

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

UNITED STATES OF AMERICA

v.

**ABD AL-RAHIM HUSSEIN
MUHAMMED ABDU AL-NASHIRI**

AE 092HH

Defense Motion to Compel Production of
Discovery Materials Related to AE 092AA

25 January 2017

1. **Timeliness:** This motion is filed within the timeframe established by Rule for Military Commission (“R.M.C.”) 905 and pursuant to Military Commissions Trial Judiciary Rule of Court (“RC”) 3.7.c.(1).
2. **Relief Requested:** The defense respectfully requests that the Commission enter an order directing the prosecution to produce the information requested in the defense’s request for discovery related to the prosecution’s filing in AE 092AA. (Attachment B).
3. **Overview:** In order to explain the unexplainable, that the prosecution and the prior judge allowed the defense to remain unaware of the judge’s secret order in AE 092K, the prosecution has provided an explanation, nearly six months after this matter was raised, for this error that places fault on a low level member of the Trial Judiciary and a prosecution paralegal. The prosecution provides little or no supporting evidence on the vast majority of these newly discovered “facts”. Because of the history of this case with respect to discovery issues, the defense requests evidence to support the prosecution’s assertions and an evidentiary hearing on this matter as the factual timeline could impact

any proposed remedy requested in the underlying AE 092S. The discovery requested is in furtherance in this search for the truth.

4. **Burden of Proof:** The burden of persuasion is on the defense.
5. **Facts:** Many of the pertinent facts are contained in the underlying defense motion, AE 092S and the follow on series of motions. The defense obtained an order from the Commission compelling the Government to preserve evidence. The prosecution later obtained an *ex parte* order allowing it to destroy that evidence. The existence of this request for a secret order and the order itself was not disclosed to the defense. Indeed, it appears that it was not discovered to the new trial judge at the time he began presiding over the case. Moreover, the new trial judge was not advised that the defense was unaware of this order. After discovery of the secret order, litigation commenced in this case and in the related case of *United States v. Mohammed*, and the defense filed AE 092S, Defense Motion to Abate the Proceedings Due to Destruction of Evidence Referenced in AE 092. Months after that litigation began, the prosecution claims to have discovered how it was that the defense was not notified of the existence of the secret order for over a year (AE 092AA). The prosecution now claims it was not the fault of the former judge or the prosecution, but rather low level members of the prosecution team and the Trial Judiciary. However, the motion did not include any supporting documents or evidence to support the prosecution's new claims. The defense seeks evidence either confirming or disproving the prosecution's unsupported explanation. The defense seeks the following:

1. The name, present duty station, and contact information of the Trial Judiciary

Clerk who allegedly contacted a paralegal from the Office of the Chief Prosecutor via telephone on 8 July 2014;

2. The name, present duty station, and contact information of the Office of the Chief Prosecutor paralegal contacted via telephone on 8 July 2014 by the Clerk from the Trial Judiciary;
3. All supporting documentation for the statement “On or about 21 July 2014, the Office of the Chief Prosecutor requested executive branch review of the redacted order for transmittal to the Trial Judiciary”;
4. Documentation of the following statement contained in AE 092AA “The requested review indicated that the transmittal was for both *United States v. Mohammed, et al.* and *United States v. Al-Nashiri* including copies of all correspondence, e-mails, and other supporting documents”;
5. The identity of the persons and agency in the executive branch who reviewed the prosecution’s proposed redacted order;
6. All supporting documentation regarding the transmission of the two discs to the Trial Judiciary on 21 July 2014, including but not limited to identification of the individuals who transmitted the discs and the individuals who received them;
7. All written communications between the Office of the Chief Prosecutor and the Trial Judiciary concerning the discs, including any and all documentation stating that it was the responsibility of the Trial Judiciary to serve these discs upon the defense;

8. All written communications within the Office of the Chief Prosecutor concerning the discs containing the redacted order, including any communications concerning service of the discs upon the defense; and
9. All communications between the Office of the Chief Prosecutor and the Trial Judiciary from 21 July 2014 until 15 December 2016 concerning the two discs allegedly provided to the Trial Judiciary.

The prosecution opposes these requests, preferring continued secrecy. (Attachment C).

