

**Military Commissions:
Military Commission, ISN 10015 Nashiri
December 6–15, 2021**

Hearing Summary:

The December 6–15, 2021, Military Commission hearings for ISN 10015 Nashiri were evenly divided between closed and open sessions.¹ Both sessions included the testimony of several witnesses, discussions of past and recently provided evidence and indices, argument over due process, and completion of the relitigation of rulings vacated by the third circuit court of appeals. Nashiri attended the December 7 session but waived his attendance at all others.

Witness testimony covered two topics: DNA forensics and treatment of PTSD (post-traumatic stress disorder) and TBI (traumatic brain injury).

DNA Forensics

The government intended to show that a sample obtained from a site connected with the *Cole* bombing matched a sample taken from Nashiri at a significant number of genetic loci (genetic markers). The government witnesses discussed the statistically known percentages of samples matching at certain loci and the greater significance that both samples attributed to Nashiri have been run against all samples entered before or since but only match to any significance with each other.

The defense in response proposed running a search of all database samples against each other to demonstrate the probability of any sample matching any other sample at that number of loci. Additionally, the defense witness countered that more recent developments in FBI prerequisites to demonstrate a genetic identity required even greater numbers of matches, as well as studies that had run similar searches of smaller databases and looked at instances of certain numbers of loci matching – without the samples coming from the same or related people.

However, government witnesses testified on the applicability and feasibility of running an “all against all” search of genetic materials in the NDIS/CODIS database, pointing out the illegality of running such a search, as well as the time burden inherently postponing use of the database for other investigations.

Treatment of PTSD and TBI

A defense witness testified on the detainee’s treatment for PTSD (post-traumatic stress disorder) and TBI (traumatic brain injury). The witness discussed the nature of flashbacks that Nashiri has reported and the impact of TBI on motion sickness that the defense team worries is causing him not to fully participate in his own defense. The witness, a general internist who also treats for trauma and torture, lobbied for access to the detainee's physicians and medical records to improve her treatment protocol or recommended treatments for the detainee and to correct what she felt might be medical oversights and over-medication. The government argued against the witness having access to the physicians, in that it would likely interfere with ongoing treatments and possibly allow the detainee to play medical staff against each other. The government also argued that Nashiri’s medical documents have been provided to the defense on a quarterly basis.

The judge did not offer any immediate rulings based on the witness testimony and carefully balanced the numbers of follow-up questions he asked directly of witnesses. In open session, while the

¹ Judicial Watch observer was not in attendance at the December 13, 2021, session.

government’s position on the forensic issue was persuasive, the defense’s argument on detainee’s trauma care seemed reasonable. Both sides indicated further arguments were reserved for closed sessions.

Remaining issues addressed in open court concerned the provision and organization of discovery documents and whether due process could be reasonably argued. The judge directed the government and the defense to discuss the organization of the discovery documents outside of court.

Summary of Witness Testimony:

Three witnesses testified concerning forensic and genetic issues, and one witness testified on trauma as impacting effective participation in defense.

