

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

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>AE 528M</p> <p>RULING</p> <p>Defense Motion to Compel The Government to Produce All Phone Bills Seized in the Taliban Embassy Raid and Related Documents</p> <p>11 January 2019</p>
--	--

1. **Procedural Background.** Counsel for Mr. bin ‘Attash filed the instant motion to compel discovery on 25 October 2017.¹ The Government responded in opposition on 8 November 2017² and the Defense replied on 27 November 2017.³ The Defense also filed supplements on 1 March 2018⁴ and 4 May 2018.⁵ On 20 July 2018, Counsel for Mr. bin ‘Attash filed a motion to compel the production of Mr. John Kiriakou as a witness on the underlying issue.⁶ The Government responded on 3 August 2018,⁷ and the Defense replied on 10 August 2018.⁸ Mr. Ali (a.k.a. al Baluchi) declined joinder on 31 October 2017⁹ and Mr. Mohammad declined joinder on 7

¹ AE 528 (WBA), Defense Motion to Compel the Government to Produce All Phone Bills Seized in the Taliban Embassy Raid and Related Documents, filed 25 October 2017.

² AE 528C (GOV), Government Response to Defense Motion to Compel the Government to Produce All Phone Bills Seized in the Taliban Embassy Raid and Related Documents, filed 8 November 2017.

³ AE 528D (WBA), Defense Reply to Government Response to AE 528D (WBA), Motion to Compel the Government to Produce All Phone Bills Seized in the Taliban Embassy Raid and Related Documents, filed 27 November 2017.

⁴ AE 528 (WBA Sup), Mr. bin ‘Atash’s Supplement to AE 528 (WBA), Defense Motion to Compel the Government to Produce All Phone Bills Seized in the Taliban Embassy Raid and Related Documents, filed 1 March 2018.

⁵ AE 528 (WBA 2nd Sup), Mr. bin ‘Atash’s Second Supplement to AE 528 (WBA), Defense Motion to Compel the Government to Produce All Phone Bills Seized in the Taliban Embassy Raid and Related Documents, filed 4 May 2018.

⁶ AE 528F (WBA), Mr. bin ‘Atash’s Motion to Compel Production of Mr. John Kiriakou for Evidentiary Hearing on the AE 528 Series and Related Matters, filed 20 July 2018.

⁷ AE 528G (GOV), Government Response to Mr. bin ‘Attash’s Motion to Compel Production of Mr. John Kiriakou for Evidentiary Hearing on the AE 528 Series and Related Matters, filed 3 August 2018.

⁸ AE 528H (WBA), Mr. bin ‘Atash’s Reply to AE 528G (GOV), Government Response to Mr. Bin ‘Attash’s Motion to Compel Production of Mr. John Kiriakou for Evidentiary Hearing on the AE 528 Series and Related Matters, filed 10 August 2018.

⁹ AE 528A (AAA), Mr. al Baluchi’s Motion to Decline Joinder to AE 528 (WBA) Defense Motion to Compel the Government to Produce All Phone Bills Seized in the Taliban Embassy Raid and Related Documents, filed 31 October 2017.

November 2017.¹⁰ Messrs. Hawsawi and bin al Shibh remained joined but did not submit briefs or participate in argument of the motion.¹¹ The Commission received evidence and heard argument on this motion series on 14 November 2018 at the U.S. Naval Station, Guantanamo Bay, Cuba.¹² On 4 December 2018, the Commission issued AE 528J, directing the Government to file a supplemental pleading explaining certain apparent discrepancies between representations in their response (AE 528C (GOV)) and their oral argument.¹³ That supplemental pleading was filed on 13 December 2018¹⁴ and clarified what records had been provided. The Defense filed a classified response on 20 December 2018.¹⁵ The Government amended their supplemental filing on 2 January 2019.¹⁶

