

UNCLASSIFIED//FOR PUBLIC RELEASE  
**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY**

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED  
ABDU AL-NASHIRI

AE 327C

**DEFENSE MOTION TO  
COMPEL WITNESSES TO  
TESTIFY AT THE HEARING  
ON AE327:**

**DEFENSE MOTION TO  
SUPPRESS CUSTODIAL  
STATEMENTS MADE BY MR.  
JAMAL AL- BADAWI**

18 March 2015

- 1. Timeliness:** This request is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and is timely pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.c.(1).
- 2. Relief Requested:** The defense respectfully requests that the Commission compel the production of the witnesses identified in paragraph 5 of this motion. The defense recognizes that, according to a prior ruling of this Commission, there is no authority to compel production for live testimony from Naval Station Guantanamo.<sup>1</sup> Thus, we leave it to the discretion of the Commission as to where the witnesses will be directed to testify, but express a strong preference for live testimony from the courtroom in Naval Station Guantanamo.
- 3. Overview.** The prosecution in AE 166/166A/166B/166C has sought to admit over 80 hearsay statements before this Commission. Specifically, the prosecution has provided notice that it intends to offer the hearsay custodial statements of Mr. Jamal Al-Badawi made between [REDACTED]

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<sup>1</sup> The defense does not concede that the Commission is correct in its prior ruling.

██████████ The defense challenged the admissibility of the aforementioned hearsay statements in AE327. The defense now seeks the assistance of the Commission in obtaining the production of the witnesses identified by the defense as relevant and necessary to the presentation of its case regarding Mr. Al-Badawi's custodial hearsay statements.

**4. Burden of Proof and Persuasion:** As the moving party, the defense bears the burden on this motion. R.M.C. 905(c). Denial of this motion will violate the defendant's rights guaranteed by the Fifth, Sixth and Eighth Amendments to the Constitution of the United States of America, the Military Commissions Act (MCA) of 2009, the Detainee Treatment Act (DTA) of 2005, treaty obligations of the United States and fundamental fairness.

**5. Facts:**

a. On 1 March 2015, the defense submitted a request for the following witnesses in accordance with R.M.C. 703 (Attachment B):

FBI SA ██████████  
 NCIS SA Robert McFadden  
 FBI SA ██████████  
 FBI SA Andrew Emley

b. These witnesses were all directly involved with the taking of the custodial statement of Mr. Al-Badawi from ██████████

c. FBI Special Agent ██████████ and (former) NCIS SA Robert McFadden will be present to testify at the hearing on AE166 *et seq*/AE319<sup>2</sup>. All four witnesses were requested by the defense in AE319G.

d. As the Commission noted during the 3 March 2015 hearing, this matter can be litigated in conjunction with the AE166 hearings. At the same hearings, the defense noted that

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<sup>2</sup> At one point the government had agreed to produce FBI Special Agent Andrew Emley. The government then "switched" him with (former) NCIS Special Agent Kenneth Reuwer. The defense was not provided any justification for this change.

when the requested witnesses were called as prosecution witnesses for the AE166 matters, a separate line of questioning could be conducted at that time regarding the AE327 suppression motion, in order to promote efficiency. Unofficial Transcript at 5991.

e. On 17 March 2015, the prosecution verbally informed the defense that it is opposed to production of the requested witnesses.

**6. Argument:**

The defense is requesting production of all witnesses listed in paragraph 5(a) of this motion. Under R.M.C. 701(j), “[e]ach party shall have adequate opportunity to prepare its case and no party may unreasonably impede access of another party to a witness or evidence.” The government’s refusal to produce these witnesses is an unreasonable, indeed unlawful impediment to the accused’s ability to present evidence.

Between 2002 and 2006, agents of the United States tortured Mr. Al-Nashiri while he was in their custody. The information obtained by Mr. Al-Nashiri’s torture was then shared with law enforcement agents, who subsequently re-questioned Mr. Al-Badawi in 2007 in Yemen. Mr. Al-Badawi had previously provided a statement to U.S. law enforcement, but armed with the information from Mr. Al-Nashiri’s torture, sought out another statement. SA [REDACTED] NCIS SA McFaddin, SA [REDACTED] and SA Emley were all involved in the questioning of Mr. Al-Badawi in Yemen over the course of several days from [REDACTED]. During this interrogation, the aforementioned witnesses used the information they learned from statements derived from torture, specifically the torture statements of Mr. Al-Nashiri, to confront Mr. Al-Badawi. Using this information they were able to create Mr. Al-Badawi’s new 2007 custodial hearsay statement which was noticed by the prosecution as evidence in AE166.