Witness Name, Role, Qualifications	Witness Testimony
<p>Dr. Karl A. Reich:</p> <ul style="list-style-type: none"> • Currently the chief science officer at “Independent Forensics,” an accredited laboratory that tests DNA for forensics and family relationships. • Earned a Bachelor of Science degree in chemistry from Cornell. • Earned a twinned degree in neurobiology from Harvard and molecular biology from UCLA. • Was a Howard Hughes Fellow and worked for Abbott Pharmaceuticals. • Founded Independent Forensics in 2002 but has performed DNA forensics personally since the 1980s. • Has twice qualified as an expert witness in state courts and up to ten times in federal courts; in another answer, he stated he was qualified 135 times total, with 100 being for criminal court, and he was retained by state or federal teams approximately 12 times. • Independent Forensics was accredited by way of an outside agency/company comparing the lab's practices to 	<ul style="list-style-type: none"> • Defined two types of samples: <ul style="list-style-type: none"> ◦ Reference standard – Everything is known about the sample, including the donor, the time taken, the method of collection, and the chain of custody. These are used as a basis for comparison. ◦ Evidentiary – Information about the sample is only gained through comparison to reference samples. These are usually collections on swabs or stains on fabric. • Labs apply the same process to each type of sample, but process samples for comparison at different times and places to avoid confusion or cross-contamination. • Steps in extraction and purification: <ol style="list-style-type: none"> 1. Destroy the cell with chemicals to release DNA. 2. Remove the chemicals and debris. 3. Estimate/measure the amount of recovered DNA. 4. Given the amount of DNA recovered, determine the process for next steps. 5. Amplify the DNA through use of commercial accredited/approved kit. 6. Place DNA in a thermocycler to develop the fragments. 7. Measure amplification through capillary electrophoresis. 8. Display electropherogram for comparison between reference and evidentiary samples. • Amplification kits from 1990-2000 were “Profiler+” and “Cofiler” used in conjunction to develop all 13 markers that the FBI then required. • As of 2017, the FBI began requiring 20 markers for a profile, because not all 13 were equally discriminating.

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<p>FBI lab standards.</p>	<ul style="list-style-type: none"> • Different countries choose different markers; FBI expanded the marker requirement partially to facilitate international searches and databases. • When testing relationships, samples from multiple parents or siblings are helpful because not all alleles transmit the same way: <ul style="list-style-type: none"> ◦ Homozygous-- Same gene/allele comes from both parents. ◦ Heterozygous-- Different genes/alleles come from each parent. • “Random Man Not Excluded” (RMNE) statistics are calculated through allele frequency tables that have been developed for different populations. • Holds that the Nashiri DNA's profile of 8 matching loci (markers) may not be unique given an RMNE calculated for CODIS/NDIS. • An “all vs. all” search compares all available DNA profiles to find out how many profiles can be of the same markers but unrelated people. A paper on a smaller database identified two people with nine identical markers but no relation, which prompted the defense to request the search. • A larger database allows more similar profiles to emerge, but fewer numbers of matches mean the sample is unusual or unique. • The usual process is an evidence-to-reference comparison, but an “all vs. all” search would be a profile-to-profile comparison. • “All vs. all” does not solve for a particular set of loci. (Example: In two profiles, loci 1, 4, 15, 16, 17, and 20 could match. In another two profiles, loci 3, 6, 7, 8, 12, and 18 could match.) • “The number of comparisons is irrelevant to knowing if the results would be informative.” (Tone was disdainful.) • Agreed that K470, a sample connected to Nashiri, was uploaded to CODIS and to date has only one match with K19, which is another sample connected to Nashiri. • “All vs. all” just tells us how similar we are.” • “No threshold exists to say, 'You're done, that's identity.'” • Running an “all vs. all” search is important to the defense because “people [jurors] don't think in probabilities.”

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	<ul style="list-style-type: none"> The match results would be impacted by whether profiles have 13 or 20 loci.
<p>Ms. Lisa Grossweiler:</p> <ul style="list-style-type: none"> Current custodian of NDIS (National DNA Index System). Has been a forensics analyst, worked in local labs, uploaded to NDIS, gave classes on CODIS use, and oversees daily upload and operations of NDIS/CODIS. 	<ul style="list-style-type: none"> NDIS contains DNA samples from crime scenes, offenders, and missing persons. 54 state laboratories (number includes D.C., Puerto Rico, and other U.S. territories) upload to NDIS. NDIS held 20,000,000 samples at the time of testimony. Samples are not broken down by ethnic groups. Duplicates are present in the database, representing repeat offenders and linked crime scenes, and are not always removed given that some are exemplars. NDIS holds no personally identifiable information (PII). It only contains the provided profile and the name of the lab that provided it. CODIS is the name of the software that accesses NDIS. CODIS can only upload or search, not both in parallel, so uploads occur in the day, and searches automate to occur at night. Weekends are reserved for longer missing persons searches, and for maintenance and upgrades. A “hit” is a confirmed match between a freshly uploaded forensic sample and a previously uploaded profile. Offender “all vs. all” searches are not allowed by statute or federal law, and CODIS is not configured to run “all vs. all” searches. Agreed that the Illinois State Lab seems to have configured a local version of CODIS to run an “all vs. all” search on its smaller database, but she did not know what those configurations were. Uploaded profiles must have 8 or more loci, as that is required for a 1-in-10,000,000 probability. Is not familiar with the profiles uploaded for this case. Following standard procedure, the uploaded sample would be run against all previous uploads and is compared to all future uploads at the time of those uploads.
<p>Alan Giusti:</p> <ul style="list-style-type: none"> Currently an FBI forensic examiner. Earned a Bachelor of Science degree in molecular chemistry from Yale. 	<ul style="list-style-type: none"> “All vs. all” searches compare all offender profiles to each other. “Random Match Probability” (RMP) is the probability of seeing a match in a random, unrelated person in the population. Statistically, searches are expected to find matching profiles for limited numbers of loci.

