MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHAIBAH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	AE 425(Mohammad) **Mr. Mohammad's Motion To Recuse Military Judge and the Current Prosecution Team and for Further Appropriate Relief** 10 May 2016

1. Timeliness

This motion is timely filed.

2. Relief Sought

Mr. Mohammad respectfully requests the recusal of the Honorable Colonel James L. Pohl, U.S. Army, from presiding over any further aspects of this case, to include pretrial hearings, consideration of or participation in *ex parte, in camera* proceedings, and/or trials; the disqualification of all Trial Judiciary personnel with substantive legal duties who were involved in the secret disposition of motions and promulgation of orders, to include February 2016, permitting and/or delaying notice of the destruction of the evidence that is the subject of this motion; the disqualification of Brigadier General Mark Martins, U.S. Army, and all members of the prosecution trial team serving under his supervision, direction and/or control, from any further role or participation as counsel for the United States in any aspect of the litigation of this or a derivative action against the defendants, to include pre-trial, trial, appellate, collateral and/or *ex parte* proceedings; and that the Military Commission, presided over by an impartial judge, should declare that the guilt and/or penalty phase of the case is permanently abated.

Mr. Mohammad further requests that another military judge be selected by lot from among those military judges who are qualified and available to preside over the litigation of this motion pursuant to R.M.C. 502(c)(1).

3. Overview

This motion arises from facts and events summarized below, and described in more detail in references 1-6, Classified Attachment B. In summary, the government sought permission from the Military Commission to dispose of certain evidence that had important guilt-phase and mitigation value. The defense filed an objection to the proposed disposal, and the Military Judge issued an order directing the government to ensure the evidence was not destroyed pending further order of this Commission. As a result, counsel for Mr. Mohammad reasonably understood that timely notice would be provided if the Commission decided to alter or rescind the Order and permit the government to destroy the evidence. In direct reliance on the Commission's assurances, Mr. Mohammad refrained from seeking further orders to maintain the status quo, to include a stay from the Commission, or interlocutory relief or writ of prohibition to prevent the destruction of the evidence. Indeed, unless and until the Commission provided defense counsel further notice, and the defense were able to allege that the order barring destruction had been withdrawn or substantively revised, initiating litigation of an appeal or a writ of prohibition would have been premature as a matter of law.

Meanwhile, during the period that the controlling order remained in effect publicly, the government communicated *ex parte* and *in camera* with the Military Judge seeking authorization to destroy the evidence; the Military Judge, in an *ex parte*, sealed and classified order, which the defense was not permitted to read, granted the government's request; and the government thereafter destroyed the evidence – all without giving fully-cleared defense counsel for Mr.

Mohammad even a hint as to the changes until more than 18 months after the Commission's issuance of the *ex parte* destruction order, and waiting more than 20 months before disclosing to cleared defense counsel a partially-redacted though still classified version of the destruction order.

These events effectively deprived Mr. Mohammad of his right of access to the courts, including preventing him from seeking extraordinary remedies preventing destruction of the evidence; to meaningful appellate review of any prospective judgment in his case; and to the representation of counsel. As a result, his right to prepare his defense in a capital case and his right to a reliable determination of guilt and penalty in a capital case have been substantially gutted.

Because he was not advised that the Military Commission surreptitiously authorized the destruction until nearly two years after the government obtained the destruction order, and after the actual destruction of the evidence, Mr. Mohammad's opportunity to seek appellate or other relief preventing destruction of the evidence has been irreparably harmed by the *ex parte* action of the Commission and prosecution. Similarly, the evidence is now unavailable to any appellate court to which it otherwise would have been provided as part of the record necessary to permit meaningful evaluation of the sufficiency of any Commission-authorized substitutions provided to the defense in lieu of the actual evidence. The prosecution and Military Judge misled Mr. Mohammad's counsel and deprived them of the information necessary to protect Mr. Mohammad's right to access to the Military Commission and other Federal Courts on an important issue of preventing destruction of evidence until after that right had become a nullity.

Military Judge Pohl's participation in the prosecution's orchestration of events, which foreseeably misled Mr. Mohammad's counsel to believe they could rely on the Commission's

unclassified order not to destroy the evidence, and prevented them from vindicating Mr. Mohammad's right of access to the courts, to the assistance of counsel and to appellate review of the classified and hidden-from-the-defense destruction order, evidences a lack of detached impartiality and the neutral, even-handed administration of the laws governing this case to which Mr. Mohammad is constitutionally entitled.

At minimum, in light of these events, the present proceedings are not, and cannot "appear fair to all who observe them," as required by *Wheat v. United States*, 486 U.S. 153, 160 (1988). An objective, disinterested lay observer fully informed of the facts would entertain a significant doubt about Military Judge Pohl's impartiality and predisposition to treat both sides fairly, *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988), particularly in his ability to fashion remedies for the prosecution's intentional destruction of the evidence. *See Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (due process violation resulting from bad faith failure to preserve "potentially useful" evidence); *California v. Trombetta*, 467 U.S. 479, 489 (1984) (destruction of apparently exculpatory evidence); *United States v. Simmermacher*, 74 M.J. 196, 199 (C.A.A.F. 2015) (abuse of discretion in failing to abate proceedings following destruction of centrally important evidence for which there was no adequate substitute); R.M.C 703(f)(2)(A) and (B).

