

UNCLASSIFIED//FOR PUBLIC RELEASE  
MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

<p><b>UNITED STATES OF AMERICA</b></p> <p>v.</p> <p><b>KHALID SHAIKH MOHAMMAD; WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH; RAMZI BINALSHIBH; ALI ABDUL AZIZ ALI; MUSTAFA AHMED ADAM AL HAWSAWI</b></p>	<p><b>AE 555DDD (GOV)</b></p> <p><b>Government Response</b> To AE 555CC (KSM Sup), Mr. Mohammad’s Supplement to AE 555CC (KSM)</p> <p>4 January 2019</p>
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**1. Timeliness**

The Prosecution timely files this Response pursuant to Military Commissions Trial Judiciary Rule of Court (“R.C.”) 3.7.

**2. Relief Sought**

The Prosecution respectfully requests the Commission rule on the substantive AE 555 motions—denying relief consistent with the absence of any actual or apparent unlawful influence—and also deny any other Defense request for witness testimony.

**3. Burden of Proof**

As the moving party, the Defense is required to demonstrate by a preponderance of the evidence that Mr. Rishikof’s testimony is relevant and necessary. *See* R.M.C. 905(c)(1)–(2); R.M.C. 703(c)(2)(D).

**4. Facts**

As set forth below.

## 5. Law and Argument

The Defense supplement in AE 555CC (KSM Sup) is not an actual supplement. It is a request for a do-over following two final arguments on the motion. This cannot be how it works. The Defense's renewed request for Mr. Rishikof's testimony should be denied.

Following the second argument on this motion, and while all of the parties await a ruling on what was a straight-forward personnel action that occurred almost a year ago, the Defense now argues that since they chose to present no evidence of the existence of an actual "pre-trial agreement," and the Prosecution then argued that there was no evidence of a "pre-trial agreement," (after asking both the Convening Authority's office for a copy, and the Defense for a copy), they should now be permitted to call Mr. Rishikof to testify about this purported "Pre-Trial Agreement Offer." The Military Judge should rule on the substantive motion and deny any further testimony from any witness.

Of course, none of the facts presented in AE 555CC (KSM Sup) are new to the Defense such that the instant pleading constitutes an actual supplement as contemplated under R.C. 3.5.e. The Defense was fully aware of whatever "Pre-Trial Offer"<sup>1</sup> they presented to Mr. Rishikof, and could have presented evidence of it in myriad ways (i.e. via declaration; tendering of the "Pre-Trial Agreement Offer" as evidence; tendering of any receipt for providing the "Pre-Trial Agreement Offer" to the Convening Authority; calling a Defense team member as a witness, etc.), but instead chose not to.

The Defense could have even simply attached the "Pre-Trial Agreement Offer" they presented to Mr. Rishikof to this most recent supplement, but again, for strategic reasons known only to them, decided instead to seek the testimony of Mr. Rishikof so he can describe the very "Pre-Trial Agreement Offer" that the Defense themselves possess. Had the Prosecution been shown this "Pre-Trial Agreement Offer" and accompanying documentation indicating that it had

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<sup>1</sup> The Prosecution uses the term "Pre-Trial Agreement Offer" because that is the term used by the Defense in page 5 of AE 555CC (KSM Sup). Whatever the document was, by the Defense's admission, it was not an actual "Pre-Trial Agreement," as it was not signed by Khalid Sheikh Mohammad or the Convening Authority. *See* AE 555CC (KSM Sup) at 5.

been delivered to Mr. Rishikof, it likely would have stipulated to those facts but is clearly not required to do so as the Defense continues to shield this “Pre-Trial Agreement Offer” from the Commission for some strategic reason known only to them.