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<ul style="list-style-type: none"> • Holds a Master of Science degree in forensic science. • Worked for a lab to develop profiling kits, and also performed forensic profiling at that time. • Worked for the FBI to develop, refine, and improve DNA analysis. • Transferred to the FBI DNA Analysis Department in 1994, where he conducted, directed, wrote reports on, and testified about analysis. • Briefly transferred to the CBRN unit, but later returned to the DNA Casework Unit. • Has analyzed close to 2000 cases, published 18 papers in refereed journals and presented findings at conferences. • Has been qualified as an expert witness more than 87 times. 	<ul style="list-style-type: none"> • “All vs. all” searches do not provide context for specific loci and do not take into account the relative rarity of particular alleles. • Particular alleles have different probabilities per population. Knowing these is necessary for calculating RMP. • “All vs. all” searches have no impact on or relevance to RMP and, moreover, provide no context, information, or research value, since they show the results predicted by RMP.
<p>Dr. Sandra Crosby:</p> <ul style="list-style-type: none"> • General internist with specialty practice treating residual effects of torture, involuntary captivity, and physical assault traumas. • Has been treating trauma victims for 20 years. 	<ul style="list-style-type: none"> • Retained by the defense for the observation/evaluation/diagnosis/treatment of Nashiri. • Nashiri has traumatic brain and ear injuries that are contributing to his motion sickness events, but the events are partially created by flashbacks to being contained in small spaces. This makes riding in small or enclosed vans between the cells and the court difficult and contraindicated. • A prior injury before capture did inflict a head trauma. • PTSD may be a part of the whole thing. • Crosby has not seen Nashiri's medical documents or met with his medical personnel. • Insists that the doctors seem to be doing the best they can. For instance, Meclizine and Adderall are not standard treatments for motion sickness and drowsiness, but experimentally they seem to be working well. • The medication, the stress of riding in the vehicle, etc., are interfering with Nashiri's participation in defense. • Recommends treating PTSD and traumatic brain injury (TBI) and training Nashiri to manage his triggers.

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	<ul style="list-style-type: none"> • Recommends minimizing transportation. Notes arranging for Nashiri to stay at the Expeditionary Legal Complex (ELC) during his court weeks might or might not help. • Nashiri has given the following indications that past experiences still impact him: <ul style="list-style-type: none"> ◦ Repeatedly dreams of water. (Reflects experiences with water suffocation.) ◦ Showers trigger flashbacks. ◦ Sleeps with the lights on to prevent flashbacks to dark sites. ◦ Only sleeps in short intervals and wakes hypervigilant. • Opines that Nashiri needs a multidisciplinary team to treat him for torture; presses for direct access/communications with medical providers. • Was aware that another detainee attacked Nashiri in MAY2021 but was unable to recommend treatments due to lack of knowledge of treatments in place and agreed with defense that documents would have been helpful. • Agreed with government that Nashiri has had repeated problems with shackles and transportation. • Crosby, as an internist and not a psychologist, has collaborated with Dr. Rosenfeld on the defense. • Did not see the long form result of the psychology and competency evaluation of Nashiri. • Agrees to read/interpret the short form evaluation: <ul style="list-style-type: none"> ◦ Axis 1: <ul style="list-style-type: none"> ▪ PTSD ▪ Depressions (recurrent/chronic) ◦ Axis 2: <ul style="list-style-type: none"> ▪ Narcissistic ▪ Histrionic ◦ No Axis 3 diagnoses. ◦ Axis 4: <ul style="list-style-type: none"> ▪ Chronic problems with legal interactions. ◦ Axis 5: <ul style="list-style-type: none"> ▪ An acronym, but the meaning is unintelligible. • It is reasonable and possible to diagnose PTSD as a general internist. • Has not been trained in forensic psychiatry.