2. **Findings of Fact.** The Commission makes the following findings of fact:

a. On 16 September 2016, Mr. bin ‘Atash submitted a discovery request to the Government asking for, “All phone bills seized in the February 2002 Taliban Embassy Peshwar raid described by Mr. Kiriakou, and all documents pertaining to them in any way, to include their chain of custody, analysis and follow-up investigations.” Mr. bin ‘Atash asserted, “Any information connecting the Taliban Government of Afghanistan to the 9/11 hijackers or others in the United States and any support networks in the United States is discoverable to Mr. bin’Atash’s defense and may lead to exculpatory or favorable evidence and/or evidence in

¹⁰ AE 528B (KSM), Motion to Decline Joinder to AE 528 (WBA) Defense Motion to Compel the Government to Produce All Phone Bills Seized in the Taliban Embassy Raid and Related Documents, filed 7 November 2017.

¹¹ Unofficial/Unauthenticated Transcript of the *U.S. v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 14 November 2018 from 10:43 A.M. to 11:48 A.M. at 21463.

¹² Unofficial/Unauthenticated Transcript of the *U.S. v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 14 November 2018 from 10:43 A.M. to 11:48 A.M. at pp. 21437-21467.

¹³ AE 528J, Interim Order; Defense Motion to Compel the Government to Produce All Phone Bills Seized in the Taliban Embassy Raid and Related Document, dated 4 December 2018.

¹⁴ AE 528K (GOV), Government Response to AE 528J, Interim Order, Defense Motion to Compel the Government to Produce All Phone Bills Seized in the Taliban Embassy Raid and Related Documents, filed 13 December 2018.

¹⁵ AE 528L (WBA), Mr. bin ‘Atash’s Response to AE 528K (GOV), Supplemental Pleading to Comply with AE 528J (ORD) and Address the Significant Difference Between Government Representations on Discovery Provided and Actual Discovery Provided, filed 20 December 2018.

¹⁶ AE 528K (Gov Amend), Amendment* to Government Response To AE 528J, Interim Order, Defense Motion to Compel the Government to Produce All Phone Bills Seized in the Taliban Embassy Raid and Related Documents, filed 2 January 2019.

mitigation.”¹⁷

b. The factual basis for the discovery request was an account by Mr. John Kiriakou in his book, Reluctant Spy: My Secret Life in the CIA's War on Terror, (2012) and a subsequent C-SPAN interview published to the Commission in AE 528I (WBA) in which Mr. Kiriakou discussed the book. Mr. Kiriakou's book contains a photograph of a van loaded with records purportedly seized in the raid with a caption below indicating that Tommy McHale reportedly found “phone bills showing dozens of calls from the Taliban to numbers across the United States in the weeks before the September 11, 2001, attacks.” Mr. Kiriakou's interview sheds further light. In it, he describes the operation conducted by him and Mr. McHale, a New York Port Authority officer on loan to the FBI, the lead agency on the investigation. After the raid, Mr. Kiriakou related, “Four or five days later, [Mr. McHale] came to my office and said, ‘You're never going to believe what I found.’ It was a file folder with telephone bills and the telephone bills were written in English. They were Pakistani issued telephone bills, and they documented 168 calls made from the Taliban embassies to numbers inside the United States and I mean all over the United States: Bethesda, Maryland; Los Angeles, Buffalo, Kansas City, all over the country, and those calls stopped abruptly on September the 10th 2001 and then started again slowly on a September the 16th.” He continued, “This is the best lead that we had during that time that I was in Pakistan.”¹⁸

c. On 29 September 2016 and 14 October 2016 the Government informed Mr. bin ‘Attash that they would respond upon completion of their due diligence.¹⁹ The Government avers that on 17 October 2017, while not conceding their discoverability, they provided what they believed to be “the records referred to by John Kiriakou in his book...”²⁰ and their

¹⁷ AE 528 (WBA) at 18.

¹⁸ By Frederick P. Hitz for “After Words” on C-SPAN2 BookTV, aired on 23 April 2010; available at <https://www.c-span.org/video/?293438-1/after-words-john-kiriakou&start=1726>; at 32:30 to 33:00.