To the extent the existence of the “Pre-Trial Agreement Offer” and whether it was tendered to Mr. Rishikof is a matter of import to the Military Commission in deciding the AE 555 motion series, the Military Commission could simply order its production along with any receipts for delivery of the document the Defense may have in lieu of ordering Mr. Rishikof’s testimony. As this so-called “Pre-Trial Agreement Offer” is the legally operative document at issue, it clearly constitutes the best evidence not only of its own existence but also of its proposed terms (as well as whether any of those terms required Attorney General approval) and is better evidence than the testimony of Mr. Rishikof would be on the issue. *See United States v. Davis*, 596 F.3d 852, 858 n.4 (D.C. Cir. 2010) (The policy underlying the best evidence rule, embodied in Federal Rule of Evidence 1002, requires litigants to prove the contents of a writing by introducing the writing itself, which guards against inaccuracy, fraud, and incompleteness). But Mr. Rishikof’s testimony on this issue is also unnecessary for another reason recently clarified by the Defense in the most recent hearings and again in its supplement: By the Defense’s own admission, there was never an actual “Pre-Trial Agreement.”

Mr. Mohammad did not sign the “Pre-Trial Agreement Offer,” and there is no evidence that he has ever seen this document, let alone agreed to its terms. *See* AE 555CC (KSM Sup) at 5 (“... this PTA offer, was signed by me. It was not signed by Mr. Mohammad. And I understood that in order to be a pretrial agreement it needs to be signed by all the parties.”) (quoting Unofficial/Unauthenticated Transcript (“Tr.”) at 21865–66). There is no also no evidence that Mr. Rishikof had signed the “Pre-Trial Agreement Offer,” and by all accounts he had not.

Even taking the Defense’s averments as fact, all that ever existed was a “Pre-Trial Agreement Offer” from counsel, not a signed “Pre-Trial Agreement” by Khalid Sheikh Mohammad awaiting Mr. Rishikof’s signature. As such, Mr. Mohammad clearly suffered no

cognizable prejudice from the termination of Mr. Rishikof while this “Pre-Trial Agreement Offer” was pending, and he cannot now claim that he would have had an actual “Pre-Trial Agreement” but for the termination of Mr. Rishikof. Not only is there no evidence to make such a claim, the evidence in the record actually refutes such a claim, as apparently there was a term in this “Pre-Trial Offer” requiring a guarantee that Mr. Mohammad would not be prosecuted in federal court; a term which was not going to be accepted by the United States. *See* AE 555CC (KSM Sup) at 6. (“I will also say that the record -- that the pretrial agreement offer, the PTA offer did require that the convening authority agree that Mr. Mohammad would not be prosecuted elsewhere . . . .”) (quoting Tr. at 21865–66). Of course, as the Defense well knows, the Convening Authority does not possess the authority to make that determination on his own and would need to seek concurrence of other federal and state agencies before agreeing to such a term.

Defense counsel for Mr. Mohammad made a strategic decision not to present evidence of his tendering of a “Pre-Trial Offer” to Mr. Rishikof, and further chose not to provide the actual “Pre-Trial Offer” to either the Prosecution in discovery or as evidence before the Commission. With the filing of this supplement he has now made that choice not once, but twice. The Prosecution simply argued these facts to the Commission. Such argument does not constitute “new facts” such that a supplement is now warranted and Mr. Rishikof’s testimony be reconsidered.

Defense counsel should not now be granted a do-over and be permitted to call Mr. Rishikof as a witness to establish facts he knew long before the litigation in the AE 555 motion series, and could have also readily established through other evidence prior to two different arguments on the motion.

## **6. Oral Argument**

The Prosecution does not request oral argument.

**7. Witnesses and Evidence**

The Prosecution will not rely on any witnesses or additional evidence in support of this pleading.

**8. Additional Information**

The Prosecution has no additional information.

**9. Attachments**

A. Certificate of Service, dated 4 January 2019.

Respectfully submitted,

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Clay Trivett  
Managing Trial Counsel

Mark Martins  
Chief Prosecutor  
Military Commissions

# ATTACHMENT A

**CERTIFICATE OF SERVICE**

I certify that on the 4th day of January 2019, I filed AE 555DDD (GOV), Government Response To AE 555CC (KSM Sup), Mr. Mohammad's Supplement to AE 555CC (KSM), with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//

Clay Trivett  
Managing Trial Counsel  
Office of the Chief Prosecutor  
Office of Military Commissions