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	<ul style="list-style-type: none"> • Forensic exams check for challenges to the legal system, where clinical exams are for diagnosis and treatment. • Crosby uses the Istanbul Protocol to generate a patient history: <ul style="list-style-type: none"> ◦ Interview in a safe, confidential place. ◦ Establish rapport. ◦ Gain informed consent. ◦ Take a trauma history: <ul style="list-style-type: none"> ▪ Traumatic events before incident of interest, including car accidents and childhood. ▪ Trauma of interest. ▪ Treatments. ▪ Subsequent effects. ◦ Make physical examinations. ◦ Collect records and reports of treatments. • Nashiri fell and hit his head in the hospital long before capture, and he had several bike accidents, but no childhood sexual traumas. • Crosby has seen torture, beatings (scars, broken bones, joints), burnings, sexual assaults, and anoxic brain injury, but mostly only the long-term impacts of these traumas. • Not everyone who suffers trauma will develop PTSD. Even in cases of torture, only 50% of people develop PTSD. • Memory is impacted by traumatic events. Memories are not consolidated properly during heightened arousal in trauma. Many memories are not indexed for recall, during these events. • “Intrusive memories” are not the same as flashbacks. An “intrusive memory” does not entail reliving an experience the way a flashback does. These are different symptoms. • Trauma victims may not understand why they have particular triggers; identifying triggers and the reasons for them is part of treatment. • Crosby has never traveled with the detainee, interviewed the guards traveling with him, or read the testimony of guards traveling with him. Travel experiences are by Nashiri's report only. • Denied that guards have ever interrupted a session with Nashiri because of holding hands or excessively

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	<p>touching.</p> <ul style="list-style-type: none"> • Anti-motion-sickness attempted medicines: <ul style="list-style-type: none"> ◦ Scoleropene patches (resulted in drowsiness and dizziness). ◦ Benadryl (resulted in drowsiness). ◦ Zofran (resulted in drowsiness). • Anti-drowsiness medicines: <ul style="list-style-type: none"> ◦ Adderall. • Transportation causes intrusive thoughts and hyper-arousal, which impact motion sickness and nausea. • In some people, flashbacks manifest behaviors, but not in all people. • Has not seen any videos of Nashiri's transportation. • Crosby was not aware of Nashiri's history of testing IEDs, so she did not ask about that in particular and had not considered that for a source of TBI. • There are some mental health issues she is competent to diagnose, but more complicated cases she refers to specialists. • The Istanbul Protocol is for documenting trauma, not for determining or standardizing treatment. • “The medical providers don't understand the root cause to be torture, and don't have the resources to treat it, but they are doing the best they can do.” • Nashiri's reported abdominal pain is consistent with PTSD. • Nashiri may not have wanted to talk about sodomy, so attributed anal tear to constipation; Crosby opined that Nashiri was anally raped with a feeding tube and a brush. • “Nashiri minimizes his symptoms. They may not be obvious to people who do not ask him.” • Nashiri's full participation in his defense would be easiest if transportation was minimized and he met his defense team in a place he felt safe. Also, he should be examined and evaluated for the root cause of his transportation difficulties.