For the reasons set forth below, the Honorable Colonel James L. Pohl should be recused from further participation in the case; the lead prosecutor and present prosecution team should be disqualified; and the government should be barred from proceeding with the guilt phase and/or seeking the death penalty in any prosecution of Mr. Mohammad for the offenses alleged in this matter. *See United States v. Stellato*, 74 M.J. 473, 488 (C.A.A.F. 2015) (affirming dismissal and

noting that fashioning sufficient remedy for violation of discovery and loss of exculpatory evidence requires MJ to evaluate the particular facts of individual case).

4. Burden of Proof

As the moving party, Mr. Mohammad bears the burden of demonstrating by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1).

5. Facts

The facts, which are more fully described in Reference 2 identified in Classified Attachment B and which Reference is incorporated here by reference as if fully set forth, may be summarized as follows.

a. Several years ago, over the course of approximately two months, the government filed a notice of its intent to dispose of certain evidence, and the defense filed objections to the proposed disposition and further moved for discovery of the subject evidence, as well as other, related evidence the government might dispose of or destroy. *See* references 1, 2 and 5, Classified Attachment B; and Classified Attachment C.

b. Approximately a year later, the Commission determined that the evidence was discoverable and that the defense would have an opportunity to litigate their asserted entitlement to disclosure of the actual evidence, rather than summaries or substitutions. *See* references 2 and 5, Classified Attachment B.

c. The Commission's follow-on Order that was released to the defense explicitly granted the defense's request to prohibit destruction of the evidence, and directed the prosecution to ensure the evidence was not destroyed. *See* references 2 and 6, Classified Attachment B.

d. The defense reasonably understood the letter and spirit of the Commission's order to require the government to maintain the status quo and not destroy the evidence until such time as

the Commission issued a new and different order or otherwise communicated to the parties that the government was relieved of its obligation. *See* Reference 6, Classified Attachment B.

e. Approximately six months after the issuance of the order not to destroy evidence, and as the result of secret communications between the government and Judge Pohl, which he conducted without the knowledge of defense counsel, Judge Pohl authorized the government to destroy the evidence in question. *See* references 1, 2, 4 and 6, Classified Attachment B.

f. Almost two years after Military Judge Pohl's secret communication with the government and his secret issuance of the destruction order, the government sent the defense a letter informing counsel that examination of the contested evidence was no longer possible. *See* Classified Attachment C.

g. On the same day, and in concert with the government's transmittal of its letter immediately referenced above, Military Judge Pohl caused to be transmitted to the defense a redacted version of the nearly-two-year-old destruction order, thereby informing defense counsel that he had authorized the destruction of the subject evidence nearly two years earlier. *See* references 1, 2 and 4, Classified Attachment B. Although the destruction order – again issued originally only to the prosecution via *ex parte* communication – purported to direct that a redacted version was to be provided to the defense, Military Judge Pohl did not actually instruct the prosecution to proffer any proposed redactions of the order until 18 months after granting the government permission to destroy the evidence, and over a year after it was apparently actually destroyed. *See* references 1, 2 and 4, Classified Attachment B. The Military Commission thereafter belatedly transmitted the redacted version of the secret destruction order to defense counsel by attaching it to another secret order, which further deemed the prosecution "to have met any notice obligations with regard to the original order or underlying considerations." *See*

references 1 and 4, Classified Attachment B. In turn, on the same day the Military Commission belatedly transmitted the destruction order, it purported to find, without benefit of ever having examined the actual evidence, that the government's proffer of a *summary* of a *substitute* for the original (now destroyed) evidence provided the defense with an adequate alternative to access to the evidence in question. *See* references 1, 2 and 4, Classified Attachment B.

h. Judge Pohl made these purported findings at a time when he was in fact aware that the government had destroyed the evidence without notice to the defense and without the Commission having made any superseding revisions to, or recension of, the unclassified do-not-destroy order. Judge Pohl was further aware that, under these circumstances, his involvement in the events leading to the destruction of the evidence created a personal interest in the outcome of his assessment of the adequacy of proffered substitutes. At that late point, with that knowledge, and in light of his previous secret authorization of the destruction and of the actual destruction by the government, Military Judge Pohl then had a personal interest in the government receiving favorable findings as to the adequacy of the proffered summary, to excuse the government's intentional secret destruction of the evidence on the ground that it had not prejudiced the defense. *See* references 1, 2 and 4, Classified Attachment B.

i. As was reasonably foreseeable, the prosecution has exploited Judge Pohl's findings to argue that its intentional, surreptitious destruction of material evidence did not prejudice the defense. *See* references 1-4, Classified Attachment B; and Classified Attachment C. The prosecution further informed the defense, and Military Judge, that the government never had any intention of disclosing the material, exculpatory evidence to the defense, and in the future it will not disclose similar evidence to the defense, irrespective of the sanctions that the Military Commission might impose for the government's willful behavior. *See* reference 3, Classified

[redacted]

Attachment B. The government's announcement reflects the understanding that it is free to act with impunity, secure in the knowledge that the Military Judge is not prepared to impose sanctions of sufficient severity (e.g., permanent abatement of the proceedings, striking death as a punishment) to dissuade the government from wantonly destroying or refusing to disclose materially exculpatory evidence. The explicit and implicit factors informing the government's understanding of the Military Judge's anticipated response reasonably call into question Judge Pohl's impartiality in deciding whether to impose sanctions on the government that are necessary to safeguard Mr. Mohammad's right to a fair trial.