Furthermore, at the time of the 2007 custodial interview, Mr. Al-Badawi had been in Yemeni custody for almost seven years, except for the time he had escaped. It is no secret that the Yemeni government, in particular the organization that oversaw Mr. Al-Badawi's confinement, used coercive methods to obtain statements. These Yemeni officials were present in 2007 when U.S. law enforcement agents re-questioned Mr. Al-Badawi.

Mr. Al-Badawi's 2007 hearsay statement did not come about in a vacuum; it was derived from the 2002 torture of Mr. Al-Nashiri and Mr. Al-Badawi's own conditions of confinement. Not only is the 2007 statement unreliable for the reasons set forth in the defense's challenge set forth in AE319, this coerced statement is inadmissible as the derivative product of the torture of Mr. Al-Nashiri. In its response to AE327, the prosecution has denied that an evidentiary hearing is needed. Essentially, the prosecution's position is that the defense has not met an "initial burden," thus an evidentiary hearing on the matter is not necessary. However, this novel position is directly contradicted by statute, rules, and case law that control the matter. As discussed in AE327B, once the voluntariness of a statement has been challenged, an evidentiary hearing is required and the burden is on the prosecution to demonstrate its admissibility. The defense must be presented the opportunity to call witnesses to support its motion and build a record these witnesses are necessary to evaluating the admissibility of Mr. Al-Badawi's 2007 statement, both under the rules of hearsay and the rules of evidence related to the use of torture and coercion.

Each witness can testify about the circumstances of the detention and incarceration of Mr. Al-Badawi, as well as circumstances related to the interrogation itself. Further, the agents can all testify as to what information they each reviewed prior to the interrogation of Mr. Al-Badawi and how they used that information to create the 2007 statement from Mr. Al-Badawi. Because these agents were all involved in an event that occurred several years ago, each witness is likely to

have a different memory and add a different bit of information that will be relevant in determining the admissibility of the hearsay statement from Mr. Al-Badawi. The prosecution has indicated it would only call SA McFadden and SA [REDACTED] to testify at an evidentiary hearing, but SA Emley and SA [REDACTED] are likewise relevant witnesses on this matter. In defense interviews, SA McFadden repeatedly indicated his lack of independent memory of these events due to the lapse of time. More specifically, SA McFadden's testimony will rely heavily on the 302s and his notes. The testimony of SA Emley and SA [REDACTED] is not cumulative as each agent will be able to provide their unique recollection and testimony regarding the 2007 statement. This information is highly relevant in determining whether or not the statement from Mr. Al-Badawi is the product of torture, derived from torture, or in any way voluntary. The defense must present these witnesses to make an adequate record for the Commission and for appellate review.

The prosecution's objection to permitting these witnesses to testify at an evidentiary hearing on this matter is further undermined by the fact that there will already be an evidentiary hearing on the statement of Mr. Al-Badawi because the prosecution seeks to introduce his hearsay statement as part of AE 166. The defense is merely asking for a separate line of questioning for witnesses who will already be present in order to determine, in addition to the reliability of the statement, if it is derived from the use of torture and free from coercion. The defense requests that all of these witnesses be produced and testify from the witness stand in the courtroom in Naval Station Guantanamo in relation to this matter as they testify about other AE166 matters.<sup>3</sup>

**7. Oral Argument:** The defense requests oral argument on this motion.

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<sup>3</sup> The defense we acknowledges the Commission's prior ruling that would allow for testimony by VTC and would accept remote testimony if the alternative no is testimony at all.

8. **Witnesses:** None.
9. **Conference with Opposing Counsel:** The defense has conferred with the prosecution, which opposes this motion.
10. **List of Attachments:**
  - A. Certificate of Service, dated 18 March 2015
  - B. Defense R.M.C. 703 Request for Witnesses, dated 1 March 2015 (4 pages)

Respectfully submitted,

/s/ Brian Mizer  
BRIAN L. MIZER  
CDR, JAGC, USN  
*Assistant Detailed Defense Counsel*

/s/ Allison Danels  
ALLISON C. DANELS, Maj, USAF  
*Assistant Detailed Defense Counsel*

/s/ Thomas Hurley  
THOMAS F. HURLEY, MAJ, USA  
*Assistant Detailed Defense Counsel*

/s/ Daphne Jackson  
DAPHNE L. JACKSON, Maj, USAF  
*Assistant Detailed Defense Counsel*

/s/ Richard Kammen  
RICHARD KAMMEN  
*DOD Appointed Learned Counsel*

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

# ATTACHMENT

# A

**CERTIFICATE OF SERVICE**

I certify that 18 March 2015, I electronically filed the forgoing document with the Clerk of the Court and served the foregoing on all counsel of record by e-mail.

