

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID
MUHAMMAD SALIH MUBARAK BIN
'ATTASH, RAMZI BINALSHIBH, ALI
ABDUL AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

AE502MM (AAA)

Defense Motion for Advance Production
Of R.M.C. 914 Statements for Government
Witnesses Identified in AE502X

6 November 2017

1. **Timeliness:** This motion is timely filed.
2. **Relief Sought:** Mr. al Baluchi requests that the military commission compel the production of statements by the government's four witnesses identified in AE502X (GOV) Government Updated Notice of Witnesses Demonstrating Personal Jurisdiction over the Accused, that relate to the subject matter of their testimony no less than thirty days prior to their testimony pursuant to R.M.C. 914.
3. **Overview:** Mr. al Baluchi has requested and continues to request any and all statements that relate to the subject matter of the testimony of the government's witnesses identified in AE502X.
4. **Burden and Standard of Proof:** The burden of persuasion on this motion to compel discovery rests with the defense.¹
5. **Facts:**
 - a. On 21 June 2017, the government filed AE 502K (GOV) Government Notice of Witnesses Demonstrating Personal Jurisdiction of the Accused, wherein it identified six witnesses and provided synopses of their expected testimony.

¹ R.M.C. 905(c)(2).

b. On 14 July 2017, Mr. al Baluchi submitted a discovery request, which in pertinent part requested that the government “produce any and all statements by the persons identified by the government in AE502K that relate to the subject matter of their testimony in the upcoming personal jurisdiction hearing no less than 30 days prior to their expected testimony.”²

c. On 11 September 2017, the Military Commission issued AE 502V Trial Conduct Order, which in essence ordered the parties to provide more detailed synopses of expected witness testimony.

d. On 28 September 2017, the government filed AE 502X (GOV) Government Updated Notice of Witnesses Demonstrating Personal Jurisdiction over the Accused, wherein it identified an updated list of four witnesses and synopses of their expected testimony.

6. **Law and Argument:**

The military commission should compel the government to produce statements required by R.M.C. 914 thirty days prior to their testimony. Advance production of these statements will ensure adequate preparation of cross examination and encourage judicial economy. While the government is equipped with more than a decade’s worth of statements from reports, e-mails, and other electronic communications, the defendant is provided with a mere less than one-page synopsis of the witnesses’ expected testimony. By withholding prior statements until each witness has testified on direct examination, the government deprives Mr. al Baluchi of the opportunity to fully benefit from cross examination and will inevitably delay proceedings.

The interplay between 18 U.S.C. § 3500, the Jencks Act, and R.M.C. 914, the rule governing the production of statements of witnesses, provide an accused with the right to obtain government witnesses’ prior statements. These rules require a military judge, upon motion by a

² Att. B (DR-334-AAA).

defendant, to order the government to disclose prior statements of its witnesses that are related to the subject matter of their testimony after each witness testifies on direct examination.³ In accordance with the statute and R.M.C. 914, Mr. al Baluchi seeks an order producing these statements in advance, as the government has not responded to his discovery request.

The Jencks Act has long applied to courts-martial.⁴ R.C.M. 914, upon which the military commission's rule is based, substantially tracks the language of the Jencks Act.⁵ The discussion of R.M.C. 914 provides that "counsel should anticipate legitimate demands for statements under this and similar rules and that counsel should avoid delays in the proceedings by voluntary disclosure before arraignment." Together, the Jencks Act and Rule 914 afford an accused an opportunity to impeach witnesses and enhance the accuracy of trial proceedings through cross examination of witnesses.⁶ This is the exact outcome Mr. al Baluchi seeks in this motion for production of R.M.C. 914 statements for government witnesses.

The broad discovery rules of the military justice system combined with the routine practice of advance production in federal courts constitute a strong basis to support Mr. al Baluchi's access to the prior statements of the government's witnesses before their testimony. The military justice system has been a leader in the practice of open discovery⁷ with its rules expanding upon those of the federal system. The extension of the Jencks Act to military practice was deemed necessary "to ensure that discovery and disclosure procedures in the military justice system, which are designed to be broader than in civilian life, provided the accused, at a minimum, with the disclosure and

³ 18 U.S.C. Section 3500(b); R.M.C. 914.