j. The above-described series of events and conduct reasonably indicates that Military Judge Pohl, acting in tandem with the prosecution, misled the defense; deprived Mr. Mohammad's counsel of the opportunity to litigate their entitlement to access to information that was "material to the preparation of the defense," R.M.C. 701(c), and clearly "exculpatory," R.M.C. 701(e); foreclosed meaningful review of Judge Pohl's destruction and substitution orders, either by way of Mil. Comm. R. Evid. 505(f)(3), as purportedly defined by the Military Commission (*see* AE 164C Order and 23 Oct 2013 session Unauthenticated Transcript pp. 6775-6815), or appellate review including special writ; and deprived Mr. Mohammad of the fundamental Sixth and Eighth Amendment right to fair notice of the rules governing the prosecution's efforts to kill him. *See Lankford v. Idaho*, 500 U.S. 110, 119-120 (1991); *Maynard v. Carwright*, 386 U.S. 356, 361-362 (1988).

k. When Mr. Mohammad was informed of the unclassified version of events described above, he responded in sum or substance: "First they tell us they will not show us the evidence, but they will show our lawyers. Now, they don't even show the lawyers. Why don't they just kill us?"

6. Law

Introduction

The conviction and execution of a prisoner who has not been afforded counsel and meaningful access to the evidence necessary to prepare a defense "would be little short of judicial murder." *Powell v. Alabama*, 287 U.S. 45, 72 (1932). A corollary principle recognizes the right of capital and non-capital defendants alike to a trial before a neutral and disinterested tribunal. *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed.2d 749 (1927). Federal and military jurisdictions jealously guard this right by requiring that judges "shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial." *Berger v. United States*, 255 U.S. 22, 36 (1921); *see United States v. Berman*, 28 M.J. 615 (A.F.C.M.R., 1989); 28 U.S.C. § 455; R.C.M. 902.

The rules and procedures governing defense access to the purportedly classified information in this case already create a two-track system in which Mr. Mohammad is significantly disadvantaged by the government's ability to hold secret sessions with the Commission, make secret presentations to which Mr. Mohammad's counsel have no opportunity to respond, and obtain uncontested orders preventing the defense from examining or using information that is material to the defense of Mr. Mohammad's life. Defense counsel understand and have been forced to accept the fact that, despite defense objections, the Commission interprets applicable R.M.C. and M.C.R.E. provisions to permit the prosecution to conduct the most significant part of pre-trial litigation behind closed doors, in proceedings with the Military Judge from which not only Mr. Mohammad, but Mr. Mohammad's fully-cleared defense counsel have been excluded. To the limited extent Mr. Mohammad is permitted to know the outcome and consequences of these secret sessions it is only after the fact. Nevertheless, if this regime

previously could have been said to have any benefit for the defense it was that counsel could not have been affirmatively misled by what they did not know.

The series of events which give rise to this motion present a very different situation. Here, the Military Judge, in concert with the prosecution, manipulated secret proceedings and the use of secret orders to mislead the defense and unfairly deprive Mr. Mohammad of his otherwise available remedies to prevent the destruction of material, helpful evidence. The importance of the evidence, as more fully described in references 2 and 5 listed in Classified Attachment B, demonstrates that such judicial and prosecutorial conduct in a criminal case would be grossly improper. In a case where, as here, the defendant is on trial for his life, such conduct is unconscionable.

Thus, whether on the grounds of actual bias, or as necessary to promote "public confidence in the integrity of the military commission process," Military Judge Pohl and the prosecution team should be recused from further participation in these proceedings. *United States v. Al Bahlul*, 807 F. Supp. 2d 1115, 1123 (USCMCR 2011) (Memorandum of Recusal, Acting Chief Judge Daniel E. O'Toole). Similarly, the government's manipulation of the proceedings to destroy the evidence when it reasonably knew the defense was unaware of the secret destruction order compels disqualification of the prosecution team and the abatement of the proceedings. *See Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); *United States v. Simmermacher*, 74 M.J. 196, 201 (C.A.A.F. 2015); *United States v. Heldt*, 668 F.2d 1238, 1275 (D.C. Cir. 1981).

I. Judge Pohl's Recusal is Required to Dispel Actual or Apparent Bias.

It is beyond serious question that a defendant in a capital case has an absolute right to a neutral and detached tribunal. *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed.2d 749

(1927).[1] The recusal standards of 28 U.S.C. § 455, as amended by Congress in 1974, include a "'catchall' recusal provision, covering both interest or relationship' and 'bias or prejudice' grounds," and "requiring them *all* to be evaluated on an *objective* basis, so that what matters is not the reality of bias or prejudice but its appearance." *Liteky v. United States*, 510 U.S. 540, 548, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) (emphasis in the original). As a result, "[q]uite simply and quite universally, recusal was required whenever 'impartiality might reasonably be questioned.'" *Id. See, also, Parker v. Connors Steel Co.*, 855 F.2d 1510, at 1524 (11th Cir. 1988) (standard is whether "an objective disinterested lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality"); *Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980) ("a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street").

