MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI	**AE 354A** **Government Response** To Defense Motion To Abate Proceedings Due to Destruction of Evidence: Video Tapes of Mr. Al-Nashiri's Interrogations 27 July 2016

1. Timeliness

The government timely files this response pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.d.(1).

2. Relief Sought

The government respectfully requests that the Commission deny the defense motion to abate proceedings.

3. Overview

R.M.C. 703(f)(2) allows a military judge to grant a continuance, an abatement, or other relief where an accused demonstrates that lost or destroyed evidence was of such central importance that it was essential to a fair trial; there was no adequate substitute for the lost or destroyed evidence; and the loss or destruction of the evidence was not the fault of nor could have it been prevented by the requesting party. The accused has failed to present facts to support a finding that the destroyed evidence in this case is of central importance or that there is no adequate substitute for it. Moreover, his motion is premature as there is an on-going discovery process that may provide him with adequate evidence to replace the evidence that was destroyed.

Accordingly, the defense motion to abate proceedings should be summarily denied without argument.

4. Burden of Proof

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

5. Facts[1]

In August 2002, terrorist detainee Abu Zubaydah was subjected to enhanced interrogation techniques ("EITs") by the CIA at a black site. Approximately ninety (90) video tapes were made of some of these interrogation sessions. In November 2002, the accused arrived at the same black site and was subjected to EITs by the CIA. Approximately two (2) videotapes were made of interrogations of the accused. These ninety two (92) tapes were destroyed by the CIA in November 2005. Charges were sworn against the accused on 15 September 2011. Charges were referred against the accused on 28 September 2011. The prosecution has not located any copies of these tapes nor has it received any information, credible or otherwise, that any copies exist.

The discovery process in this matter is continuing. Pursuant to the order issued under AE 120AA on 24 June 2014, the prosecution is required to provide the accused discoverable information falling within the following categories of 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] The government contests some of the factual allegations in the brief of the accused. Given the applicable legal analysis in this matter, however, it is not necessary to resolve those factual disputes as many are not germane to the issue presented. The government believes those facts outlined in its response, which are generally undisputed, are those necessary to apply in order to make an informed decision in this motion.

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, psychologists, 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 10d of the Defense Request for Discovery dated 9 August 2012. (Attachment A of AE 120); 9

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 13d of this order and 5d of AE 120 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 13a of this order and 5a of AE 120 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 13d of this order and 5d of AE 120 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. 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; and,

j. 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.

See AE 120AA at 9-11. Viewed in their totality, these provisions require the government to provide extensive material regarding the use of EITs, including the identity of any persons who had "direct and substantial" contact with the accused at any black site. The release of this information is subject to the provisions of 10 U.S.C. § 949p-1 *et seq.* and R.M.C. 505 and R.M.C. 701(f). *See also* AE 120AA at 6, 11. This process, like the discovery process, is on-going.

6. Law and Argument

The accused seeks, in addition to the dismissal of the death penalty notice, yet another abatement of the proceedings. *See* AE 354 at 1.[2] He cites R.M.C. 703(f)(2) as a basis for his present request. A review of those provisions, as well as applicable precedent, reveals that they do not support the granting of an abatement.

R.M.C. 703 addresses the "[p]roduction of witnesses and evidence" in military commissions. R.M.C. 703(f)(1) mandates that "subject to § 949j(c) and R.M.C. 701, each party is entitled to the production of evidence which is relevant, necessary and noncumulative." R.M.C. 703(f)(2) provides:

[2] The accused cites R.M.C. 703(f)(2) as the basis for the relief sought. This rule allows a military judge to order a continuance or abatement, or order some other remedy in an attempt to obtain production of the evidence. It does not allow a court to dismiss charges or prevent the government from seeking the death penalty. *See United States v. Simmermacher*, 74 M.J. 196, 201 (C.A.A.F. 2015) ("The 'other relief' language in R.C.M. 703(f)(2) is clearly applicable only to the military judge's attempt to produce the missing evidence and does not grant the military judge broad discretion to fashion a remedy for violation of the rule.").

