

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

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 614H

RULING

**Government Motion
to Compel Notice of Intent to Introduce
Expert Mental Health Evidence**

25 April 2019

1. Procedural History.

a. On 19 December 2018, the Government moved this Commission pursuant to Rule for Military Commissions (“R.M.C.”) 701(g)(2) to issue an order compelling each of the Accused to provide notice of intent to introduce expert mental health information at trial, to include a potential presentencing hearing.¹ The Government further requested that the notices contain the name and qualifications of the defense expert, a description of the general nature of testing the expert has completed or will complete, and a description of the general nature of the expert’s proposed testimony.² The Government stated the notice must also include any experts who will provide opinion testimony based upon a review of records, as opposed to a personal examination of the Accused.³ Lastly, the Government requested that this Commission require the aforementioned notices to be filed by 1 June 2019.⁴ The Government’s position was premised largely on the assumption that the Commission’s establishment of a trial date is imminent, and therefore the Government needs adequate notice and time to prepare rebuttal evidence (to include the opportunity to have the Accused examined by its own medical and/or mental health

¹ AE 614 (GOV), Government Motion to Compel Notice of Intent to Introduce Expert Mental Health Evidence, filed 19 December 2018, at 1

² *Id.*

³ *Id.*

⁴ *Id.* at 2.

professionals) should the Defense intend to offer any such evidence pursuant to R.M.C.

701(g)(2).⁵

b. On 15 January 2019, Messrs. Ali, Hawsawi, and bin al Shibh replied separately to the Government's motion. Mr. Ali affirmed he would comply with R.M.C. 701(g), but argued that the Government's request should be denied because it "substantially exceeds the scope of R.M.C. 701(g)(2)."⁶ Specifically, Mr. Ali took issue with not just the timing of the notice requested by the Government, but also the breadth of the notice requested, stating that it went well beyond what the Defense was required to provide under R.M.C. 701(g)(2) and (g)(4).⁷ Mr. Hawsawi argued the Government motion should be denied because it was "premature and unnecessary."⁸ Mr. bin al Shibh listed three arguments for denial of the Government motion: (1) the Government request is an unconstitutional, impermissible infringement on the rights of the Accused; (2) the Government's interpretation of R.M.C. 701(g)(2) is misleading, as the rule is not intended to address notice for mitigation; and (3) ongoing litigation regarding discovery is a barrier to the Defense's ability to make fully-informed decisions about any mental health affirmative defense or mitigation evidence.⁹

⁵ *Id.* at 5-7.

⁶ AE 614A (AAA), Mr. al Baluchi's Response to Government Motion to Compel Notice of Intent to Introduce Expert Mental Health Evidence, filed 15 January 2019. Mr. Ali indicated that he does not intend to offer the defense of lack of mental responsibility, but may provide notice of intent to offer expert testimony as to the accused's mental condition. *Id.* at 3.

⁷ *Id.* at 3-4.

⁸ AE 614B (MAH), Mr. al Hawsawi's Response to AE 614 (GOV), Government Motion to Compel Notice of Intent to Introduce Expert Mental Health Evidence, filed 15 January 2019 at 1.

⁹ AE 614C (RBS), Defense Response to Government Motion to Compel Notice of Intent to Introduce Expert Mental Health Evidence, filed 15 January 2019 at 2-9.

c. On 14 and 16 January 2019, Messrs. Mohammad and bin ‘Attash filed respective notices with the Commission to indicate that they declined to file pleadings in the AE 614 motions series.¹⁰

d. On 22 January 2019, the Government filed a consolidated reply to the various Defense responses in which the Government asserted it had “substantially complied” with its discovery obligations and that the “time has come for this Commission to establish a trial date.”¹¹ The Government’s justification for compelling the Defense to provide “early notice of mental health experts” was predicated on the amount of time the Government anticipates it will need to identify rebuttal experts, obtain security clearances and funding for those experts, provide the experts time to evaluate the Accused, provide the experts time to prepare for their testimony, and for the Prosecutors “to educate themselves on the complexities of mental health.”¹²

e. On 25 March 2019, the Commission heard oral argument on the motion to compel notice of intent to introduce expert mental health evidence.¹³ In its argument, the Government characterized the issue as one of timing and referred to the prior litigation in the AE 478 series¹⁴ of the Government’s proposed milestones and deadlines for trial.¹⁵ The Defense Teams presented oral argument in opposition to the government motion, basing their objection on both the timing