Adherence to this standard enforces the duty of judges that require they "shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial." *Berger*, 255 U.S. at 36. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988) (§ 455 enacted to maintain public confidence in the judicial system by avoiding even the appearance of partiality); *Liteky v. United States*, 510 U.S. at 565 (Kennedy, J., concurring in the judgment) ("[i]n matters of ethics, appearance and reality often converge as one").

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[1] *Tumey* recognized the right to an impartial tribunal, responsible for deciding guilt and appropriate fines, in a criminal prosecution for possession of intoxicating liquor. 273 U.S. at 514.

In turn, "the military rule on the disqualification of judges closely parallels the federal rule," and "federal decisions in this area can offer guidance." *United States v. Berman*, 28 M.J. at 617. Accordingly,

> the test for the appearance of partiality on the part of a judge so as to require recusal is whether an objective, disinterested observer fully informed of the facts would entertain a significant doubt that justice was done. The question to be asked is: Would a hypothetical onlooker be troubled by what happened?

Id. at 617-618 (citing *United States v. Murphy*, 768 F.2d 1518 (7th Cir.1985)). *See also United States v. Wright*, 52 M.J. 136 (C.A.A.F. 1999).[2]

Mr. Mohammad submits that any "hypothetical onlooker" would be deeply troubled by what happened in this case. Military Judge Pohl, on the one hand, provided the defense an order that reassured Mr. Mohammad's counsel that critical evidence would not be destroyed, but with the other hand issued a secret order at the clandestine behest of the government permitting the prosecution to destroy that very evidence without informing Mr. Mohammad's counsel. Whatever legitimate national security interests might purportedly justify the near-Star-Chamber proceedings that have riven this case, there can be no articulable excuse for so clearly misleading Mr. Mohammad's counsel and preventing them from seeking remedies to prevent the destruction of crucial evidence. As the result of Military Judge Pohl's judicial head-fake, Mr. Mohammad no longer has the opportunity to pursue a motion to compel to test the fairness and propriety of denying him access to the evidence, nor can he pursuant extraordinary appellate remedies to preserve his right to a fair trial.

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[2] "The provisions of R.C.M. 902 are 'virtually identical' to 28 U.S.C. § 455(a), and '[t]he exhortation in the statute' for a judge to disqualify him- or herself whenever their impartiality might reasonably be questioned 'is designed to foster the appearance of justice within the judicial system.' Id. at 141.

Thus, while the fact that Judge Pohl unfairly enabled the prosecution to mislead Mr. Mohammad's counsel is itself sufficient to trouble the average, disinterested observer, still more troubling is the impact of the concerted action in depriving Mr. Mohammad of fair notice of the government's action, an opportunity even to seek lawful judicial remedies to prevent destruction of the evidence, and notice of the basic rules governing questions necessary to decide his very survival.

Reasonable notice and a fair opportunity to be heard are core due process guarantees whether the interests at stake are property, liberty or human life. *See Dusenbery v. United States*, 534 U.S. 161, 168-169 (2002) (forfeiture of property requires government to give notice apprising interested party of "pendency of the action and afford them an opportunity to present their objections"); *Lankford*, 500 U.S. 110, 119-120 (1991) (capital defendant denied adequate notice that death was still an available penalty at his sentencing hearing); *Maynard v. Cartwright*, 386 U.S. 356, 361-362 (1988) (pursuant to Eighth Amendment, due process notice challenge to vagueness of statutory aggravation analyzed as providing insufficient guidance to sentencing jury); *Goss v. Lopez*, 419 U.S. 565, 574-576 (1975) (prohibition against arbitrary deprivation of liberty requires notice and opportunity to be heard prior to pupil's suspension from school); *Oyler v. Boles*, 368 U.S. 448, 452 (1962) (due process requires reasonable notice and opportunity to be heard on recidivist criminal accusation); *Nunley v. Department of Justice*, 425 F.3d 1132, 1135 (8th Cir. 2005) ("indirect" notice to inmate's girlfriend was insufficient to satisfy due process requirements in forfeiture case).

By contrast, the orchestrated series of events preceding the authorized destruction of evidence in this case runs afoul of the principle that it is "an idle accomplishment to say that due process requires counsel but not the right to reasonable notice and opportunity to be heard."

Oyler, 368 U.S. at 452. As the Court in *Lankford* reminded us: "'The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and *fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.*" *Lankford*, 500 U.S. at 121 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1953)) (emphasis added).

Similarly, a capital defendant's right of access to the courts is a real and substantial constitutional guarantee. Even convicted "prisoners have a constitutional right of access to the courts," *Bounds v. Smith*, 430 U.S. 817, 821 (U.S. 1977); and such access must be "adequate, effective, and meaningful." *Id.*, at 822 (citations omitted). As explained by Chief Justice Rehnquist, writing for the Court in *Murray v. Giarratano*, 492 U.S. 1, 8-9, 109 S. Ct. 2765, 2769-70, (1989), this right applies with even greater force – and must be effectuated by the assistance of counsel – at "the trial stage of capital offense adjudication," at which the tribunal must "decide the questions of guilt and punishment." The principle stems from the Court's recognition:

> that the Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death. *See, e.g., Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (trial judge must give jury the option to convict of a lesser offense); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (jury must be allowed to consider all of a capital defendant's mitigating character evidence); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (same). The finality of the death penalty requires "a greater degree of reliability" when it is imposed. *Lockett, supra*, 438 U.S., at 604, 98 S.Ct., at 2964.

