

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

UNITED STATES OF AMERICA

v.

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

AE 615S (KSM)

Mr. Mohammad's Motion to Compel
Discovery from Special Trial Counsel

26 February 2019

1. Timeliness:

This motion is timely filed.

2. Relief Requested:

Mr. Mohammad respectfully moves for an order compelling the government, via Special Trial Counsel, to produce all "information" or "documents" (as those terms are defined in his request for discovery) in any form which relate in any way to the investigation, pursuit, search, detention, interrogation or polygraph examination described in AE 615, Attachment B, including but not limited to that which is further detailed in his Request for Discovery, DR-098-MOH, dated 22 January 2019.¹ Special Trial Counsel has as of this date, made no response to the request.

3. Burden of Proof:

As the moving party, the defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

¹ Attachment B.

4. Facts:

On 3 December 2018, the government, through the regular trial counsel team, filed a classified *ex parte, in camera*, under seal notice.² Nothing in that notice gave any clue as to the true nature of the *ex parte, in camera* information that was provided solely to the military judge. However, information provided to Mr. Mohammad subsequently indicates that the *ex parte, in camera* pleading provided information, pursuant to the Order of Military Judge Pohl in AE 292QQ *Amended Order*³, regarding a member of the team representing Walid bin ‘Atash, a co-defendant of Mr. Mohammad.⁴

Almost three weeks later, the now-former⁵ member of the team representing Walid bin ‘Atash, was subjected to harassing government surveillance, searches, involuntary detention, interrogation, polygraph examination, and specific inquiry focused on the other defendants and the other defense teams in the present case.⁶

Because of the paucity of information provided by the government in their public pleadings in the matter, and because of the extensive prior history of government investigation of the defense teams in this case,⁷ Mr. Mohammad submitted Request for Discovery No. DR-

² AE 613 (GOV), Government Unclassified Notice of Ex Parte, In Camera, Under Seal Classified Filing, 3 December 2018.

³ AE292QQ AMENDED ORDER Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused (16 December 2014).

⁴ The record does not clarify why this notice was filed by the regular trial counsel team despite the fact that the Special Trial Counsel team was “involved in this investigation since its inception.” Transcript at 22159. The only logical inference is that the government intended to hide their investigation of the team member until he was no longer a member of the team. Such intentional opacity violates the spirit of Judge Pohl’s Order.

⁵ The team member was “read off” on 7 December 2018 and thereby formally left the team though he was on terminal leave, awaiting his follow on orders, for another five weeks. Transcript 22147.

⁶ See AE 615 (WBA), Defense Motion to Conduct Thorough Inquiry Into Actual and/or Potential Conflict of Interest Pursuant to R.M.C. 901 and *Holloway v. Arkansas*, 435 U.S. 475 (1978) and to Cancel Proceedings Pending Inquiry, 9 January 2019, at Attachment B.

⁷ See, e.g., AE292, Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of

098-MOH to Special Trial Counsel on 22 January 2019. The Request for Discovery sought any and all “information” or “documents” (as those terms were defined in the Request for Discovery) in any form which relate in any way to the investigation, pursuit, search, detention, interrogation or polygraph examination described in AE 615, Attachment B, including but not limited to those detailed in the Request.⁸

The Special Trial Counsel never responded to Mr. Mohammad’s request.

5. Law and Argument:

This investigation began while the individual was an active member of the defense team representing Mr. bin ‘Atash. During the investigation, he was asked questions regarding the inner workings of the defense team, the nature and substance of his interactions with the defendant, as well as questions about the other defendants and the other defense teams. The nature of this questioning raises the familiar specter of government agents investigating the defense teams in this capital case. If yet another investigation of defense team members has begun, and it is one in which there are at least some questions directly relating to, and therefore constituting an investigation of other teams, then counsel for Mr. Mohammad may reasonably assume that they are, once again, potentially under investigation.

While the government has asserted that other defense team members are not under investigation, they have utterly failed to provide to defense counsel any substantive evidence

Interest Burdening Counsel’s Representation of Accused (13 April 2014); AE 350(GOV) Government Unclassified Notice Of Classified Filing, 10 February 2015; Unofficial/Unauthenticated Transcript, 9 February 2015, at 8248-50; and AE 460 (GOV STC), Government Notice by Special Trial Counsel of Letter to Defense Requesting Defense Remediation of Material Obtained Outside of the Discovery Process, 19 October 2016.