(2) Unavailable evidence.

> (A) Notwithstanding subsection (f)(1) of this rule, a party is not entitled to the production of evidence that is destroyed, lost, or otherwise not subject to compulsory process. However, if such evidence is of such central importance to an issue that is essential to a fair trial and if there is not adequate substitute for such evidence, the military judge may grant a continuance or other relief in order to attempt to produce the evidence.
>
> (B) If a continuance under paragraph (A) cannot or does not result in the production of evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party.

Identical provisions, which are contained in R.C.M. 703(f)(2), were recently reviewed by the Court of Appeals for the Armed Forces (C.A.A.F.) in *United States v. Simmermacher*, 74 M.J. 196 (C.A.A.F. 2015).[3] In *Simmermacher*, the C.A.A.F. overturned prior precedent and held that the constitutional principles surrounding lost or destroyed evidence set forth in *California v. Trombetta*, 467 U.S. 479, 488-89 (1984), and *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988), were not incorporated into R.C.M. 703(f). 74 M.J. at 199.[4] Instead, the C.A.A.F, based on the plain language of the statute, held that application of R.C.M. 703(f)(2) and the granting of relief under its provisions involved satisfaction of a three prong test:

1. The lost or destroyed evidence was of such central importance that it was essential to a fair trial;
2. There was no adequate substitute for the lost or destroyed evidence; and

[3] The judicial construction and application of the U.C.M.J., while instructive, are not binding on military commissions. 10 U.S.C. § 948b(c).

[4] The accused, in the fact section of his brief, recites various factual circumstances whose only relevance arguably goes to the motivation of the person who destroyed the videotapes. As the holdings of *Trombetta* and *Youngblood* are specifically not incorporated into R.C.M. 703(f)(2), those factual circumstances are irrelevant to deciding this motion.

3. The loss or destruction of the evidence was not the fault of nor could have it been prevented by the requesting party.

Id. at 200-01 & n.4. Thus, the accused, in this case, must satisfy all three prongs before a court may continue or abate the proceedings under Rule 703(f)(2*). Id.* at 201 n.5.

While in *Simmermacher* the C.A.A.F. did not incorporate *Trombetta* or *Youngblood* into R.C.M. 703(f), the Court did emphasize that the evidence had been possessed by the government and that the government was negligent in its destruction. *Id.* at 200.[5] Additionally, the opinion noted that it had granted review of the following question:

> When *the government destroys evidence* essential to a fair trial, the Rules for Courts–Martial require the military judge to abate the proceedings. *Here, the government negligently destroyed* the sole piece of evidence that provided the basis for Appellant's conviction prior to both the referral of charges and the assignment of defense counsel. Should the military judge have abated the proceedings?

Id. at 197 n.1 (emphases added). These two factors, when viewed together, reveal that the C.A.A.F. in *Simmermacher* was deeply concerned with the government's possession of the evidence and its subsequent negligent handling of it.

In *Simmermacher,* the C.A.A.F did not explore the meaning of the term "lost or destroyed evidence." Thus, it is unclear whether the provisions of R.M.C. 703(f)(2) apply to a situation, like the present, where the items, identified later as evidence, were possessed by a third party or a law enforcement agency and were destroyed prior to any investigation or charges. The video tapes, unlike the samples in *Simmermacher* and *Madigan*, 63 M.J. 118 (C.A.A.F. 2006), were

[5] The opinion stated, "We see no meaningful distinction between the situation in [*United States v. Manuel*, 43 M.J. 282, 288 (C.A.A.F. 1995)] and the situation presented in this case. In both cases the government was negligent in destroying the samples prior to a timely request for a retest, the samples were the sole evidence of drug use, the accused denied using cocaine and had no explanation for the positive results, and the nanogram levels were close to the DOD cutoff." 74 M.J. 201-202.

