

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

UNITED STATES OF AMERICA

v.

**ABD AL RAHIM HUSSAYN
MUHAMMAD AL NASHIRI**

AE 120C

ORDER

**Defense Motion to Compel Discovery of
Information in the Possession of Any
Foreign Government and the United
States Related to the Arrest, Detention,
Rendition and Interrogation of the
Accused**

14 APRIL 2014

1. The Accused is charged with multiple offenses in violation of the Military Commissions Act of 2009, 10 U.S.C. §§ 948 *et seq.*, Pub. L. 111-84, 123 Stat. 2574 (Oct. 28, 2009). He was arraigned on 9 November 2011.
2. Procedural History. The Defense filed AE 120, a classified motion requesting information in the possession of any foreign government and the United States related to the arrest, detention, rendition, and interrogation of the Accused. The motion encompassed a 9 August 2013 Discovery request for 75 line items of various records and documents (AE 120, Attachment A (Unclassified//FOUO)), and seven (7) additional requests for information. (AE 120, Paras 2b - 2h, (Classified)). The Prosecution responded (AE 120A) requesting the motion be denied as the Prosecution previously fulfilled its discovery responsibilities. Additionally, the Prosecution argued the information was not discoverable; asserted the requests were overbroad; asserted the requests were for information not relevant and material to the preparation of the defense; and, or asserted the requested information was not proper mitigation or extenuation evidence as described in Rules for Military Commissions (R.M.C.) 1001 and 1004. Because of the classified nature of the information requested, the motion was argued *in camera* pursuant to Military

Commissions Rule of Evidence (M.C.R.E.) 505, on 22 February 2014.¹ On 14 March 2014, pursuant to the Commission's order from the bench,² the Prosecution filed AE 120B, an updated inventory of discovery provided in response to Defense's 75 line item discovery request (AE 120, Attachment A) with justification when discovery was not provided.

3. The Prosecution accurately outlined the various statutes, Military Commission Rules, and case law concerning discovery standards and a prosecutor's obligations to provide discovery to a defense team. (*See* AE 120A, pp. 4-7). The Defense outlined the legal authorities, which establish its legal obligations to conduct pretrial investigation to develop extenuation and mitigation evidence in order to provide effective assistance of counsel in a capital trial. (*See* AE 120, pp. 11-15).

4. The Commission recognizes the Defense in its various requests attached to AE 120 utilized expansive language in describing the scope of the information requested. The Prosecution's point of over-breadth is well taken; however, their follow-on point asserting the Defense must identify particular documents is not reasonable. The Commission views the Prosecution's obligation to provide discovery broadly and liberally, especially in light of the capital referral of the charges against the Accused and the Defense's ethical duty to conduct pre-trial investigation in order to develop the full range of exculpatory, mitigation and, extenuation evidence.

5. The Prosecution will provide the Defense the following discovery information:

a. A chronology identifying where the Accused was held in detention between the date of his capture to the date he arrived at Guantanamo Bay, Cuba in September 2006;

b. A description of how the Accused was transported between the various locations including how he was restrained and how he was clothed;

¹ *See* Unofficial/Unauthenticated Redacted Transcript of the Al Nashiri (2) Motions Hearing Dated 22 February 2014, from 9:14 AM to 11:05 AM at 2988 - 3062.

² *Id.* at 2993 - 97.

c. All records, photographs, videos and summaries the Government of the United States has in its possession which document the condition of the Accused's confinement at each location, and the Accused's conditions during each movement between the various locations;

d. The identities of medical personnel (examining and treating physicians, psychologist, psychiatrists, mental health professionals, dentists, etc.), guard force personnel, and interrogators, whether employees of the United States Government or employees of a contractor hired by the United States Government, who had direct and substantial contact with the Accused at each location and participated in the transport of the Accused between the various locations. This includes individuals described in paragraph 10a and d of the Defense Request for Discovery dated 9 August 2012. (Attachment A of AE 120);

e. Copies of the standard operating procedures, policies, or guidelines on handling, moving, transporting, treating, interrogating, etc, high value detainees at and between the various facilities identified in paragraph 5a. This includes documents described in paragraphs 15, 17, 18, 21a, and 22, of the Defense Request for Discovery dated 9 August 2012. (Attachment A of AE 120);

f. The employment records of individuals identified in paragraph 5d limited to those documents in the file memorializing adverse action and/or positive recognition in connection with performance of duties at a facility identified in paragraph 5a above or in transporting the Accused between the various facilities;

g. The records of training in preparation for the performance of duties of the individuals identified in paragraph 5d above at the various facilities or during transport of the Accused. This includes documents described in paragraph 24 of the Defense Request for Discovery dated 9 August 2012. (Attachment A of AE 120);

h. All statements obtained from interrogators, summaries of interrogations, reports produced from interrogations, interrogations logs, and interrogator notes of interrogations of the Accused and all co-conspirators identified in Appendix C of the Charge Sheet dated 15 September 2011;

i. Un-redacted copies of requests with any accompanying justifications and legal reviews of same to employ Enhanced Interrogation Techniques on the Accused and all co-conspirators identified in Appendix C of the Charge Sheet dated 15 September 2011. This includes documents described in paragraphs 48, 49, and 51 of the Defense Request for Discovery dated 9 August 2012 (Attachment A of AE 120), with “particular detainees” being the Accused and all co-conspirators identified in Appendix C of the Charge Sheet dated 15 September 2011.;

j. Un-redacted copies of documents memorializing decisions (approving or disapproving), with any additional guidance, on requests identified in para 5i to employ Enhanced Interrogation Techniques on the Accused and all co-conspirators identified in Appendix C of the Charge Sheet dated 15 September 2011. This includes documents described in paragraph 48, 49, and 51 of the Defense Request for Discovery dated 9 August 2012 (Attachment A of AE 120), with “particular detainees” being the Accused and all co-conspirators identified in Appendix C of the Charge Sheet dated 15 September 2011.

6. The Commission acknowledges the Prosecution’s provision of discovery in response to paragraphs 3-5, 14, 20, 27-42, 44-46, 49, 53, 54, 57-62, 64, 68, 69, 70a, 70d, 72, and 73 of the Defense Request for Discovery dated 9 August 2012 (Attachment A of AE 120), and reminds the Prosecution of its continuing obligation to provide updates and newly discovered information in accordance with applicable legal standards previously acknowledged.

7. The requests for discovery contained in the remaining numbered line items of the Defense Request for Discovery dated 9 August 2012 (Attachment A of AE 120) are denied as the Commission cannot ascertain the relevance and materiality to the preparation of the defense and, or how the requested information could be proper mitigation or extenuation evidence as described in R.M.C. 1001 and 1004.

8. The parties will continue to comply with the Commission's Protective Orders AE 013M, "Protection of Classified Information Throughout All Stages of Proceedings" and AE 014C "Protected but Unclassified Information" and the procedures of M.C.R.E. 505.

Accordingly, AE 120 is **GRANTED** in part and **DENIED** in part.

So ORDERED this 14th day of April, 2014.

//s//
JAMES L. POHL
COL, JA, U.S. Army
Military Judge