6. **Argument:** This Commission is all too aware of the law concerning discovery as it is confronted with the same arguments at virtually every hearing. The defense is entitled to discovery that undermines or contradicts the prosecution's narrative. See *U.S. v. McVeigh*, 954 F.Supp. 1441 (D. Colo. 1997). Here the prosecution's narrative is that the failure of the prosecution to notify the defense that it had obtained a secret order allowing the Government to destroy evidence that the defense had believed was subject to preservation order, was not the prosecution's fault, but rather the fault of low level unidentified employees and a misunderstanding between the prosecution and the Trial Judiciary. This narrative implies that the prosecution believed that the defense would simply remain silent after receiving the order, neither confirming receipt nor filing any opposing motions in the Commission. Given the nature of this issue, it is highly unlikely to assume the defense would simply accept the destruction of the evidence without comment.

The prosecution's version of events is that critical evidence was allowed to be secretly destroyed and the failure to notify the defense was a misunderstanding, and not

by design. This is an important issue for the AE 092S motion, as the actions of the prosecution could be highly relevant in determining what remedies are appropriate for the destruction of this evidence. Given the myriad of similar issues involving destruction of evidence and other misconduct committed by governmental agencies involved in this case, this factual predicate must be proven with evidence, not a mere proffer. The information sought will allow the defense to either confirm or disprove the prosecution's supported assertions. Yet rather than demonstrate to the defense and to the public that evidence exists to support its newly discovered assertions, the prosecution prefers secrecy over transparency.

Importantly, the prosecution has not suggested that the defense request is cumulative or overbroad, nor does it suggest that the evidence is cumulative. Rather, the prosecution asserts only that the "one additional fact" the government provided does not warrant any further investigation by the defense or by the Commission. The government's position should be rejected, as this cannot be accepted as a fact without evidence-this is merely a proffer.

The defense requested relevant evidence so that it can challenge the prosecution's new proffer, as AE 092AA contained no factual evidence to support the new "facts". The requested evidence is material and necessary as the actual facts and timeline now in question will likely impact appropriate and possible remedies for the destruction of evidence. Without this evidence, the defense is left to speculate as to the veracity of the prosecution's proffer in a case where governmental agencies have destroyed evidence, sometimes defying judicial orders. Only the requested evidence and a potential

evidentiary hearing will resolve the questions. The evidence sought will assist the parties in resolving this dispute, assist the Commission in determining what remedies are appropriate, and perhaps aid in the public's confidence in this process.

7. **Oral Argument:** The defense requests oral argument on this motion.
8. **Witnesses:** None
9. **Conference with Opposing Counsel:** The defense conferenced with the prosecution and it opposes this motion.
10. **List of Attachments:**
 - a. Certificate of Service, dated 25 January 2017 (1 page)
 - b. Defense Request for Discovery Regarding the Prosecution's Filing in AE 092AA, dated 3 January 2017 (3 pages)
 - c. Government Response to Defense Request for Discovery, dated 13 January 2017 (1 page)
 - d. Proposed Draft Order (1 page)

Respectfully submitted,

/s/ Richard Kammen
RICHARD KAMMEN
DoD Appointed Learned Counsel

/s/ Jennifer Pollio
JENNIFER POLLIO
LCDR, JAGC, USN
Detailed Defense Counsel

/s/ Rosa Eliades
ROSA ELIADES
Assistant Defense Counsel

/s/ Mary Spears
MARY SPEARS
Assistant Defense Counsel

ATTACHMENT

A

Filed with TJ
25 January 2017

Appellate Exhibit 092HH (Al-Nashiri)
Page 8 of 17

CERTIFICATE OF SERVICE

I certify that on 25 January 2017, I electronically filed the forgoing document with the Trial Judiciary and served it on all counsel of record via e-mail.

/s/ Jennifer Pollio
JENNIFER L. POLLIO
LCDR, JAGC, USN
Detailed Defense Counsel

ATTACHMENT

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Grace Atwater

January 3, 2017

REQUEST FOR DISCOVERY REGARDING THE PROSECUTION'S FILING IN AE 92 AA

Trial counsel

The defense requests that the prosecution produce the following information no later than 15 January 2016 so that the defense can properly analyze the merits of the statements contained in the prosecution's filing in AE 92 AA and decide whether to request an evidentiary hearing on AE 92AA

1. The name, present duty station, and contact information of the Trial Judiciary Clerk who allegedly contacted a paralegal for the Office of the Chief Prosecutor by telephone on 8 July 2014;
2. The name, present duty station, and contact information of the Office of the Chief Prosecutor paralegal contacted by telephone on 8 July 2014 by the Clerk from the Trial Judiciary;
3. All supporting documentation for the statement: "On or about 21 July 2014, the Office of the Chief Prosecutor requested executive branch review of the redacted order for transmittal to the Trial Judiciary." Specifically the defense requests documentation of the following statement contained in the Prosecution's AE 99AA filing: "The

requested review indicated that the transmittal was for both *United States v. Khalid Shaikh Mohammad et al.* and *United States v. Al Nashiri* including copies of all correspondence, e-mails and other supporting documents.”

