

UNCLASSIFIED//FOR PUBLIC RELEASE  
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 621 (RBS)**

Defense Motion to Compel  
Production of Discovery  
Related to Evidence Provided by the German  
Government

12 March 2019

- 1. Timeliness:** This motion is timely filed.
- 2. Relief Sought:** Mr. Bin al Shibh respectfully requests the Military Commission compel the production of requested discovery regarding any agreements, conditions, and/or assurances that preceded or accompanied the handing over of evidence against Mr. Bin al Shibh by any government agency of Germany, as well as any surrounding correspondence. He also requests a listing of the evidence that would be subject to the relevant agreements, conditions, and/or assurances.
- 3. Overview:** The Defense is entitled to discovery of any requested agreement, condition, and/or assurances between the United States and Germany that evidence provided by the German government would not be used directly or indirectly to secure a death sentence against Mr. Bin al Shibh or any other accused in this case or any other. Mr. Bin al Shibh has good reason to believe

that the German government provided evidence that may be used against him at trial. The requested agreement would be relevant to his preparation and presentation of his defense at trial, as it could amount to a stipulation on the Government's use of key evidence. Additionally, any agreement, conditions, or assurances would be relevant at any presentencing hearing as mitigation evidence to support an argument that any death sentence against Mr. Bin al Shihb would be arbitrary and based on a violation of the agreement or German law.

**3. Burden of Proof:** The Defense bears the burden of persuasion on the motion to compel to show by a preponderance of the evidence that the requested discovery is relevant and helpful to the preparation of Mr. Bin al Shihb's defense.<sup>1</sup>

#### 4. Facts

On Wednesday, 28 November 2002, the media reported that the governments of Germany, France and the United States had reached an agreement regarding the delivery of evidence from Germany and France to the United States for use in the prosecution of Zacarias Moussaoui.<sup>2</sup> The evidence purportedly consisted of financial transfers between Mr. Moussaoui and Mr. Bin al Shihb. *Id.* At the time, the German Embassy was quoted as saying, "[t]he United States of America has assured [us] that the evidence and the information submitted by Germany will not directly or indirectly be used against the defendant nor against a third party towards the imposition of the death penalty." *Id.* Additionally, The New York Times quoted the German

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<sup>1</sup> R.M.C. 905(c)(1)-(2).

<sup>2</sup> See, e.g., Dan Eggen, *U.S. to Get Moussaoui Data From Europe*, Wash. Post, (Nov. 28, 2002), [https://www.washingtonpost.com/archive/politics/2002/11/28/us-to-get-moussaoui-data-from-europe/35157ae0-bfd5-47a2-a069-1a70c6329aa9/?utm\\_term=.e9cfd75593a5](https://www.washingtonpost.com/archive/politics/2002/11/28/us-to-get-moussaoui-data-from-europe/35157ae0-bfd5-47a2-a069-1a70c6329aa9/?utm_term=.e9cfd75593a5) ("French and German authorities have agreed to turn over documents relating to terror suspect and French national Zacarias Moussaoui, after being assured by the Justice Department that the evidence will not be used to seek or impose the death penalty, officials said yesterday.").

Interior Minister as saying, “The principle is we can’t provide information which would lead to the death penalty ... We have to stick to our Constitution. You have to stick to your laws.”<sup>3</sup>

In 2009, after the United States Government announced plans to try Mr. Bin al Shibh in New York City, the German Justice Minister stated, in reference to evidence that had been handed over being used to secure a death sentence, “[i]n this case, we will also watch very closely to ensure that the assurances given are adhered to.”<sup>4</sup> In August 2018, the Government provided Mr. Bin al Shibh with discovery that included a summary of an investigation by the German Federal Police into Mr. Bin al Shibh, which was originally prepared on 4 July 2002, and had earlier been provided in discovery to the Moussaoui defense team.

On 13 December 2018, Defense Counsel for Mr. Bin al Shibh filed a discovery request with Trial Counsel, requesting production of the following:

1. Any agreement between the United States and Germany regarding the production of evidence related in any way to the prosecution of Mr. Bin al Shibh – whether the evidence was provided specifically for this prosecution, the prosecution of Zacarias Moussaoui, or the prosecution of any other 9/11 defendant. This would include, but is not limited to:
  - a. Any oral or written agreement or understanding that limits or seeks to limit the use of any evidence produced by Germany so that such evidence may not be used to seek or obtain a death sentence.
  - b. Any oral or written agreement or understanding that limits or seeks to limit the use of any evidence produced by Germany so that such evidence may not be used in a prosecution before an extraordinary court.