¹⁹ AE 528 (WBA) at 21, 24.

²⁰ AE 528C (Gov) at 5.

accompanying chain of custody documentation and analysis to Mr. bin ‘Attash, but denied the request for other documents citing the absence of a sufficient proffer of relevance.²¹

d. On 18 October 2017, Mr. bin ‘Attash requested more legible copies of the records from the Government.²² On 2 November 2017, after Mr. bin ‘Attash filed the base motion, the Government provided more legible copies to the Defense. The Government claims these are the most legible scans that it can make and offered the Defense the opportunity to inspect and photograph the documents in person. Mr. bin ‘Attash asserts, “most, but not all pages” are legible²³ but does not point out particular pages as to which they object on the basis of legibility, rather complaining the Government obviously had the wherewithal to make legible copies from the beginning, evincing a pattern of shoddy discovery practice.²⁴ Mr. bin ‘Attash did not modify their original prayer that the Commission compel the production of all items as requested in the original discovery request.

e. In oral argument, the Government asserted what they provided were records and related documents, to include analysis, of phone calls made “the month before, the month after, around that time frame.”²⁵ At the direction of the Commission to explain certain apparent contradictions, the Government asserted in AE 528K (GOV) that it requested all seized records for the time period of 11 August through 11 October 2001, examined those records and confirmed, “that it previously disclosed all records for 11 August through 11 September 2001.”²⁶ The Government confirmed “that the Defense are in possession of all Taliban consulate telephone records that are in the possession of the United States for the month prior to the September 11, 2001 attacks.”²⁷

²¹ AE 528 (WBA) at 27.

²² *Id.* at 152.

²³ AE 528D (WBA) at 2.

²⁴ *Id.*

²⁵ Unofficial/Unauthenticated Transcript of the *U.S. v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 14 November 2018 from 10:43 A.M. to 11:48 A.M. at 21459.

²⁶ AE 528K (GOV) at p. 3, fn. 4.

²⁷ *Id.* at 4.

f. After the Commission directed the Government to explain certain inconsistencies between its in-court statements and the evidence actually provided to the Defense, the Government corrected some misstatements in their oral argument and disclosed some additional records. Nonetheless, the records provided, which the Government continues to maintain are all of the records in the Government's possession for the month of September, 2001, only contain records of four calls to the United States, not the 168 referenced by Mr. Kiriakou in his book. Mr. bin 'Attash's classified filing referred to the analysis of the seized records and suggested a particular storage location where Counsel believed the records were kept. That analysis, however, seems to strongly indicate that the records actually maintained and analyzed by the FBI only involved four calls to the United States in the month of September 2001; likely the same four calls appearing in the discovery provided to the Defense. Whatever may have been seized by Mr. Kiriakou, what was provided to the Defense is what the Government has in its possession from the relevant timeframe.

g. Mr. Kiriakou had agreed to an interview with a defense investigator. He withdrew that agreement after being contacted by a Central Intelligence Agency (CIA) attorney who reiterated the permissible limits of his prospective interview.²⁸ Mr. Kiriakou denied having had any contact with the Defense and further denied having set up any interview. This denial is contradicted by compelling evidence to the contrary. The Defense has averred in previous filings that Mr. Kiriakou has been convicted and served jail time for his failure to adequately protect classified CIA information.²⁹ The letter sent by the CIA to Mr. Kiriakou was understandable based on the totality of the circumstances and simply reminded him of the permissible limits of information he could disclose in his interview. It contained no text supporting Mr. bin 'Attash's argument that they "kindly reminded him of all the statutes that he could be prosecuted for and

²⁸ AE 528 (WBA 2nd Sup), Mr. bin 'Atash's Second Supplement to AE 528 (WBA), Defense Motion to Compel the Government to Produce All Phone Bills Seized in the Taliban Embassy Raid and Related Documents, filed 4 May 2018 at 34.