¹⁰ See AE 614D (KSM), Mr. Mohammad’s Notice Regarding Non-Filing of Reply to AE 614 (GOV), filed 14 January 2019 at 2; AE 614E (WBA), Notice of Conflict Affecting Representation of Mr. bin ‘Atash’s Interests in Filing Pleadings in the AE 614 Motions Series, dated 16 January 2019. The Commission previously ruled that no Defense Team was burdened by a conflict of interest and that it would view any subsequent unwillingness to participate in the proceedings as waiver. Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 28 January 2019 from 3:52 P.M. to 4:02 P.M. at 22192. On 20 March 2019, the Commission reaffirmed its earlier ruling that the conflict of interest cited by Counsel for Mr. Mohammad and Mr. bin ‘Attash did not exist. AE 613G/615Y Consolidated Ruling, Mr. Mohammad’s Motion to Reconsider AE 613E/615P Ruling; Mr. Mohammad’s Motion to Compel Discovery from Special Trial Counsel; and Renewed Defense Motion to Cancel Proceedings Pending Conclusion of Full FBI Investigation, dated 20 March 2019.

¹¹ AE 614F (GOV), Government Consolidated Reply to AE 614A (AAA), filed 22 January 2019 at 4.

¹² *Id* at 5.

¹³ Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 25 March 2019 from 10:43 A.M. to 11:50 P.M. at 22309-22349.

¹⁴ See AE 478 (GOV), Government Renewed Motion for a Trial Scheduling Order, filed 3 January 2017, *et. seq.*

¹⁵ Transcript at 22309-22320 and 22347-22349.

and the scope of the notice requested by the Government.¹⁶ However, the three Defense Teams who presented oral argument generally agreed that the Military Judge has some authority to set reasonable time limits for the Defense to provide notice as to various defenses, expert witnesses, and mitigation evidence.¹⁷

f. On 3 April 2019, the Commission issued its order in AE 524LLL, which expressed an intent to conduct evidentiary hearings related to the voluntariness of pretrial statements made by the Accused.¹⁸ No date has been set for either these evidentiary hearings, or for trial.

2. Law.

a. The general guidelines governing discovery at a Military Commission are set forth in R.M.C. 701.

b. Rule 701(g) requires the Defense to “notify the trial counsel of the names of all witnesses, other than the accused, whom the defense intends to call during the defense case-in-chief and provide sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.” Such notice is to be given “before the beginning of trial on the merits.” R.M.C. 701(g)(1)(A). The rule also requires the Defense “upon request of the trial counsel” to provide the “names of any witnesses whom the defense intends to call at the presentencing proceedings” and “permit the trial counsel to examine any written material that will be presented by the defense at the presentencing proceeding.” R.M.C. 701(g)(1)(B).

c. R.M.C. 701(g) also requires the Defense to provide notice of its “intent to offer the defense of lack of mental responsibility, or its intent to introduce expert testimony as to the accused’s mental condition.” Such notice is to be provided “before the beginning of trial on the

¹⁶ Transcript at 22321-22347.

¹⁷ Transcript at 22330, 22340, 22341, and 22347.

