashiri*; and
- 9) the testimony of a to-be named forensic psychiatrist.

Attachments:

- A. Certificate of Service, dated 30 October 2020.

ATTACHMENT A

ATTACHMENT B

Statements of Mr. Al Darbi¹

DATE	BATES NO.	CLASSIFICATION
8/24/2002	10015-00000756	U
8/24/2002	10015-00007178	U
8/24/2002	10015-00020106	U
8/24/2002	10015-00020115	U
8/24/2002	10015-00020322	U
8/27/2002	10015-00006158	U//FOUO//LES
8/27/2002	10015-00020923	U//FOUO//LES
9/6/2002	10015-00007159	U
9/10/2002	10015-00007163	U
9/12/2002	10015-00007168	U
9/13/2002	10015-00007171	U
9/13/2002	10015-00020055	U
9/19/2002	10015-00007174	U
9/26/2002	10015-00021373	U
10/17/2002	10015-00007181	U
10/29/2002	10015-00007185	U
11/2/2002	10015-00007188	U
11/2/2002	10015-00020110	U
11/5/2002	10015-00020121	U
11/13/2002	10015-00007195	U
11/15/2002	10015-00033705	U//FOUO//LES
12/30/2002	10015-00007197	U
12/30/2002	10015-00020134	U
1/30/2003	10015-00007206	U
1/30/2003	10015-00020145	U
2/16/2003	10015-00007208	U
3/4/2003	10015-00020166	U
3/24/2003	10015-00006164	U//FOUO//LES
3/24/2003	10015-00020881	U//FOUO//LES
3/29/2003	10015-00018976	U
4/1/2003	10015-00006168	U//FOUO//LES
4/11/2003	10015-00006169	U//FOUO//LES
6/18/2003	10015-00020836	U//FOUO//LES
8/26/2003	10015-00020885	U//FOUO//LES
10/1/2003	10015-00006179	U//FOUO//LES
10/6/2003	10015-00006180	U//FOUO//LES
11/17/2003	10015-00006181	U//FOUO//LES
12/20/2003	10015-00020543	U//FOUO//LES

¹ The Government acknowledges that some of the material identified herein is currently classified. As previously stated, the Government plans to rely upon unclassified information in its case-in-chief, and will continue to work with equity holders, in accordance with applicable rules, to seek declassification of classified materials to the greatest extent practicable.

UNCLASSIFIED//FOR PUBLIC RELEASE

1/3/2004	10015-00006187	U//FOUO//LES
1/8/2004	10015-00006188	U//FOUO//LES
2/12/2004	10015-00006190	U//FOUO//LES
2/13/2004	10015-00020952	U//FOUO//LES
2/14/2004	10015-00006193	U//FOUO//LES
2/16/2004	10015-00006195	U//FOUO//LES
2/18/2004	10015-00006197	U//FOUO//LES
3/9/2004	10015-00021002	U
8/19/2004	10015-00006245	U
9/14/2004	10015-00020981	U//FOUO//LES
9/16/2004	10015-00020983	U//FOUO//LES
9/28/2004	10015-00006249	U//FOUO//LES
10/27/2004	10015-00006281	U//FOUO//LES
11/9/2004	10015-00006284	U//FOUO//LES
11/11/2004	10015-00006285	U//FOUO//LES
12/7/2004	10015-00020534	U//FOUO//LES
12/10/2004	10015-00002832	U
12/27/2004	10015-00006294	U//FOUO//LES
3/9/2005	10015-00006295	U
4/11/2005	10015-00006296	U
4/11/2005	10015-00021004	U
4/21/2005	10015-00006145	U//FOUO//LES
4/21/2005	10015-00020536	U//FOUO//LES
5/14/2005	10015-00021011	U//FOUO//LES
6/2/2005	10015-00021014	U//FOUO//LES
6/9/2005	10015-00021019	U//FOUO//LES
6/14/2005	10015-00006311	U//FOUO//LES
6/15/2005	10015-00006313	U//FOUO
6/15/2005	10015-00006316	U
6/15/2005	10015-00021028	U//FOUO
6/15/2005	10015-00021035	U
6/17/2005	10015-00006319	U//FOUO//LES
7/23/2005	10015-00006323	U//FOUO//LES
7/27/2005	10015-00006324	U//FOUO//LES
8/16/2005	10015-00020546	U//FOUO//LES
8/16/2005	10015-00006325	U//FOUO//LES
9/22/2005	10015-00006147	U//FOUO//LES
9/29/2005	10015-00006149	U
1/13/2006	10015-00006328	U//FOUO//LES
2/8/2006	10015-00006330	U//FOUO//LES
5/24/2006	10015-00020553	U//FOUO//LES
6/21/2006	10015-00006335	U//FOUO//LES
1/17/2007	10015-00020946	U//FOUO//LES
6/7/2007	10015-00033888	U
6/9/2007	10015-00019454	U//FOUO//LES
8/9/2007	10015-00019455	U
12/16/2008	10015-00157491	S
3/10/2010	10015-00152345	S
5/25/2011	10015-00095223	U

7/21/2011	10015-00111236	U
1/17/2017	10015-00157491	S
4/3/2017	10015-00157473	S
4/27/2017	10015-00157495	S
4/27/2017	10015-00157538	U//FOUO
6/30/2017	10015-00157548	U//FOUO
6/30/2017	10015-00157505	S
7/26/2017	10015-00157388	U//FOUO
10/25/2017	10015-00165905	U//FOUO
10/26/2017	10015-00165903	U//FOUO
1/24/2018	10015-00174987	U