

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

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ATTASH, RAMZI BIN ALSHIBH, ALI ABDUL-AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	AE 300B <i>RULING</i> Defense Motion To Compel Production of Discovery Related to Majid Khan 18 August 2015
--	---

1. On 22 May 2014, Mr. Hawsawi filed a motion to compel production related to Majid Khan.¹

Specifically he requested:

(1) the opportunity to inspect and photograph the current confinement facility where Majid Khan is being held, to include his cell and recreational facilities; (2) records documenting the frequency and manner in which Majid Kahn has been permitted to speak with his family since July 2011; (3) copies of Detainee Information Management System (DIMS) records for Majid Khan from his transfer to Guantanamo until the present time.

2. Mr. Hawsawi proffered this information is relevant in order to challenge his conditions of confinement and because Mr. Khan will be a witness in Mr. Hawawi's case as part of a pretrial agreement. The pretrial agreement grants Mr. Khan special conditions of confinement, raising a motive to fabricate.

3. The Government responded requesting this Commission to deny the motion because:

(1) [the request] is premature here, where the Prosecution has not asked Mr. Khan to testify at trial; (2) Mr. Khan's confinement conditions are irrelevant to the determination of whether Mr. Hawsawi's confinement conditions are lawful and related to a legitimate governmental interest; and (3) Mr. Khan's confinement

¹ Defense Motion To Compel Production of Discovery Related to Majid Khan, filed 22 May 2014 (AE 300 (MAH)).

conditions do not constitute matters in mitigation of Mr. Hawsawi's alleged offenses.²

4. On 13 February 2012, Majid Khan entered into a plea agreement before Military Commission, in which he agreed to "cooperate fully and truthfully with the government" which includes providing testimony.³ The agreement further provided:

[A]s long as I am fully and truthfully cooperating with the Government as required by this agreement, I should not be detained at Camp 7 and should be detained at a facility consistent with the detention conditions appropriate for Law of War detainees. . .⁴

5. Previously, Mr. Hawsawi filed a motion requesting this Commission order compliance with "International Humanitarian Law Standards."⁵ This Commission denied the motion and did not find Mr. Hawsawi's conditions to be "inhumane."⁶

6. Defense requested Oral Argument on this motion. The Government requested this Commission deny the Oral Argument request. Pursuant to Rule for Military Commission (R.M.C.) 905h and Military Commissions Trial Judiciary Rule of Court 3.9, the request for oral argument is **DENIED**.

7. Law

a. The Military Commissions Act (M.C.A.) (10 U.S.C. §§948a, *et seq*) gives the Defense a "reasonable" opportunity to obtain evidence (10 U.S.C. §949j). The M.C.A. provides the accused a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense. *See* 10 U.S.C. § 949j. R.M.C. 701(c)(1) requires the Government to produce evidence that is "material to the preparation of the defense." "Each party is

² Government Response To Defense Motion To Compel Production Of Discovery Related To Majid Khan, filed 6 June 2014 (AE 300A (GOV)) at 1.

³ AE 300 (MAH) at Attachment D., para. 13.

⁴ *Id.* at Attachment D. para. 27.

⁵ Defense Motion for Appropriate Relief to Require Confinement Conditions That Comply with International Humanitarian Law Standards, filed 29 May 2014 (AE 303(MAH)).

⁶ Ruling Defense Motion For Appropriate Relief To Require Confinement Conditions That Comply With International Humanitarian Law Standards, dated 22 June 2015 (AE 303D).

entitled to the production of evidence which is relevant, necessary and noncumulative.” R.M.C.

703(f)(1). Evidence is relevant under the M.C.A. when it “contribute[s] to a party’s presentation of the case in some positive way on a matter in issue.” R.M.C. 703(f)(1) and Discussion.

b. Pursuant to *Brady v. Maryland*, 373 US 83 (1963), the Government cannot withhold evidence “that is favorable to the defense and material to the defendant’s guilt or punishment.” *Smith v. Cain*, 132 S. Ct. 627, 630, 181 L. Ed. 2d 571 (2012). Favorable evidence includes evidence capable of impeaching the government’s case. *United States v. Behenna*, 71 M.J. 228, 237-238 (C.A.A.F. 2012).

c. Moreover, Military Commission Rule of Evidence 608(c) provides that “bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.” Military Courts have recognized that the “exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.” *United States v. Bahr*, 33 M.J. 228, 232 (C.M.A. 1991)(internal quotations and citations omitted).

8. Analysis

a. This Commission has ruled on the conditions of Mr. Hawsawi’s confinement.⁷ If Mr. Hawsawi’s conditions of detention have changed, he can seek relief from the Commission, but Mr. Kahn’s conditions of confinement are not relevant in determining if Mr. Hawsawi’s conditions meet the required standard. Comparing and contrasting Mr. Hawsawi’s conditions with Mr. Kahn’s conditions for the purpose of a motion similar to AE 303 (MAH) is not relevant.

⁷ See *id.*

b. Evidence of a witness's motive to fabricate must be disclosed, however, courts disagree about the exact level of detail that is required.⁸ Because Mr. Kahn is not a witness for the prosecution at this time, the Government has no duty disclose potential motives to fabricate.

9. Accordingly, the Defense's Motion, AE 300, is **DENIED**. If Mr. Kahn becomes a witness for the prosecution and the Government fails to disclose Mr. Kahn's relevant impeachment evidence, the Defense may move to compel disclosure.

So ORDERED this 18th day of August 2015.

//s//
JAMES L. POHL
COL, JA, USA
Military Judge

⁸ Courts have differed on how much detail about witness pretrial agreements and what level of cross-examination of those agreements is required. However, all seem to understand that the motive to lie is a core component of cross examination. *United States v. Nelson*, 39 F.3d 705, 707-08 (7th Cir. 1994); *United States v. Robinson*, 832 F.2d 366, 373 (7th Cir. 1987); *United States v. James*, 61 M.J. 132, 135 (C.A.A.F. 2005); *United States v. Roan Eagle*, 867 F.2d 436 (8th Cir. 1989); *United States v. Schoneberg*, 388 F.3d 1275 (9th Cir. 2004). In *United States v. Roan Eagle*, the court found the specific terms of the agreement essential because the witness was awaiting sentencing and "there is a continuing incentive to give testimony that strengthens the prosecution's case." 867 F.2d at 443. *United States v. Nelson*, however, found that extra detail was not required. 39 F.3d at 709.