Murray v. Giarratano, 492 U.S. at 8-9 (1989).

In the context of the issue here, meaningful access to the court, with the necessary assistance of counsel, meant affording Mr. Mohammad a fair opportunity to litigate the propriety of the government intended destruction of evidence that was material to Mr. Mohammad's

defense at the guilt and penalty phase of his trial. If Mr. Mohammad had been informed in a timely manner that the Commission was authorizing destruction of this evidence despite its previous do-not-destroy order, he would have had the right and ability to file motions and petitions at the trial and appellate level seeking to prevent the destruction. If Mr. Mohammad had been informed timely (i.e. before destruction of the original) that the Commission was approving a substitute for this evidence, Mr. Mohammad would have had the right and ability to bring a motion to compel disclosure of the original evidence despite the apparently prohibitive language of Mil. Comm. R. Evid. 505(f)(3). If the Commission then denied relief available under 505(f)(3) as construed in AE 164C Order,[3] Mr. Mohammad could have pursued extraordinary appellate review and/or tested the constitutionality, facially and as applied in this instance, of any order limiting access to the evidence in question, including purported limitations on reconsideration. *See In re. al-Nashiri*, 791 F.3d 71 (D.C. Cir. 2015) (availability of mandamus jurisdiction in military commission cases).

As observed in *Lankford*, whether Mr. Mohammad "would ultimately prevail on this argument is not at issue at this point; rather, the question is whether inadequate notice concerning the character of the" status quo "frustrated counsel's opportunity to" seek appropriate remedies. *Lankford*, 500 U.S. at 124.

Mr. Mohammad had a right to litigate to prevent destruction of this evidence, and to seek meaningful review of any order authorizing destruction of this evidence or limiting his access to it. His rights to do this were destroyed along with the evidence—without notice to him—while he and his counsel labored under the misimpression they had prevailed on the issue.

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[3] *See also* discussion of AE 164 and motion to compel versus reconsideration in Unauthenticated Transcript of 23 Oct 2013 hearing session at pp. 6775-6815.

Thus, the government's destruction of the evidence, under cover of Judge Pohl's misleading order, has unfairly and irreparably deprived Mr. Mohammad of such opportunities for review, and the assistance of counsel in pursuing the remedies that should have remained available. When a litigant attempts to gain advantage by advancing two irreconcilable positions, the practice is condemned as "playing 'fast and loose with the courts,'" and "has been emphasized as an evil the courts should not tolerate." *Scarano v. Central R. Co. of N. J.*, 203 F.2d 510, 512-513 (3rd. Cir. 1953); *see also Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990). It is said that "this is more than affront to judicial dignity," because "intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." *Scarano*, 203 F.2d at 513. The affront to judicial integrity – and public confidence in judicial impartiality – is even greater when the tribunal itself engages in self-contradictory actions that carry at least the appearance of colluding with the government to defraud its adversary.[4]

The principle that "the appearance of impropriety is itself to be avoided," applies equally "for pretrial maneuvers as the trial itself." *United States v. Dean*, 13 M.J. 676 (A.F.C.M.R. 1982). Therefore, at any stage of the proceedings, "[a]n ex parte communication by the military

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[4] "*Bouvier* defines collusion as 'an agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law.' 1 Bouv.Law Dict., Rawle's Third Revision, p. 526. It is generally recognized that collusion in law embraces either a fictitious or assumed state of facts in order to obtain a judicial determination, or an actual existence of issues which have been corruptly arranged beforehand in order to obtain the court's determination. The Supreme Court stated in *Dickerman v. Northern Trust Co.*, 176 U.S. 181, 190, 20 S.Ct. 311, 314, 44 L.Ed. 423 [(1900)], that collusion 'implies the existence of fraud of some kind, the employment of fraudulent means or of lawful means for the accomplishment of an unlawful purpose.'"

Curb and Gutter Dist. No. 37 of City of Fayetteville v. Parrish, 110 F.2d 902, 907-08 (8th Cir. 1940).

judge under circumstances which give the appearance of *granting undue advantage* to one party over the other cannot be condoned." *Id.* at 678 (emphasis added) (*ex parte* meeting with prosecutor and psychologist led judge to foreclose sanity board). *See also United States v. Copening*, 32 M.J. 512, (A.C.M.R. 1990) ("coaching" prosecutor on theories for admitting illegally seized evidence); *United States v. Norment*, 34 M.J. 224, 227 (USCMA 1992) (Crawford, Judge, concurring in result) ("improper communications between judges . . . and counsel undermine the military justice system," and such breaches "are not to be 'whimsically dismissed') (internal citation omitted) (staff judge advocate conducted independent investigation of defense claim of juror misconduct and did not serve defense with findings or give defendant opportunity to respond).

The rules for handling classified evidence, of course, apparently authorize the prosecution virtually unbridled, *ex parte* access to the Military Commission to secure orders and rulings that may have profound impact on Mr. Mohammad's ability to prepare his case. Consistent with the principle discussed above, however, statutory authority to engage in such communications does not cure the vice of conducting them "under circumstances which" not only "give the *appearance* of granting undue advantage to one party over the other," but actually *did* grant such undue advantage. *Dean*, 13 M.J., at 678 (emphasis added).