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



# ATTACHMENT

# B



**DEPARTMENT OF DEFENSE  
OFFICE OF THE CHIEF DEFENSE COUNSEL  
OFFICE OF MILITARY COMMISSIONS**

1 March 2015

From: Jennifer L. Pollio, LCDR, JAGC, USN, Assistant Detailed Military Counsel  
To: Justin Sher, Trial Counsel

Subj: REQUEST FOR PRODUCTION OF WITNESSES IN ACCORDANCE WITH R.M.C  
703 ICO *UNITED STATES v. AL-NASHIRI*.

Ref: (a) 10 U.S.C. § 949j  
(b) R.M.C. 701(j)  
(c) R.M.C. 703(c)(2)(A)

1. Per R.M.C. 703(c)(2)(A), the defense requests that the government produce the below witness at the hearing on AE 327 (Defense Motion to to Suppress Custodial Statements Made by Mr. Jamal Al-Badawi to Federal Law Enforcement Agents between [REDACTED] as Required by 10 U.S.C. §948r and the Fifth Amendment)<sup>1</sup>:

SA [REDACTED] In his capacity as a Special Agent with the FBI, SA [REDACTED] questioned Mr. Al-Badawi over the course of several days from [REDACTED] Prior to this questioning, SA [REDACTED] had access to the information obtained by the torture of Mr. Al-Nashiri between 2002-2006. This information was then used by SA [REDACTED] when questioning Mr. Al-Badawi in 2007. When called as a witness, SA [REDACTED] will testify to the following<sup>2</sup>: After obtaining information from Mr. Al-Nashiri through the use of torture, U.S. law enforcement agents desired to re-question Mr. Al-Badawi. Although Mr. Al-Badawi provided a statement previously, the new torture information obtained from Mr. Al-Nashiri contradicted Mr. Al-Badawi's previous statement. U.S. law enforcement officials reviewed the information provided by Mr. Al-Nashiri prior to re-questioning Mr. Al-Badawi. During the course of the [REDACTED] questioning, SA [REDACTED] and other U.S. law enforcement officials used the information from Mr. Al-Nashiri to obtain a new statement from Mr. Al-Badawi. The information obtained from Mr. Al-Nashiri, information that was obtained through the use of torture, was integral to the production of Mr. Al-Badawi's [REDACTED] statement. SA [REDACTED] testimony, as one of the main FBI interrogators, is relevant and necessary to the defense on any hearing regarding evidence obtained from Mr. Al-Badawi in 2007. SA [REDACTED] testimony is material to demonstrating the underlying information used to produce the 2007 statement of Mr. Al-Badawi. SA [REDACTED] testimony is highly relevant and material to the defense for these matters.

<sup>1</sup> AE 327 is currently docketed to be argued at the hearing scheduled for 23 February to 6 March 2015; however, it is the defense position that in order to efficiently and effectively litigate this matter, any requests for witnesses/evidence must be submitted and responded to prior to the commencement of the February hearing.

<sup>2</sup> This list of questions is not exhaustive. In fact, it is a mere sampling of the information the defense would elicit from SA [REDACTED]. Nothing in the regulation requires the defense to provide the verbatim testimony of the requested witness. Based on the proffer by the defense, the government has been put on notice as to the subject matter with specificity of SA [REDACTED] testimony in order to grant the requested relief.

**SA Robert McFadden:** In his capacity as a Special Agent with the NCIS, SA McFadden questioned Mr. Al-Badawi over the course of several days from [REDACTED]. Prior to this questioning, SA McFadden had access to the information obtained by the torture of Mr. Al-Nashiri between 2002-2006. This information was then used by SA McFadden when questioning Mr. Al-Badawi in 2007. When called as a witness, SA McFadden will testify to the following<sup>3</sup>: After obtaining information from Mr. Al-Nashiri through the use of torture, U.S. law enforcement agents desired to re-question Mr. Al-Badawi. Although Mr. Al-Badawi provided a statement previously, the new torture information obtained from Mr. Al-Nashiri contradicted Mr. Al-Badawi's previous statement. U.S. law enforcement officials reviewed the information provided by Mr. Al-Nashiri prior to re-questioning Mr. Al-Badawi. During the course of the [REDACTED] questioning, SA McFadden and other U.S. law enforcement officials used the information from Mr. Al-Nashiri to obtain a new statement from Mr. Al-Badawi. The information obtained from Mr. Al-Nashiri, information that was obtained through the use of torture, was integral to the production of Mr. Al-Badawi's [REDACTED] statement. SA McFadden's testimony, as one of the main U.S. law enforcement interrogators, is relevant and necessary to the defense on any hearing regarding evidence obtained from Mr. Al-Badawi in 2007. SA McFadden's testimony is material to demonstrating the underlying information used to produce the 2007 statement of Mr. Al-Badawi. SA McFadden's testimony is highly relevant and material to the defense for these matters. As these interrogations occurred years ago, SA McFadden is not cumulative to any other agent. Each agent's separate memories and distinct testimony are relevant and necessary.

