

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

P 004

ON RECONSIDERATION  
RULING ON MOTION FOR STAY AND  
FOR ACCESS  
TO HIGH VALUE DETAINEES

14 March 2008

After a hearing on 7-8 February 2008, the Commission granted a Defense Motion for access to certain High Value Detainees (HVDs). The Commission ordered the Government to permit the Defense to submit written questions, passed through a Government Security Officer and Linguist, so the Defense's questions and the detainees' answers could be reviewed for classified material without disclosing the exchange to the Prosecution. The Government filed a request to stay implementation of that order, and a Motion for Reconsideration. This Ruling addresses both Government Motions. The Government argues that the Ruling is premised on an incorrect legal standard (RMC 701); that access to the HVDs is not warranted under the correct legal standard (RMC 703); that the Ruling is unfair and does not permit the Government to adequately protect classified information; and that the Ruling fails to account for complications created by criminal charges later preferred against four of the HVDs. The Defense opposes both Motions.

Legal Standard for Access to Witnesses

The Government objects to the Commission's reliance on RMC 701, which controls pre-trial discovery, and argues that access to these detainees should be governed by RMC 703, which addresses the production of witnesses and evidence at trial.

The Commission sees these initial "interviews" of witnesses with potentially exculpatory evidence as part of the process of discovery, and as an element of the "adequate opportunity" to prepare its case assured by RMC 701(l). Thus, the Commission is not persuaded by the Government's argument that 10 U.S.C. §949j(a) and RMC 703 control. After the Defense has determined what, if anything, these witnesses will say, it may seek to compel their production at trial. Should that occur, the Defense will have to provide a "synopsis of the expected testimony sufficient to show the relevance and necessity" of each witness's testimony, as required by RMC 703.

In addition, the Government invites the Commission's attention to *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), *Giakoumelos v. Coughlin*, 88 F. 3d 56 (2<sup>nd</sup> Cir 1996) and *United States v. Grant*, 256 F. Supp. 2d 236, 243-244 (D. Del 2003) for the proposition that detainees should not have access to potentially exculpatory witnesses under the circumstances in this case. None of these cases is persuasive. In *Valenzuela-Bernal*, the Supreme Court upheld the defendant's conviction for transporting aliens within the United States, even though two of the three aliens he transported had been deported, and were not available to testify in defendant's trial. Because the defendant had not given a "plausible explanation" of how these witnesses might have helped him, he could not show any prejudice from their unavailability. *Giakoumelos* was a federal civil rights action challenging a New York State decision upholding an

administrative punishment awarded in a prison-discipline hearing for attempted escape. It is true that the Second Circuit upheld the State's refusal to identify another prisoner who had informed against the accused, but the Court also noted the lesser standards of proof and due process applicable at prison discipline procedures, and observed that "At each stage of the case . . . [Giakoumelos]'s defenses and claims have been defeated by evidence to which he has had no access." 88 F. 3d 56, 63. The possibility of convictions based on evidence to which detainees had not had access was among the concerns that led the Supreme Court to reject Military Commissions in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2787 (2006). *Grant* moved for disclosure of the identify of a confidential informant because "it could lead to exculpatory information." The Court held that "[b]ecause Defendants have not shown a likelihood that disclosure would lead to exculpatory evidence, the Court concludes that *Brady* does not mandate disclosure of the CI's identity in the instant case" 256 F. Supp. 2d 243. What is instructive about these cases is the standard the Courts have applied for defense requests for access to witnesses: "likelihood" and "plausible explanation." In *United States v. Moussaoui*, 382 F. 3d 453 (4<sup>th</sup> Cir. 2004) the Court was satisfied by a "plausible showing."

The Commission concludes that the Government's authorities are not persuasive that the Defense should not be able, even under the restrictive limits the Commission has established, to determine whether any of these witnesses can provide exculpatory evidence.

#### Access not warranted under the Correct Legal Standard

Having rejected the Government's argument that RMC 703 is the correct legal standard, there is no need to consider the Government's argument that RMC 703 does not warrant access to the HVDs.