The considerations that dictate a proper course of action for a judge in this situation were eloquently explained by United States Court of Military Commission Review Acting Chief Judge Daniel E. O'Toole, in his memorandum of recusal from *United States* v. *Al Bahlul*, 807 F. Supp. 2d 1115 (USCMCR 2011):

> In considering recusal, I am also mindful that, under military principles, including those applicable to military commissions, a judge should interpret and apply the grounds for recusal broadly, but should not recuse unnecessarily.

> R.M.C. 902(d)(1). Discussion. *See also United States v. Mellwain*, 66 M.J. 312, 314 (C.A.A.F.2008) (citing *United States v. Wright*, 52 M.J. 136, 141 (C.A.A.F.1999)). Though these principles apply most directly to situations of alleged bias at trial, they are nonetheless instructive regarding the invocation of discretionary recusal under other circumstances.
>
> The military commission process by any measure is a unique circumstance meriting heightened consideration of the public confidence. I have exhaustively and carefully balanced my responsibility not to recuse unnecessarily, with the countervailing considerations. I have weighed heavily the public's perception of the pending case and of this Court, in the greater context of the military commission process. The disposition of this case, one of the first two military commission convictions to be reviewed on appeal, will chart historic precedent regarding the jurisdiction of military commissions, as well as potentially delineating for further review the breadth and reach of Constitutional protections in the framework of what has been referred to by some as "asymmetric warfare." Under these circumstances, and even assuming judgment in favor of my continuing on this Court, I am unwilling to permit the distraction of a collateral issue related to the legitimacy of one judge, and by extension, the legitimacy of the USCMCR, to intrude into the time and resources of this Court. I am equally unwilling to contribute to anything less than full public confidence in the integrity of the military commission process, and the legitimacy of this Court as it renders its first substantive rulings.

Id. at 1123. Mr. Mohammad respectfully submits that similar considerations require Judge Pohl to be recused.

II. The Government's Improper Manipulation of the Evidence Requires Disqualification of the Prosecution Team and Permanent Abatement of the Guilt and/or Penalty Phase of this Case.

The United States Supreme Court has cautioned that "[w]hen specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Thus, the prosecution may not manipulate the proceedings to deprive a defendant of fundamental constitutional rights. *Bartkus v. Illinois*, 359 U.S. 121, 123-124 (1959) (describing standard of

"sham" state prosecution used to circumvent prohibition against retrial of federal prosecution following acquittal). This is particularly true where, as here, "manipulation of the evidence by the prosecution was likely to have an important effect on the jury's determination." *Donnelly v. DeChristoforo*, 416 U.S. at 647 (describing the misconduct in *Brady v. Maryland*, 373 U.S. 83, 83 (1973)[5]).

When the government's action "has poisoned the water in [the] reservoir" of justice, "the reservoir cannot be cleansed without first draining it of all impurity." *Mesarosh v. United States*, 352 U.S. 1, 14 (1956) (remanding for new trial where government acknowledged witness testified falsely in other proceedings). The method of cleansing may take one or more forms. In some instances, "serious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indictment or a new trial, without regard to prejudice to the accused." *United States v. McCord*, 509 F.2d 334, 339 (D.C. Cir. 1974). *See, also United States v. Kojayan*, 8 F.3d 1315, 1319–23 (9th Cir.1993) (reversing defendants' convictions and remanding case to trial court for determination whether to dismiss the indictment based on finding of prosecutorial misconduct that included making untrue factual representations, refusal to produce *Brady* material, and failing to acknowledge wrongdoing); *United States v. Chanen*, 549 F.2d

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[5] As the Court explained:

> In *Brady*, the prosecutor had withheld evidence, a statement by the petitioner's codefendant, which was directly relevant to the extent of the petitioner's involvement in the crime. Since the petitioner had testified that his codefendant had done the actual shooting and since the petitioner's counsel was not contesting guilt but merely seeking to avoid the death penalty, evidence of the degree of the petitioner's participation was *highly significant to the primary jury issue*.

Donnelly v. DeChristoforo, 416 U.S. at 647 (emphasis added).

1306, 1309 (9th Cir. 1977) (dismissal may be required to protect the integrity of the judicial process in light of unfair or improper prosecutorial conduct).

Draining the impurity from a case may also require disqualification of the prosecutor. *See United States v. Bolden*, 353 F.3d 870, 879 (10th Cir. 2003) (disqualification of prosecutor may be appropriate based on "bona fide allegations of bad faith performance of official duties by government counsel") (citing *United States v. Heldt*, 668 F.2d 1238, 1275 (D.C. Cir.1981)).

The governing principle for either remedy is that although the prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935). *See also Stellato*, 74 M.J., at 490 ("'trial counsel is not simply an advocate but is responsible to see that the accused is accorded procedural justice'"; quoting Dep't of the Army, Reg. 27–26, Legal Services, Rules of Professional Conduct for Lawyers, R. 3.8 Comment (May 1, 1992)); *United States v. Banks*, 383 F.Supp. 389, 397 (D. S.D. 1974) (a "court's first duty, then, is to insure that our laws are fairly enforced").