never "evidence" in the sense that no investigator or prosecutor possessed them and their potential evidentiary value in *this case* was not appreciated prior to their destruction. The video tapes were compiled and possessed at a time long before a prosecution of the accused was seriously contemplated and no military commission had been convened at the time they were destroyed. Their destruction, as the accused highlights in his motion, was done for reasons unrelated to this case. *See* AE 354 at 10 (stating that destruction was done to protect CIA from "ugly visuals" and citing excerpt of "Hard Measures" by former CIA employee Jose Rodriguez, Jr.). Given the remedial purposes of R.M.C. 703(f)(2), it seems likely that Rule 703(f)(2) was not meant to address circumstances like the present that are more properly addressed by seeking alternative evidence though normal investigatory or discovery channels.

I. The destroyed evidence is not of such central importance to an issue that is essential to a fair trial

The first prong of the test requires the accused to show that the destroyed evidence is of such central importance that it is essential to a fair trial. His pleading fails to provide adequate factual averments to satisfy this prong. The destroyed evidence in both *Simmermacher* and *Madigan* was the only evidence of their guilt. In the present case, the tapes of the interrogations are only one type of proof of a fact relevant to the central issue identified by the accused, which is the effect of EITs during interrogations on the voluntariness of his clean team statement. Critically, there is no dispute that he and Abu Zubaydah were subjected to EITs, and there is ample other evidence available to him to support this fact. The tapes would simply have been additional proof of an undisputed fact. The inability to use the tapes does not hinder the accused from presenting other evidence of the use of EITs and arguing that their use undercuts the reliability and voluntariness of his clean team confession. As such, the tapes are simply not of central importance to an issue that is essential to a fair trial.

II. The accused is able to obtain an adequate substitute for the lost or destroyed evidence

The second prong requires a showing that there is no adequate substitute for the lost or destroyed evidence. Again, the accused fails to satisfy this prong as he is able to obtain an adequate substitute by other reasonable and available means. *See Trombetta*, 467 U.S. at 489; *see also United States v. Tyerman*, 701 F.3d 552, 560 (8th Cir. 2012); *United States v. Bingham*, 653 F.3d 983, 994 (9th Cir. 2011); *United States v. Revolorio-Ramo*, 468 F.3d 771, 774-775 (11th Cir. 2006). As more fully discussed in the next section of this response, the on-going discovery process has or will provide the accused with significant amounts of evidence regarding EITs. This evidence will allow him to make a full presentation of the EITs in this case. For example, the accused can present statements obtained from persons present during the EITs which describes what occurred; he can present evidence of other detainees subjected to the EITs, and he can present documentary evidence describing the techniques.

III. The loss or destruction of the evidence was not the fault of, nor could have it been prevented by, the requesting party[6]

While it conceded that the accused was not involved in the destruction of the evidence, it must be noted that neither was the prosecution. The destruction of the video tapes was done by the CIA for reasons unrelated to this case. The CIA is not a law enforcement or police agency; it is an intelligence organization. It is charged not with the suppression of criminality or the investigation and prosecution of persons suspected of violating penal laws. Instead, it is charged with conducting and overseeing the intelligence activities and efforts of the United States. The

[6] The inquiry of whether the accused could not have prevented the destruction of the evidence seems particularity out of place given that the evidence was destroyed before an investigation had commenced, a prosecutor assigned, charges referred, or a military commission convened. This requirement instead suggests, that the intent of R.M.C. 703(f)(2) was to address situations where the government mishandled or lost critical evidence or where the government was in possession of evidence that an accused wished to preserve or use a trial.

prosecution is not responsible for the destruction of evidence held by persons or entities of non-law enforcement entities which are not prosecution team members. *See, e.g.*, *United States v. Hughes*, 211 F.3d. 676, 689 (1st Cir. 2000); *United States v. Vap*, 852 F.2d 1249, 1256 (10th Cir. 1988).[7]