#### The Approved System of Interrogatories Does not Allow the Government to Protect Classified Information.

The Government argues that the Commission's system of "interrogatories" does not adequately permit it to protect classified or sensitive information. The Government references the "Hilton Declaration" for the proposition that access to these detainees could lead to serious harm to the National Security. The Government's concerns for the National Security are well taken, and the Commission envisions a process that will protect them. The Commission has circumscribed the permissible areas of questioning, and required a Government Security Officer to review the questions posed to, and the answers provided by, each witness. This adequately protects the Government's interests in preventing the disclosure of classified or sensitive information, as well as the concerns outlined in the Hilton Declaration. If the Government believes other safeguards are necessary, the Commission will entertain a petition for modification of the terms of its Order. The Government asserts that Trial Counsel, and not a Security Officer, are charged with protecting classified information from disclosure. Because the Security Officer will only be providing unclassified responses to the Defense, the Commission does not agree that MCRE 505 is implicated.

The Government argues further that the system of submitting written interrogatories is unfair to it. The Government urges that the Commission require that the questions posed to the

HVDs be open-ended, so as to avoid leading them to give the answers the Defense hopes to receive, and that Government counsel should have an opportunity to comment on the questions. The Commission rejects these arguments.

The Government objects to access to these detainees on the ground that the Commission has “misunderstood” the nature of the charges against Hamdan. Specifically, the Government argues that “The accused is not charged with having foreknowledge of the attacks of September 11<sup>th</sup>, nor is the accused charged with conspiring in or supporting those attacks.” While the Government has not expressly charged the accused with having foreknowledge of the September 11<sup>th</sup> attacks or conspiring in or supporting those attacks, it has charged him with a conspiracy with those who did have foreknowledge and who did plan those attacks, and alleged that he “knew the unlawful purpose” of the agreement and “joined willfully, with the intent to further said unlawful purpose.” The issue of whether the accused was “merely a driver” or knew the unlawful purpose and was actively engaged in the unlawful work of al-Qaeda seems to be very much at issue. It is not unfair to permit the Defense to seek to show that while he may have been a body guard and driver, he knew little or nothing about the inner workings of this conspiracy, or that was not a party to it, if they can.

Finally, the Government raises the specter that one of these High Value Detainees may use their answers to the written interrogatories to surreptitiously convey a message to someone outside the area where they are detained. The Commission will modify its order to address this possibility below.

#### Professional Responsibility

Finally, the Commission did not order access to detainees represented by counsel over the objections of those counsel. The last sentence in the Ruling expressly directed the Defense to determine whether any of the prospective witnesses are represented by counsel and to act accordingly. The Defense reply acknowledges its ethical responsibilities to identify and consult with such counsel and expresses its intent to do so.

#### CONCLUSION AND DECISION

The Motion to Stay is moot, inasmuch as the Commission has now heard and decided the Motion for Reconsideration.

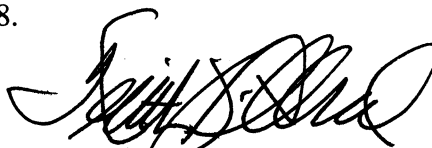
The Motion for Reconsideration is DENIED, but is clarified in these particulars:

1. The Government Security Officer may forward the questions, after his and the Linguist’s review, to other Government Security Officers and authorities in Guantanamo Bay, or to other JTF officers or representatives there who are not aligned with, and who will not communicate with the Prosecution, for delivery to and recovery from the witnesses.
2. The Government may propose additional security measures it considers necessary to protect classified information from disclosure.

3. If the Government Security Officer has procedural questions about implementation of this Order, he shall pose them to the military judge via email to the MCTJ Staff, copy to the parties. The military judge will entertain comments from the parties before giving direction to the Security Officer.

4. If the Security Officer suspects that a detainee is attempting, through his written answer to a question, to communicate some message to a colleague or a confederate, he may delete the detainee's reply to that question entirely, excise the questionable part, or summarize the answer in terms that do not contain any suspect information.

So Ordered this 14<sup>th</sup> day of March, 2008.



Keith J. Allred  
Captain, JAGC, U.S. Navy  
Military Judge