The record in this case shows clearly that the prosecution exploited its favored position of *ex parte* access to the Commission by obtaining a secret order authorizing destruction of important evidence while the defense was none the wiser. Then, the prosecution, with the Commission's acquiescence, maintained the charade created by the ersatz "do-not-destroy" order which was given to defense counsel, for the better part of two years. Only after the government had thereby afforded itself ample time to destroy the evidence did it advise the defense that access to the evidence was no longer possible.

The United States Supreme Court has made it clear that the government prejudicially violates due process when it fails to *disclose* material exculpatory evidence, *Brady*, 373 U.S. at 83; *destroys* apparently exculpatory evidence that cannot be replaced or replicated, *California v. Trombetta*, 467 U.S. 479, 489 (1984); or acts in bad faith in failing to *preserve* "potentially useful" evidence. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). Only the latter situation requires a showing of bad faith. *See Illinois v. Fisher*, 540 U.S. 544, 547-548 (2004) (where government fails to produce material, exculpatory evidence, "the good or bad faith of the prosecution is irrelevant").

Measured against these standards, the prosecution in this case is in a league of its own. The Commission's finding that the evidence was discoverable, *see* references 2 and 5, Classified Attachment B, put the government on notice that, as a matter of law, the evidence was "noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing." Mil. Comm. R. Evid. 505(f)(1)(B). Despite such knowledge, the government proceeded intentionally and in bad faith to destroy the evidence. The government was unquestionably aware of the material, exculpatory nature of the evidence, knew that the defense believed the evidence was protected from destruction pursuant to the Commission's public, misleading order, and deliberately kept the defense in the dark about the existence of the Commission's secret destruction order. The prosecution's manipulation of the evidence through the use of secret proceedings, misleading orders and belated disclosure of the true state of affairs constitutes "foul blows" indeed.

The destroyed evidence would have been material to Mr. Mohammad's ability to test and refute the prosecution's case in the guilt phase of trial, and would have been particularly significant to a reliable determination of penalty. *See* reference 2, Classified Attachment B.

Accordingly, minimally adequate remediation of the prosecution's pollution of the proceedings, and violation of Mr. Mohammad's rights under the Sixth and Eighth Amendments, requires disqualification of the current prosecution team and barring the death penalty as an available punishment in any sentencing phase of this case.

Moreover, even without the disturbing specter of collusion and fraud on the defense, the prosecution's bad faith destruction of exculpatory evidence entitles Mr. Mohammad to permanent abatement of the proceedings under the Rules for Military Commissions. R.M.C. 703(f)(2)(A) and (B). Although the standards enunciated in *Trombetta* and *Youngblood* necessarily govern the due process analysis for lost or destroyed evidence, the provisions of R.M.C. 703(f)(2)(A) and (B) have been interpreted to provide "an additional protection" when "lost or destroyed evidence fall within the rule's criteria." *United States v. Simmermacher*, 74 M.J. 196, 201 (C.A.A.F. 2015). Although the Court in *Simmermacher* was called upon to decide the extent of "protection the President granted to servicemembers" pursuant to R.C.M. 703(f)(2), the provisions of the two rules are essentially identical. *See Simmermacher*, 74 M.J. 196, 201.[6]

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[6] R.C.M. 703(f)(2) provides:

> Notwithstanding subsection (f)(1) of this rule, a party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process.
>
> However, if such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such 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.

Save for formatting differences, R.M.C. 703(f)(2) is virtually the same:

> (A) Notwithstanding subsection (f)(1) of this rule, a party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process. However, if such evidence is of such central importance to an issue that it is essential

Simmermacher involved the destruction of a urine sample that served as the only inculpatory evidence in a cocaine use case. The Naval Drug Screening Laboratory (NDSL) sent a urinalysis report to the defendant's command with a letter stating that the sample would be destroyed in approximately 11 months. The defendant was not charged with wrongful use of cocaine until twelve days after the disposal date specified in the NDSL letter, and the sample was destroyed. When defense counsel requested access to the sample and a retest, the government informed counsel the sample had been destroyed.

On these facts, the court held that the defendant satisfied the criteria in R.C.M. 703(f)(2), and trial judge should have abated the proceedings.

First, the urine sample was particularly significant because it served as the only evidence against the defendant.

Second, the court found there was no adequate substitute for the evidence. Without the actual evidence, the defendant could not retest and determine whether the government's test result was accurate, or whether there had been any adulterations or misidentifications of the sample. A laboratory report of the initial analysis procedures was not an adequate substitute for being able to retest.

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to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence.

(B) If a continuance under subparagraph (A) cannot or does not result in the production of the 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.

Third, the defendant was not at fault for the destruction of the evidence, nor could the defense have prevented it. The defendant was not charged, assigned counsel nor aware of the NDSL's letter notifying her command of the expiration of the retention period.

Because a continuance or other relief could not have produced the destroyed urine sample, the *Simmermacher* court held that the failure to abate proceedings constituted an abuse of discretion.

Application of the criteria in Rule 703(f)(2)(A) and (B) similarly require abatement here.

First, the destroyed evidence was of central importance to resolving issues that are essential to affording Mr. Mohammad a fair trial. Thorough examination of the evidence, to include consultation with qualified experts, was necessary to develop meritorious grounds to impeach, refute and exclude government evidence – including derivative evidence – that the prosecution will attempt to rely on in its case-in-chief and rebuttal at the guilt phase. Similar access and examination was indispensable to the development of the affirmative evidence that would have formed a pillar of Mr. Mohammad's case in mitigation at any penalty phase. As the Commission already found, the noncumulative, helpful and relevant nature of this evidence is quite apparent.