¹⁸ AE 524LLL, Ruling, Government Motion to Reconsider and Clarify AE 524LL, Ruling, dated 3 April 2019.

merits.” R.M.C. 701(g)(2). Although the Rules require that such notices be provided “before the beginning of trial on the merits,” the rules are silent as the timing of similar notices as to intended use in the sentencing phase of trial.

d. Additionally, Rule 701 makes clear that the Military Judge has the authority to “specify the time, place and manner of making discovery and may prescribe such terms and conditions as are just.” R.M.C. 701(l)(1).¹⁹ The rule provides the Military Judge with the authority to “order that the discovery or examination be denied, restricted, or deferred, or make such other order as is appropriate.” R.M.C. 701(l)(2).

e. The failure to comply with R.M.C. 701 may result in the Military Judge (1) ordering the party to permit discovery; (2) granting a continuance; (3) prohibiting the party from introducing the evidence, calling the witness, or raising a defense not disclosed; or (4) entering such other order as is just under the circumstances. R.M.C. 701(l)(3).

f. As noted in this Commission’s prior Ruling in AE 245G, Counsel for Mr. Ali and Counsel for the Government previously agreed that the principles of Federal Rule of Criminal Procedure (Fed. R. Crim. P.) 16 should apply to expert witnesses called by either side.²⁰

Accordingly, in AE 245G, the Commission adopted the following guidelines regarding expert witnesses:

Any party presenting an expert witness will be required to give the opposing party a written summary of the expert witness’s testimony forty-five (45) days before the witness is scheduled to testify. The summary must describe the witness’s opinions, the bases and reasons for those opinions, and the witness’s qualifications. The opposing party will have seven (7) days to object to the summary and/or the witness. The party presenting the witness will have seven (7) days to respond.

¹⁹ Regulation for Trial by Military Commissions, § 17-3 also recognizes this authority by stating: “[a]t the appropriate time in the trial process, the military judge will issue a discovery order” that “will be modified to fit each particular case.”

²⁰ AE 245G Ruling Mr. Ali’s Motion to Reconsider AE 036C Ruling in Light of AE 036L Supplemental Trial Conduct Order, dated 12 May 2017 (*citing* Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 21 March 2017 from 10:35 A.M. to 12:47 P.M. at 14907-14908).

No reply by the objecting party will be permitted. These time limits will govern all expert witnesses and will be applied strictly absent extraordinary circumstances.²¹

3. Analysis.

a. Rules for Military Commissions 701(l)(1), 701(l)(3), and generally-accepted courts-martial practice provide ample authority for this Commission to set reasonable dates in advance of trial for the Defense to provide notice related to the use of mental health experts pursuant to R.M.C. 701(g)(2).

b. To logically establish a date for such notice, however, the Commission must first establish milestones starting with a date for trial. As is the case in typical courts-martial practice, the date of trial is the anchor upon which all other trial milestones are set. For a variety of reasons, to include *inter alia* the plethora of discovery provided by the Government to the Defense over the past two years and the Commission's recent order directing evidentiary hearings in AE 524LLL, the Commission continues to find it premature to establish a trial date. Without a trial date, and corresponding trial milestones, it would be arbitrary to compel the Defense Teams to provide the type of notice required by R.M.C. 701(g)(2) by 1 June 2019.²²

4. Ruling.

a. The Government motion is **DENIED**.

b. At an appropriate time in the future, the Commission will establish a trial date and corresponding trial milestones. Thereafter, the Commission will reconsider issuing an order setting forth reasonable deadlines in advance of trial (and in advance of a potential sentencing hearing) for the Defense to provide the requested notice pursuant to R.M.C. 701(g)(2), as well as appropriate guidance as to the scope of such notice as required by R.M.C. 701(g)(4).

²¹ AE 245G Ruling at 3-4 (*citing United States v. Barile*, 286 F.3d 749, 758-59 (4th Cir. 2002)).

²² The Commission notes, however, that the Government need not necessarily wait until it receives the requested notices to begin taking some of the time-consuming actions it referenced in its reply brief.

c. In the absence of a more specific order by this Commission, the notice timelines as stated in AE 245G shall apply to notices involving mental health experts.

So **ORDERED** this 25th day of April, 2019.

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