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<sup>3</sup> Philip Shenon, *Threats and Responses: Terror Suspect, Germany Urges U.S. to Drop Death Penalty*, N.Y. Times (Oct. 26, 2002), <https://www.nytimes.com/2002/10/26/world/threats-and-responses-terror-suspect-germany-urges-us-to-drop-death-penalty-plan.html>.

<sup>4</sup> John Goetz and Marcel Rosenbach, *The Death Penalty Problem: 9/11 Trial Puts German-US Relations Under Strain*, Der Spiegel (November 23, 2009), <http://www.spiegel.de/international/world/the-death-penalty-problem-9-11-trial-puts-german-us-relations-under-strain-a-662814.html>.

- c. Any oral or written conditions placed on the handing over of evidence by Germany conditioning the transfer on an assurance that the evidence will not be used to seek or obtain a death sentence.
  - d. Any oral or written conditions placed on the handing over of evidence by Germany conditioning the transfer on an assurance that the evidence will not be used in a prosecution before an extraordinary court.
  - e. Any oral or written assurance given by the United States that evidence handed over by Germany would not be used to seek or obtain a death sentence.
  - f. Any oral or written assurance given by the United States that evidence handed over by Germany would not be used in a prosecution before an extraordinary court.
  - g. Any oral or written agreement or understanding that evidence produced by Germany would only be used by the United States in the court proceeding upon which the request for evidence was based, as well as any assurances to the same effect.
2. Any letters rogatory from the United States seeking evidence from Germany for use in this prosecution.
  3. Any correspondence that relates to any of the evidence or other information responsive to requests 1 and 2.
  4. A list of the evidence that has been produced by Germany that is subject to any agreements, assurances, conditions, or correspondence referenced in requests 1 through 3.
  5. A list of the evidence referenced in request 4 that the Government plans to use in its case against Mr. Bin al Shibh.

Defense Discovery Request, 13 December 2018 (Attach. B).

The Prosecution has yet to respond to this request.

**5. Law and Argument:**

The Defense is entitled to the requested evidence, as it is favorable to the accused and “material to preparation of the defense.”<sup>5</sup> R.M.C. 701(j) establishes that “[e]ach party shall have an adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence.” In passing the Military Commissions Act (MCA) of 2009, Congress itself statutorily mandated this process.<sup>6</sup> R.M.C. 701(c)(1) states that the Government shall permit the defense counsel to examine any books, paper, documents, photographs, tangible objects, buildings, or places so long as they are: (1) under the control of the Government, and (2) material to the preparation of the defense or intended for use by the trial counsel as evidence in the Prosecution’s case-in-chief at trial.

Demonstrating materiality “is not a heavy burden” and the standard of materiality is broadly construed.<sup>7</sup> Evidence qualifies as material when there is any reasonable likelihood it could affect the judgment of the jury.<sup>8</sup> Information is material for discovery purposes “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.”<sup>9</sup> “[A]n accused’s right to discovery is not limited to evidence that would be known to be admissible at trial. It includes materials that would assist the defense in formulating a defense

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<sup>5</sup> R.M.C. 701(c)(1); *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>6</sup> See 10 U.S.C. § 949j (“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”).

<sup>7</sup> *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1998); *United States v. Marshall*, 132 F.3d 63, 67 (D.C. Cir. 1998); *United States v. Libby*, 429 F. Supp. 2d 1, 7 (D.D.C. 2006).

<sup>8</sup> See *Wearry v. Cain*, 136 S.Ct. 1002, 1006 (2016).

<sup>9</sup> *Lloyd*, 992 F.2d at 351.

strategy.”<sup>10</sup> “Material evidence” is also not limited to exculpatory evidence.<sup>11</sup> It includes information that is unfavorable, as:

[a] defendant in possession of such evidence may alter the quantum of proof in his favor in several ways: by preparing a strategy to confront the damaging evidence at trial; by conducting an investigation to attempt to discredit that evidence; or by not presenting a defense which is undercut by such evidence.<sup>12</sup>

This is because “it is just as important to the preparation of a defense to know its potential pitfalls as it is to know its strengths.”<sup>13</sup>

The scope of materiality is broader in capital cases. Under the Eighth Amendment and the Due Process Clause of the Fifth and Fourteenth Amendments, a sentencing authority must consider any aspect of an accused’s history, his character, or the circumstances of the offense which the Defense offers in mitigation as a basis for precluding a death sentence.<sup>14</sup> The Supreme Court has held that “[v]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.”<sup>15</sup> The Government must produce any agreement, assurances, or conditions that preceded the transfer of evidence in this case between the German Government and the United States. Any agreement, and a clear listing of the evidence turned over pursuant to it, is both “material to the preparation of the defense” of Mr. Bin al Shibh and “within the possession, custody, or control of the Government.”<sup>16</sup> As to materiality, if any agreement, assurance, or condition between Germany and the United States

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<sup>10</sup> *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008).