Second, for reasons that can be explained more fully in a classified hearing, purported "substitutes" of the kind generally proffered by the prosecution are woefully inadequate to afford Mr. Mohammad a semblance of the access to the previously available evidence he was entitled in preparing his defense. In particular, Mr. Mohammad is prepared to show that any proposed reliance on second-hand information and "summaries" is inconsistent with professional standards and protocols for evaluating and developing the full exculpatory significance of such evidence.

See Kyles v. Whitley, 514 U.S. 419, 446-447, 449 (1995) (assessing material, exculpatory value of evidence requires consideration of how it could have been used by competent counsel).

Third, the destruction of the evidence clearly was not the fault of Mr. Mohammad, nor could he have done anything else to prevent it. Similar to the facts in *Simmermacher*, Mr. Mohammad did not receive the government's written notice until it was too late to do anything about the destruction of the evidence. *See United States v. Madigan*, 63 M.J. 118, 121 (C.A.A.F. 2006), overruled other grounds; *United States v. Simmermacher*, 74 M.J. 196, 201 (C.A.A.F. 2015) (even good faith destruction of evidence in compliance with regulatory retention period does not foreclose party from showing that the period between notice to the party of the test result and destruction of the evidence did not provide reasonable time within which to request access). Mr. Mohammad's only misstep here was relying on the impression created by Military Judge Pohl and the prosecution in suggesting the evidence would indeed not be destroyed until such time as Mr. Mohammad's counsel received *timely* notice to the contrary.

Thus, pursuant to the constitutional mandates of fairness and reliable decision-making in capital cases, guaranteed by the Sixth and Eighth Amendments, and the provisions of Rule 703(f)(2)(A) and (B), the guilt and/or penalty phase of Mr. Mohammad's trial must be abated.

III. Military Judge Pohl's Involvement in The Prosecution's Destruction of Evidence Disqualifies Him from Determining the Appropriate Remedy.

The foregoing analysis constitutes at least a colorable showing that the prosecution intentionally destroyed material, exculpatory evidence through bad faith manipulation of the evidence and proceedings. Under the current circumstances, it is essential that the task of evaluating the merits of Mr. Mohammad's contention and deciding the appropriate remedy falls to a judge whose neutrality and detachment from the issue cannot be questioned. As the court in

Simmermacher explained: "in determining whether an adequate substitute for lost or destroyed evidence is available, a military judge has broad discretion. It is when no adequate substitute is available, as in Simmermacher's case, that military judges do not have discretion to vary from the prescribed remedy," i.e., abatement. *Simmermacher*, 74 M.J. at 200. Resolution of this important issue must not risk a conclusion by hypothetical onlookers, or the proverbial "man on the street," that reasons of self-interest may have led a judge to conclude there was no harm, and thus no foul, resulting from the destruction of the evidence.

As the United States Supreme Court observed in *In re Murchison*, 349 U.S. 133 (1955):

> "[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.'"

Id., at 136 (quoting *Tumey v. Ohio*, 273 U.S. at 532).

Accordingly, another military judge should be selected by lot from among those military judges who are qualified and available to preside over the litigation of this motion pursuant to R.M.C. 502(c)(1). Maintaining any "public confidence in the integrity of the military commission process" requires nothing less. *Al Bahlul*, 807 F. Supp. 2d 1123.

7. Oral Argument

Mr. Mohammad requests oral argument.

8. Conference

The prosecution opposes the requested relief.

9. Witnesses

Upon selection and assignment of a disinterested Military Judge, Mr. Mohammad will:

(1) Request expert witnesses to explain why access to substitutions for the destroyed evidence will not afford him a fair opportunity to develop and present a defense; and

(2) Request to voir dire Military Judge Pohl.

10. Attachments

A. Certificate of Service
B. Detailed List of References
C. Prosecution Final Response to 20 SEPT 2012 Request for Discovery

Respectfully submitted,

//s//
DAVID Z. NEVIN
Learned Counsel

//s//
GARY D. SOWARDS
Defense Counsel

//s//
DEREK A. POTEET
Maj, USMC
Defense Counsel

Counsel for Mr. Mohammad

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 10th day of May 2016, I filed AE 425(Mohammad) Mr. Mohammad's Motion to Recuse Military Judge and the Current Prosecution Team and for Further Appropriate Relief, with the Clerk of Court and served the foregoing on all counsel of record.

//s//
DAVID Z. NEVIN
Learned Counsel

ATTACHMENT B

United States v. KSM, et al.

APPELLATE EXHIBIT 425 (KSM)

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APPELLATE EXHIBIT 425 (KSM), Attachment B, is located in the classified annex of the original record of trial.

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Office of Military Commissions

ATTACHMENT C

United States v. KSM, et al.

APPELLATE EXHIBIT 425 (KSM)

(Pages 33-34)

Classified

Defense Motion

APPELLATE EXHIBIT 425 (KSM), Attachment C, is located in the classified annex of the original record of trial.

POC: Chief, Office of Court Administration
Office of Military Commissions