SA [REDACTED] In his capacity as a Special Agent with the FBI, SA [REDACTED] questioned Mr. Al-Badawi over the course of several days from [REDACTED]. Prior to this questioning, SA [REDACTED] had access to the information obtained by the torture of Mr. Al-Nashiri between 2002-2006. This information was then used by SA Fernandez when questioning Mr. Al-Badawi in 2007. When called as a witness, SA [REDACTED] will testify to the following<sup>4</sup>: After obtaining information from Mr. Al-Nashiri through the use of torture, U.S. law enforcement agents desired to re-question Mr. Al-Badawi. Although Mr. Al-Badawi provided a statement previously, the new torture information obtained from Mr. Al-Nashiri contradicted Mr. Al-Badawi's previous statement. U.S. law enforcement officials reviewed the information provided by Mr. Al-Nashiri prior to re-questioning Mr. Al-Badawi. During the course of the [REDACTED] questioning, SA [REDACTED] and other U.S. law enforcement officials used the information from Mr. Al-Nashiri to obtain a new statement from Mr. Al-Badawi. The information obtained from Mr. Al-Nashiri, information that was obtained through the use of torture, was integral to the production of Mr. Al-Badawi's [REDACTED] statement. SA [REDACTED] testimony, as one of the main FBI interrogators,

<sup>3</sup> This list of questions is not exhaustive. In fact, it is a mere sampling of the information the defense would elicit from SA McFadden. Nothing in the regulation requires the defense to provide the verbatim testimony of the requested witness. Based on the proffer by the defense, the government has been put on notice as to the subject matter with specificity of SA McFadden's testimony in order to grant the requested relief.

<sup>4</sup> This list of questions is not exhaustive. In fact, it is a mere sampling of the information the defense would elicit from SA [REDACTED]. Nothing in the regulation requires the defense to provide the verbatim testimony of the requested witness. Based on the proffer by the defense, the government has been put on notice as to the subject matter with specificity of SA [REDACTED] testimony in order to grant the requested relief.

is relevant and necessary to the defense on any hearing regarding evidence obtained from Mr. Al-Badawi in 2007. SA [REDACTED] testimony is material to demonstrating the underlying information used to produce the 2007 statement of Mr. Al-Badawi. SA [REDACTED] testimony is highly relevant and material to the defense for these matters. As these interrogations occurred years ago, SA [REDACTED] is not cumulative to the other agents requested. Each agent's separate memories and distinct testimony are relevant and necessary.

**SA Andrew Emley:** In his capacity as a Special Agent with the FBI, SA Emley questioned Mr. Al-Badawi over the course of several days from [REDACTED]. Prior to this questioning, SA Emley had access to the information obtained by the torture of Mr. Al-Nashiri between 2002-2006. This information was then used by SA Emley when questioning Mr. Al-Badawi in 2007. When called as a witness, SA Emley will testify to the following<sup>5</sup>: After obtaining information from Mr. Al-Nashiri through the use of torture, U.S. law enforcement agents desired to re-question Mr. Al-Badawi. Although Mr. Al-Badawi provided a statement previously, the new torture information obtained from Mr. Al-Nashiri contradicted Mr. Al-Badawi's previous statement. U.S. law enforcement officials reviewed the information provided by Mr. Al-Nashiri prior to re-questioning Mr. Al-Badawi. During the course of the [REDACTED] questioning, SA Emley and other U.S. law enforcement officials used the information from Mr. Al-Nashiri to obtain a new statement from Mr. Al-Badawi. The information obtained from Mr. Al-Nashiri, information that was obtained through the use of torture, was integral to the production of Mr. Al-Badawi's [REDACTED] statement. SA Emley's testimony, as one of the main FBI interrogators, is relevant and necessary to the defense on any hearing regarding evidence obtained from Mr. Al-Badawi in 2007. SA Emley's testimony is material to demonstrating the underlying information used to produce the 2007 statement of Mr. Al-Badawi. SA Emley's testimony is highly relevant and material to the defense for these matters. As these interrogations occurred years ago, SA Emley is not cumulative to any other agent. Each agent's separate memories and distinct testimony are relevant and necessary.

2. As noted under R.M.C. 701(j), "[e]ach party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence." If the prosecution intends to deny this request in whole or in part, please provide to the defense the denial as soon as possible, so that the defense may file a motion with the Commission.

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

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<sup>5</sup> This list of questions is not exhaustive. In fact, it is a mere sampling of the information the defense would elicit from SA Emley. Nothing in the regulation requires the defense to provide the verbatim testimony of the requested witness. Based on the proffer by the defense, the government has been put on notice as to the subject matter with specificity of SA Emley's testimony in order to grant the requested relief.

I certify that this request was served on the prosecution on 1 March 2015.

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