⁸ Attachment B.

upon which they might be able to make an independent judgement regarding whether the potential conflict of interest is in fact an actual conflict of interest.⁹

The government has investigated the defense in this capital case many times previously. Frequently, defense counsel have learned of investigations by inadvertently overturning evidence revealing an investigation, or by a current or former defense team member disclosing that investigators interrogated them. Once they learn about and begin to research the apparent investigation, defense counsel also frequently have found that the investigation is much broader than originally indicated, to include government infiltration of the defense functions and compromise of privileged attorney-client and intra-team communication. In light of this experience and context, defense counsel for Mr. Mohammad asked Special Trial Counsel to provide pertinent information and documents, which are necessary for counsel to assess the potential existence of conflicts of interest arising from government investigations of the defense; and government intrusion into privileged communications. *See Mickens v. Taylor*, 535 U.S. 162, 174 (2002); *Strickland v. Washington*, 466 U.S. 668, 690 (1984); *Geders v. United States*, 425 U.S. 80, 91 (1976); *Hoffa v. United States*, 385 U.S. 293, 306 (1966).

This request is made pursuant to R.M.C. 701(c)(1) because the material requested is: “within the possession, custody, or control of the Government” and its existence is “known or by the exercise of due diligence may become known to [Special] trial counsel,” and because it is “material to the preparation of the defense ...”; and/or pursuant to R.M.C. 701(e) because it negates or reduces the degree of Mr. Mohammad’s guilt, reduces his punishment, or reasonably may be viewed as mitigation evidence at sentencing.

⁹ See AE 615R (KSM), Mr. Mohammad’s Motion to Reconsider AE 613E/615P RULING, 26 February 2019.

This request is also made because a failure to provide the requested materials would deny Mr. Mohammad due process of law, the effective assistance of counsel, a fair trial, the opportunity to present a complete defense, and the right to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth and Eighth Amendments to the United States Constitution and similar provisions of the Military Commissions Act of 2009.

6. Oral Argument:

The defense requests oral argument.

7. Witnesses and Evidence:

No witnesses or other evidence is anticipated at the time.

8. Certificate of Conference:

The government, by its refusal to provide discovery, has implicitly stated its objection to this Motion to Compel Discovery.

9. Additional Information:

The defense has no additional information.

10. Attachments:

A. Certificate of Service.

B. Request for Discovery, DR-098-MOH (22 January 2019).

Respectfully submitted,

//s//
DAVID Z. NEVIN
Learned Counsel

//s//
GARY D. SOWARDS
Defense Counsel

//s//
DEREK A. POTEET
LtCol, U.S. Marine Corps
Defense Counsel

//s//
RITA J. RADOSTITZ
Defense Counsel

Counsel for Mr. Mohammad

ATTACHMENT A

Filed with TJ
26 February 2019

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CERTIFICATE OF SERVICE

I certify that on the 26th day of February 2019, I caused to be electronically filed AE 615S (KSM) Mr. Mohammad's Motion to Compel Discovery from Special Trial Counsel with the Chief Clerk of the Military Commissions Trial Judiciary and delivered the foregoing on all parties by electronic mail, serving only Special Trial Counsel on behalf of the prosecution.

//s//
DAVID Z. NEVIN
Learned Counsel

ATTACHMENT B

Filed with TJ
26 February 2019

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REQUEST FOR DISCOVERY TO SPECIAL TRIAL COUNSEL, ICO United States v. Khalid Shaikh Mohammad, from undersigned counsel for Mr. Khalid Shaikh Mohammad.

Date: January 22, 2019

Subject: Request for Discovery No. DR-098-MOH.

1. Definitions.

In this request for discovery, the following definitions apply:

"Document" means any recorded information, regardless of the nature of the medium or the method or circumstances of recording within the possession or under the control of the Government.

"Government" includes all components of or persons acting on behalf of the United States Government, including but not limited to the Office of the Chief Prosecutor, the Central Intelligence Agency, and the Federal Bureau of Investigation.

"Information" means any knowledge that can be communicated or documentary material, regardless of its physical, electronic, or virtual form or characteristics.

The word "produce" means to convey the document or information to the defense without alteration or redaction, to include alteration of any electronically stored information associated with the document. To the extent that responsive documents or information are subject to the classified information, government information, 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 protected by the applicable privilege, and documents attached and/or incorporated into the responsive documents that are not otherwise exempt.

As to a person, "identify" means to state the person's full name, current address, current phone number, and current email address.