²⁹ AE 524W (WBA Sup), Mr. bin 'Atash's Supplement to AE 524W (WBA), Mr. bin 'Atash's Response to AE 524S (GOV), Government Notice of Proposed Protective Order, filed 4 May 2018 at p. 7, fn. 1.

be imprisoned for.”³⁰ The letter specifically disclaimed any intent to discourage his cooperation with the Defense. In light of all of the facts and circumstances, the contact between the CIA and Mr. Kiriakou did not amount to unlawful interference.

3. Law.

a. In the context of a military commission under the Military Commissions Act, “The opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under Article III of the Constitution.” 10 U.S.C. § 949j(a)(1).

b. In a military commission, the Government (e.g. the Prosecution) has the responsibility to determine what information it must disclose in discovery. Rule for Military Commissions (R.M.C.) 701(b)-(c); *United States v. Briggs*, 48 M.J. 143 (C.A.A.F. 1998); *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987). “In the typical case where a defendant makes only a general request for exculpatory material under *Brady v. Maryland*, 373 U.S. 83 (1963), it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance. *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (‘There is no general constitutional right to discovery in a criminal case, and Brady did not create one’).” *Ritchie*, 480 U.S. at 59-60. It is incumbent upon the Prosecution to execute this duty faithfully, because the consequences are dire if it fails to do so. *See United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015) (finding no abuse of discretion in military judge’s dismissal with prejudice of charges due to a Prosecution discovery violation); *United States v. Bowser*, 73 M.J. 889 (A.F. Ct. Crim. App. 2014), summarily aff’d 74 M.J. 326 (C.A.A.F. 2015) (same).

c. Upon request, the Government is required to permit the Defense to examine several

³⁰ Transcript at 21,464.

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. Under the Federal Rules of Criminal Procedure, the materiality standard for disclosure is stated “material to preparing the defense.” In view of this functionally identical language and the MCA’s requirement that an accused’s discovery rights mirror those of a defendant in the Federal system, Federal interpretations of the standard are generally more persuasive than military case law interpreting Article 46, UCMJ and its implementing regulations.

e. “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 (1993, quoting *United States v. Felt*, 491 F. Supp. 179, *internal citations omitted*). Also, information is discoverable if it is material to sentencing. R.M.C. 701(e)(3). “There must be some indication that the pretrial disclosure of the disputed evidence would [enable] the defendant significantly to alter the quantum of proof in his favor.” *Lloyd* at 351, citing *United States v. Caicedo-Llanos*, 295 U.S. App. D.C. 99, 960 F.2d 158, 164 n.4 (D.C. Cir. 1992).

f. “[E]ach party is entitled to the production of any available witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.” R.M.C. 703(b)(1).

4. Analysis.

a. Turning first to the request to compel the testimony of Mr. Kiriakou on the motion, the Commission finds that such testimony would be neither relevant nor necessary. It is not entirely clear

from the record that Mr. Kiriakou even has first-hand knowledge of the contents of the records which were apparently examined by his partner, Mr. McHale. Even were one to assume the records seized were exactly as Mr. Kiriakou described, several logical leaps would have to be made to link them to the case at bar including that 1) the calls in question related to the 9/11 attacks, 2) that the calls would tie the Taliban to the attacks, and 3) that the purported connection between the Taliban and the attacks would exculpate or mitigate any involvement by the accused. Considering further the credibility issues likely attendant to Mr. Kiriakou's testimony, the idea that said testimony will be of assistance in resolving this motion is beyond speculative.

b. As to the motion itself, the Government has asserted and re-asserted that the Defense is in possession of the records requested at least for the month of September 2001. While those records appear to differ significantly from Mr. Kiriakou's representations, the Commission is powerless to compel into existence that which the Government steadfastly avers does not exist. Even if the records existed, the tenuous and speculative link between the evidence and any legitimate theory of the defense fails to sufficiently demonstrate the records are material to the preparation of the defense.

5. **Ruling.** The motions raised by AEs 528 (WBA) and 528F (WBA) are **DENIED**.

So **ORDERED** this 11th day of January, 2019.

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