IV. The Motion of the Accused is Premature

Most importantly, the motion of the accused is premature because he cannot assert that no adequate substitutes exist. A discovery process is in place that requires broad disclosures by the government to the accused regarding the issue of the use of EITs. In addition to the standard discovery obligations found in R.M.C. 701 and 703 and 10 U.S.C. § 949j and the constitutional mandates found in *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), the military judge has entered an order requiring extensive discovery surrounding the use of EITs. *See* AE 120AA at 9-11. This on-going process will ensure that the accused has the tools to effectively present evidence of the use of EITs that he believes is relevant to the issue of the reliability and voluntariness of his statements. *See* R.M.C. 701(a)(5) (providing that discovery obligations are continuing in nature). If, at the end of the discovery process, he is convinced that he is entitled to relief, he may renew his motion pursuant to R.M.C. 703(f)(2) or

[7] The accused's motion is devoid of any evidence that would support the notion that the CIA, a non-law enforcement agency, or Jose Rodriguez, a CIA intelligence officer, possessed knowledge of the potential value of the evidence in November 2005. Likewise, there is no evidence that they were involved in the criminal investigation of the accused, that there was an active investigation of the accused or that any federal law enforcement official had reached a firm decision to pursue prosecution of the accused. Courts have recognized that the prosecution team is not the entire United States Government and, contrary to the suggestion of the accused, is only responsible for the actions and investigatory knowledge of team members. *See, e.g.*, *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996) (concluding no *Brady* violation where prosecutor unaware of exculpatory evidence possessed by Office of Thrift Supervision, SEC and IRS because agencies not part of investigation or prosecution team); *United States v. Velte,* 331 F.3d 673, 680 (9th Cir. 2003) (finding no *Brady* violation where prosecutor unaware of weather station's humidity report in forest fire case because weather station not "acting on the government's behalf").

seek additional sanctions under *Trombetta* and *Youngblood*. Accordingly, the defense motion to abate proceedings should be denied without argument.

7. Conclusion

An abatement or a continuance is not justified in this matter. The accused has failed to allege facts sufficient to justify another continuance or abatement. In the first instance, he has failed to meet the three-prong test established in *Simmermacher*. Second, the evidence under consideration is not lost; the tapes were destroyed, and a continuance or abatement will not change this circumstance. Instead, it will simply unnecessarily prolong this prosecution. The clear intent of R.M.C. 703(f)(2) is to afford an accused an avenue to remediate situations where the government possessed an item of evidence but lost or destroyed it without requiring the accused to prove bad faith on the part or law enforcement. *Simmermacher*, 74 M.J. at 201.[8] The present situation is very different from *Simmermacher* and deserves a different result. The video tapes were compiled and possessed at a time long before a prosecution of the accused was seriously contemplated and no military commission had yet been convened.

The motion is also premature. A discovery process is in place which will provide the accused with adequate substitutions so that he can present his position in a complete and cogent manner. If, at the end of the discovery process, he is convinced that he is entitled to relief, he may renew his motion or seek additional sanctions. Accordingly, the defense motion to abate proceedings should be summarily denied without argument.

[8] R.M.C. 703(f)(2) also appears to address situations where the evidence is possessed by third parties and cannot be obtained by compulsory process. *See* R.M.C. 703(f)(1). In these situations, presumably the evidence is in existence and additional time is necessary for attempts to obtain that evidence.

8. Oral Argument

Although the accused has requested oral argument in this matter, it is respectfully suggested that this Commission dispense with oral argument as the legal positions of the parties are adequately presented in the pleadings and argument would not add to the decisional process. *See* Military Commissions Trial Judiciary Rule of Court 3.9(a). However, if the Commission grants oral argument to the defense, the government requests an equal opportunity to respond.

9. Witnesses and Evidence

The government does not intend to rely on witnesses or evidence in support of this response.

10. Additional Information

The government has no additional information.

11. Attachment

a. Certificate of Service, dated 27 July 2016.

Respectfully submitted,

//s//
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ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 27th day of July 2016, I filed AE 354A, Government Response To Defense Motion To Abate Proceedings Due to Destruction of Evidence: Video Tapes of Mr. Al-Nashiri's Interrogations, with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

//s//

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