⁴ *United States v. Walbert*, 33 C.M.R. 246 (1963).

⁵ *United States v. Pena*, 22 M.J. 281, 282 n.* (C.M.A. 1986).

⁶ *United States v. Lewis*, 38 M.J. 501, 508 (A.C.M.R. 1993).

⁷ *United States v. Enloe*, 35 C.M.R. 228, 230 (1965) (noting congressional intent to provide a military accused with a broader right of discovery than civilian defendants).

discovery rights available in civilian proceedings.”⁸ The commission should order the government to produce these statements prior to their direct examination consistent with these principles.

While the Jencks Act and R.M.C. 914 normally apply after a witness’ direct examination, judicial economy supports advance production of witness statements. The District of Columbia Circuit Court of Appeals has long approved the practice of determining Jencks Act issues before trial, stating that it is “efficient and consistent with the policies behind the Jencks Act.”⁹ In a similar line of cases, the D.C. Circuit has also recognized the important duty of the government to both preserve¹⁰ and disclose witness statements. This “duty of disclosure applies not just to the prosecutor, but to the government as a whole.”¹¹ Accordingly, a duty is placed on the government as well as the agencies its expected witnesses represent (Federal Bureau of Investigation, DoD Terrorism and Criminal Investigation Unit, and U.S. Department of Homeland Security) to preserve and produce the statements related to their expected testimony.¹² In addition, the standards of the American Bar Association¹³ as well as those of the government, encourage early and open discovery.¹⁴

⁸ *United States v. Williams*, 50 M.J. 436, 440 (C.A.A.F. 1999).

⁹ *United States v. Perry*, 471 F.2d 1057, 36 n.43 (D.C. Cir. 1972).

¹⁰ *United States v. Harrison*, 524 F.2d 421, 431-32 (D.C. Cir. 1975) (“It is the government’s duty to preserve notes of investigating officers.”)

¹¹ *United States v. Bryant*, 439 F.2d 642, 650 (D.C. Cir. 1979).

¹² *Id.*

¹³ Am. Bar Ass’n, *ABA Standards for Criminal Justice: Discovery and Trial by Jury*, 3d ed. (1996) at 11. (citing Standard 11-2.1(a)(ii), available at https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_discovery_blk.html#2.1, accessed Nov. 3, 2017).

¹⁴ Memorandum for Department of Justice Prosecutors, *Guidance for Prosecutors Regarding Criminal Discovery*, available at <https://www.justice.gov/archives/dag/memorandum-department-prosecutors> (Jan. 4, 2010) (“Prosecutors are also encouraged to provide discovery broader and more comprehensive than the discovery obligations.”).

Courts routinely encourage early disclosure of witness statements, particularly, in complex cases and those involving extensive investigations. “[H]ighly unusual cases . . . are particularly appropriate for liberal discovery treatment.”¹⁵ Both the government and the commission itself have clearly established that this case meets the “complex” criteria: “The Government has characterized the offenses before the Commission as ‘the crime of the century,’ and the Chief Prosecutor has stated, ‘This case presents higher stakes and greater legal and logistical challenges, than possibly, any other trial in U.S. history.’”¹⁶

The inherent complexity of this case and its extensive investigations is underscored by the nature of the four government witnesses’ expected testimony regarding hostilities in the upcoming personal jurisdiction hearing. For example, the testimony of Special Agent [REDACTED] is expected to cover events which date as far back as 1996 and Special Agent Fitzgerald to 1998.

In *United States v. Roark*, the court reasoned that the vast amount of information accumulated in an investigation is not a reason to withhold them from the defendant.¹⁷ “The Jencks Act, however, does not restrict production of potentially relevant materials simply because the materials are, or might be voluminous.”¹⁸ It is essential that the commission afford all necessary measures to even the playing field in this complex capital case, especially when these four witness are expected to testify regarding the defendant’s alleged role, confessions, and admissions.

Advance production of witness statements is consistent with the underlying principle of effective cross examination identified by the Supreme Court in *Jencks* and courts interpreting the

¹⁵ *United States v. Narcisco*, 446 F.Supp. 252 (E.D. Mich. 1977).