2. Background.

This Request for Discovery incorporates by reference as if fully set forth, and refers throughout to, the declaration of SSG Brent Skeete, dated December 26, 2018 (AE 615,¹ Attachment B), which describes events occurring on December 20 and 21, 2018. These events included SSG Skeete's harassment by apparent government agents (including surveillance and pursuit), searches of his person and possessions, and his involuntary detention, interrogation, and

¹ AE 615(WBA), Defense Motion to Conduct Thorough Inquiry into Actual and/or Potential Attorney Conflict of Interest Pursuant to R.M.C. 901 and Holloway v. Arkansas, 435 U.S. 475 (1978) and to Cancel Proceedings Pending Inquiry, 9 January 2019.

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forced submission to a polygraph examination. The Investigation sought to probe deeply into the functioning of the Walid bin Attash defense team, the actions of “other defense teams and the other defendants,” AE 615, Attach. B, para. 32, and seemed to be supported by confidential information obtained from other person(s) on the bin Attash defense team in violation of the attorney client privilege and the requirement for confidentiality of case information, *see id.*, para. 25.

3. Information requested.

Provide any and all “information” or “documents” in any form which relate in any way to the investigation, pursuit, search, detention, interrogation or polygraph examination of SSG Skeete as described in AE 615, Attachment B, including but not limited to the following:

- a. Any FD-302, memorandum of interview, report, summary, report of polygraph examination, or similar materials which document, memorialize, or otherwise relate in any way to i.) the investigation, pursuit, search, detention, interrogation or polygraph examination of SSG Skeete, or ii.) any person who provided information regarding the bin Attash team and/or other defense teams in the 9-11 Military Commissions case, *see* AE 615, Attach. B, paragraphs 25 and 32.
- b. Any memoranda, emails, or other materials which authorized, or purported to authorize, the investigation, pursuit, search, detention, interrogation or polygraph examination of SSG Skeete.
- c. Any “information” or “documents,” without limitation, including but not limited to rough notes, emails, cables, or internal memoranda, which reflect or describe: i.) the reason(s) for conducting the investigation, pursuit, search, detention, interrogation or polygraph examination of SSG Skeete; ii.) the topics or areas of inquiry to be discussed during any contact with SSG Skeete, and/or iii.) specific questions anticipated to be addressed to SSG Skeete.
- d. Any materials, such as internal memoranda, emails, time records, log notes or the like, which document, memorialize, or otherwise relate in any way to any meetings of persons for the purposes of planning or preparing for, or otherwise discussing or memorializing the investigation, pursuit, search, detention, interrogation or polygraph examination of SSG Skeete.
- e. Audio, video, or photographic recordings in any form of the pursuit, search, detention, interrogation or polygraph examination of SSG Skeete.
- f. Contemporaneous notes in any form, including transcriptions or summaries thereof, made by any person during and/or related to the investigation, pursuit, search, detention, interrogation or polygraph examination of SSG Skeete.
- g. Any document, form, agreement or directive shown to, discussed with or signed by SSG Skeete.

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h. “Identify” any and all persons:

i. who participated in the investigation, pursuit, search, detention, interrogation or polygraph examination of SSG Skeete;

ii. who authorized, directed, ordered, approved, or were otherwise aware of the investigation, pursuit, search, detention, interrogation or polygraph examination of SSG Skeete;

iii. who facilitated in any way the investigation, pursuit, search, detention, interrogation or polygraph examination of SSG Skeete, such as by approving the expenditure of funds or arranging travel for government agents.

iv. who provided information to the Government regarding the bin Attash team and/or other defense teams in the 9-11 Military Commissions case, *see* AE 615, Attach. B, paragraphs 25 and 32.

3. Reasons for request.

This request is made pursuant to R.M.C. 701(c)(1) because the material requested is: “within the possession, custody, or control of the Government” and its existence is “known or by the exercise of due diligence may become known to [Special] trial counsel,” and because it is “material to the preparation of the defense ...”; and/or pursuant to R.M.C. 701(e) because it negates or reduces the degree of Mr. Mohammad’s guilt, reduces his punishment, or reasonably may be viewed as mitigation evidence at sentencing.

This request is also made because a failure to provide the requested materials would deny Mr. Mohammad due process of law, the effective assistance of counsel, a fair trial, the opportunity to present a complete defense, and the right to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth and Eighth Amendments to the United States Constitution and similar provisions of the Military Commissions Act of 2009.

This request is continuing, meaning that if at any time the government discovers additional material responsive to this request, it shall promptly notify Mr. Mohammad or the military judge as to the existence of the material. R.M.C. 701(a)(5), 701(i).

Respectfully submitted,

David Z. Nevin

Lt Col Derek Poteet, USMC

Gary D. Sowards

Rita J. Radostitz

Counsel for Mr. Mohammad