

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

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**UNITED STATES OF AMERICA**

v.

**KHALID SHAIKH MOHAMMAD,  
WALID MUHAMMAD SALIH  
MUBARAK BIN ‘ATTASH,  
RAMZI BIN AL SHIBH,  
ALI ABDUL AZIZ ALI,  
MUSTAFA AHMED ADAM  
AL HAWSAWI**

**AE 432C**

**RULING**

Mr. al Baluchi’s Motion to Compel  
Production of Policies and Procedures  
for the Collection and Preservation of  
Evidence from Detainees

**26 February 2019**

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**1. Procedural Background.**

a. On 17 June 2016, Mr. Ali (a.k.a. al Baluchi) moved<sup>1</sup> the Commission to compel production of discovery of “complete, un-redacted copies of any government policies, procedures, guidance, orders and/or instructions regarding the preservation of all evidence, documents, and recorded information of every detainee now or ever held at Guantanamo Bay,” as well as, “any electronic data collected, any physical evidence obtained at the time of his capture, and any records of contraband or makeshift weapons seized over the course of detention operations” specifically related to Mr. Ali.<sup>2</sup>

b. On 1 July 2016, the Government filed a response,<sup>3</sup> requesting the Commission deny Mr. Ali’s motion.<sup>4</sup> In support of its filing, the Government argued that the request for general preservation guidance is overbroad, and the Government had previously agreed to provide all relevant and material evidence and/or make available the specific requested materials related to Mr. Ali.<sup>5</sup> Additionally, the Government averred that U.S. forces did not arrest Mr. Ali or seize

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<sup>1</sup> AE 432 (AAA), Mr. al Baluchi’s Motion to Compel Production of Policies and Procedures for the Collection and Preservation of Evidence from Detainees, filed 17 June 2016.

<sup>2</sup> *Id.* at 1.

<sup>3</sup> AE 432A (GOV), Government Response to Mr. Ali’s Motion to Compel Production of Policies and Procedures for the Collection and Preservation of Evidence from Detainees, filed 1 July 2016.

<sup>4</sup> *Id.* at 1.

<sup>5</sup> *Id.* at 4.

the physical evidence from Mr. Ali's capture and the physical evidence has never been in possession of the Government. Instead, the Government was provided photographs of the physical evidence and those photographs have been provided to the Defense.<sup>6</sup>

c. On 8 July 2016, Mr. Ali filed a reply,<sup>7</sup> reasserting his request for the Commission to compel production of "certain discovery regarding the preservation of evidence, including certain items specific to Mr. Ali, which are important to defense trial preparation."<sup>8</sup>

d. On 12 October 2016, Counsel for Mr. Ali declined the opportunity to present oral argument and opted to submit the issue on the briefs alone.<sup>9</sup>

e. To date, the Commission has received no confirmation that the Government either has, or has not, provided the requested discovery the Government represented it would provide to the Defense.

## 2. Law.

a. The burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence. Rule for Military Commissions (R.M.C.) 905(c)(1). The burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party. R.M.C. 905(c)(2).

b. The Government must disclose to the Defense the existence of evidence known to the trial counsel which reasonably tends to (1) negate the guilt of the accused of an offense charged, (2) reduce the degree of guilt of the accused of an offense charged, or (3) reduce the punishment. *United States v. Graner*, 69 M.J. 104, 107 (C.A.A.F. 2010). "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

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<sup>6</sup> *Id.* at 5.

<sup>7</sup> AE 432B (AAA), Mr. al Baluchi's Reply to AE 432A Government Response to Compel Production of Policies and Procedures for the Collection and Preservation of Evidence from Detainees, filed 8 July 2016.

<sup>8</sup> *Id.* at 1.

<sup>9</sup> Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad*, et al., Motions Hearing dated 12 October 2016 from 2:17 P.M. to 4:34 P.M. at p.13838.

c. Upon request, the Government is required to permit the Defense to examine several classes of materials which are “within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.” R.M.C. 701(c)(1) – (3).

d. “This materiality standard normally ‘is not a heavy burden,’ rather, evidence is material as long as there is a strong indication that it will ‘play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.’” *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993)(quoting *United States v. Felt*, 491 F. Supp. 179 (internal citations omitted)).

### **3. Analysis.**

a. The Government represented to the Commission its intent to provide certain discovery to the Defense relevant to this motion. To the extent any of this information has not been provided to the Defense, the Commission will order the Government to provide it.

b. The physical evidence seized by non-U.S. entities was not and is not in the possession, custody or control of the United States. Accordingly, the physical evidence is not discoverable. The Defense has not disputed the Government’s assertion that it provided photographs of the physical evidence in discovery.

c. The Defense request for various information regarding “every detainee now or ever held at Guantanamo Bay” is overbroad. The Defense has failed to establish the materiality of the requested information about other detainees, or to show that this information is either exculpatory, impeaching, or mitigating. The Defense has failed to show any indication that the information requested will lead to the discovery of admissible evidence, aid in witness preparation, or assist in impeachment or rebuttal. This information is not discoverable, absent some further particularized showing of materiality by the Defense.

4. **Ruling and Order.** The Defense motion to compel is **GRANTED IN PART.**

a. In accordance with its representations to this Commission in AE 432A (GOV), the Government is ordered to provide, if it has not yet done so, the following to the Defense:

(1) Chairman of the Joint Chiefs of Staff Notice 5761, Preservation of Detainee Records, dated 29 February 2019;

(2) The two Department of Defense Office of General Counsel memoranda referenced internally within Staff Notice 5761;

(3) Discoverable electronic data contained in the Military Commission Rules of Evidence 505 filings as referenced by the Government in its response; and,

(4) Discoverable information relating to contraband seized from the Accused as referenced by the Government in its response.

b. The Defense's motion is **DENIED** with respect to all other materials requested in AE 432 (AAA).

So **ORDERED** this 26th day of February, 2019.

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K. A. PARRELLA  
Colonel, U. S. Marine Corps  
Military Judge