- a. The defense specifically requests the identity of the persons and agency in the executive branch who reviewed the prosecution’s proposed redacted order;
4. All supporting documentation regarding the transmission of the two disks to the trial judiciary on 21 July 2014, including but not limited to: identification of the individuals who transmitted the disks and the individuals who received them;
5. All written communications between the Office of the Chief Prosecutor and the Trial Judiciary concerning the disks including all documentation that it was the responsibility of the Trial Judiciary to serve these disks upon the defense;
6. All written communications *within* the Office of the Chief Prosecutor concerning the disks containing the redacted order, including any communications concerning service of the disks upon the defense;
7. All Communications between the Office of the Chief Prosecutor and

8. the Trial Judiciary from 21 July 2014 until 15 December 2016 concerning the two disks allegedly provided to the Trial Judiciary.

Very Respectfully,

/s/Richard Kammen

Richard Kammen
Attorney at Law

Richard@Kammenlaw.com

ATTACHMENT

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

<p style="text-align: center;">UNITED STATES OF AMERICA</p> <p style="text-align: center;">v.</p> <p style="text-align: center;">ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI</p>	<p style="text-align: center;">Government Response</p> <p style="text-align: center;">to Defense Request for Discovery</p> <p style="text-align: center;">13 Jan 2017</p>
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The Government received a Defense Request for Discovery dated 3 January 2017 for information relating to filing AE 092AA. The Government hereby responds to the Defense request below in bold.

The Government will – as it has in the past and continues to do – produce all relevant, material, and responsive information in accordance with the Military Commissions Act of 2009 (“M.C.A.”), 10 U.S.C. §§ 948a *et seq.*, Rules for Military Commissions (“R.M.C.”) 701 and 703, Military Commissions Rule of Evidence (“M.C.R.E.”) 505, and other applicable law.

The Government acknowledges its duty and responsibility to continually review and provide the Defense with information that is relevant and material to the preparation of the Defense when such information is in the government’s possession, custody, or control and it is known, or, by the exercise of due diligence, may become known to trial counsel. R.M.C. 701(c).

In accordance with M.C.R.E. 505, the Government in AE 092 properly claimed a privilege over certain classified materials. In AE 091A/AE 092Q, this Commission properly ordered the protection of said classified information on 4 June 2014. This redacted order was provided to the defense on 1 September 2016 in AE 092W. The Government provided one additional fact on 22 December 2016 in AE 92AA, relevant only to a delay to produce this order to the Defense. Providing this additional fact, however, does not warrant an evidentiary hearing nor require the production of “names,” “supporting documentation,” or “written communications” surrounding this fact under the above stated rules of production. Therefore, the Government respectfully declines to produce any further information regarding the matters set forth in AE 092AA.

Respectfully submitted,

//s//

Mark A. Miller
Trial Counsel

ATTACHMENT

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

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL-RAHIM HUSSEIN MUHAMMED ABDU AL-NASHIRI</p>	<p>AE 092HH</p> <p>DRAFT ORDER</p> <p>Defense Motion to Compel Production of Discovery Materials Related to AE 092AA</p> <p>25 January 2017</p>
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1. The defense submitted a discovery request regarding the prosecution's filing in AE 092AA to the government on 3 January 2017.
2. On 13 January 2017, the prosecution responded to the defense's discovery request and declined to produce any further information regarding the matters set forth in AE 092AA.
3. On 25 January 2017, the defense filed AE 092HH, Defense Motion to Compel Production of Discovery Materials Related to AE 092AA.
4. The defense now seeks the Commission's assistance to order the prosecution to produce the discovery materials contained in the defense's discovery request and the defense's motion in AE 092HH.
5. The defense Motion to Compel is **GRANTED**.
6. The prosecution is hereby ordered to produce the requested discovery materials related to AE 092AA.

So **ORDERED** this ___ day of January, 2017.