¹⁶ AE485C, Order, Mr. Ali’s Emergency Motion to Continue January 2017 Hearing Based on Failure to Provide Adequate Lodging in Accordance with Joint Travel Regulation.

¹⁷ 924 F.2d 1426, 1431 (8th Cir. 1991).

¹⁸ *Id.*

Jencks Act.¹⁹ In *Jencks*, the Supreme Court stated that only the defense can determine the value of prior prosecution witness statements for purposes of impeachment.²⁰ Without advance production of the prior statements of the government's witnesses, the defense counsel's attention is diverted "from the tasks of defending to the task of preparing."²¹ The defendant cannot reasonably be expected to form a proper cross examination of the government's witnesses without advance production.

In conclusion, Mr. al Baluchi requests a meaningful opportunity to prepare for cross-examination of the government's expected witnesses in the upcoming personal jurisdiction hearing. In the interest of judicial economy, the commission should order the government's advance production of R.M.C. statements of the government's witnesses thirty days prior to their expected testimony.

7. **Oral Argument:** The defense requests oral argument.
8. **Request for Witnesses:** None.
9. **Certificate of Conference:** The government states, "We are happy to provide RMC 914 materials for our witnesses identified in AE 502X in advance of the jurisdictional hearing, to the extent such materials exist. There should be no reason for you to have to file a motion. We will begin production of those materials next week."

¹⁹ *Ogden v. United States*, 303 F.2d 724 (9th Cir. 1962) ("The question of whether an otherwise producible statement is useful for impeachment must be left to the defendant.").

²⁰ *Jencks v. United States*, 353 U.S. 657 (1957).

²¹ *United States v. Johnston*, 127 F. 3d 380, 390 (1997).

10. **Attachments:**

A. Certificate of Service

B. DR-334-AAA

Very respectfully,

//s//
JAMES G. CONNELL, III
Learned Counsel

//s//
STERLING R. THOMAS
Lt Col, USAF
Defense Counsel

//s//
ALKA PRADHAN
Defense Counsel

//s//
JASON R. WAREHAM
Defense Counsel

Counsel for Mr. al Baluchi

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 6th day of November, 2017, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//
JAMES G. CONNELL, III
Learned Counsel

Attachment B



DEPARTMENT OF DEFENSE
MILITARY COMMISSIONS DEFENSE ORGANIZATION
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

14 July 2017

MEMORANDUM FOR Trial Counsel

FROM: Sterling R. Thomas, Lt Col, USAF, Military Defense Counsel for Mr. al Baluchi

SUBJECT: DEFENSE REQUEST FOR DISCOVERY
Witness Statements

Mr. al Baluchi, by and through undersigned counsel pursuant to RMC 701, 914, 10 U.S.C. § 949p-4, 18 U.S.C. §3500 (the Jencks Act), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), Common Article III to Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, the Due Process Clause of the Fifth Amendment, the Confrontation Clause to the Sixth Amendment, and the Compulsory Process Clause of the Sixth Amendment to the United States Constitution, hereby requests that the government produce the following discovery:

Definitions

In this request, the following definitions shall govern:

“Produce” means to convey to the defense without redaction (except as authorized by the military commission pursuant to MCRE 505) or alteration of any electronically stored information associated with the document. For email, the word “produce” includes providing the messages in the Personal Storage Table (“PST”) file format. If the military commission authorizes substitutions or redactions pursuant to MCRE 505, the word “produce” includes a notation of the Appellate Exhibit number of the order authorizing the substitutions or redactions. To the extent that responsive documents are subject to the attorney-client or other applicable privilege, the word “produce” means to provide a privilege log of any withheld information or documents, along with the facts disclosed in the responsive documents that are not communications protected by attorney-client privilege, and documents attached and/or incorporated into the responsive documents that are not otherwise exempt.

“Statement” has the meaning provided in RMC 914(f).

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2017-07-14

Discovery Request

Please produce any and all statements by the persons identified by the government in AE502K that relate to the subject matter of their testimony in the upcoming personal jurisdiction hearing NLT 30 days prior to their expected testimony.

Thank you. Please let me know if you need further information.

Respectfully Submitted,

//s//

STERLING R. THOMAS, Lt Col, USAF
Counsel for Mr. al Baluchi

DR-334-AAA
2017-07-14