<sup>11</sup> *See Marshall*, 132 F.3d 63 at 67; *see also, Libby*, 429 F. Supp. 2d at 7.

<sup>12</sup> *Marshall*, 132 F.3d at 68.

<sup>13</sup> *Id.* at 67.

<sup>14</sup> *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

<sup>15</sup> *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (*quoting Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982)).

<sup>16</sup> R.M.C. 703(c).

contains language that constitutes a stipulation as to the use of evidence, then it specifically addresses and will govern the use and admissibility of key evidence in this case. Mr. Bin al Shibh should be able to examine the requested material to determine what actions, if any, he should take before or during trial regarding the evidence that is subject to any stipulation or its equivalent.

This request is not speculative. Based on the evidence the Government has provided and the repeated concerns the German government has expressed over the last 18 years, it is very likely that Germany demanded some kind of assurance or condition against its evidence being used to secure a death sentence. Indeed, Germany would have violated its own law had it not done so. The Basic Law of Germany [German Constitution] has unambiguously banned capital punishment since it was drafted in 1949. Article 102 [Abolition of capital punishment] says simply, “Capital punishment is abolished.”<sup>17</sup> In 2002, the German government publicly stated that the submitting of material in the Moussaoui case that might lead to capital punishment would be a violation of the Basic Law. Both German law and the European Declaration of Human Rights also ban the extradition of prisoners to countries that have capital punishment without assurances that it will not be sought or imposed.<sup>18</sup>

Additionally, under the Mutual Legal Assistance Treaty (“MLAT”) between the United States and Germany, legal assistance may be refused, or assurances may be demanded, in a case where legal assistance could lead to a death sentence:

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<sup>17</sup> See Grundgesetz [GG][Basic Law], *translation at* [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html)

<sup>18</sup> See Act on International Cooperation in Criminal Matters, Section 8, *translation at* [http://www.gesetze-im-internet.de/englisch\\_irg/englisch\\_irg.html#p0045](http://www.gesetze-im-internet.de/englisch_irg/englisch_irg.html#p0045).

If a request results in a situation where the defendant would face the death penalty, the provision of legal assistance can be withheld pursuant to Art. 3. Or, pursuant to Art. 15, (1), it can be requested that the evidence and information provided by Germany can neither be held against the accused nor against third parties, if these would be used, directly or indirectly, to impose or carry out the death penalty. Hitherto, in the absence of a formal treaty, relevant assurances have been obtained in individual cases. It has been agreed that a refusal to provide legal assistance is possible if the evidence is to be used in proceedings before an extraordinary court.<sup>19</sup>

Given the likelihood and legal necessity of an agreement between the United States and Germany that controls the use of evidence in this case, Mr. Bin al Shibh should be provided with any agreement as he prepares and presents his defense. Only when he is completely aware of what the Government has agreed to will he be able to fully determine and pursue all possible legal remedies related to key evidence against him.

The requested evidence is also highly relevant to any presentencing hearing. If certain key evidence used to obtain Mr. Bin al Shibh's conviction is not to be used to impose the death penalty, he would be able to argue this in mitigation. *See United States v. Bin Laden*, 156 F. Supp. 2d 359, 368-71 (S.D.N.Y. 2001). In *Bin Laden*, the Constitutional Court of South Africa had found that "Khalfan Mohamed's removal to the United States should have been conditioned on a commitment by the United States not to seek or impose the death penalty." 156 F. Supp. 2d at 364. At issue in *Bin Laden* was whether Mohamed could introduce evidence of that court decision at his sentencing hearing. The S.D.N.Y. held that it could be introduced in sentencing proceedings as a mitigating factor, although it was not one of the statutorily enumerated factors in 18 U.S.C. § 3592. *Id.* at 368-371. Specifically, the court held that by allowing jurors to

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<sup>19</sup> See Explanatory Note to MLAT, Article 3, at <https://www.state.gov/documents/organization/188782.pdf>.



consider if other, equally culpable defendants were facing death, the statutory mitigating factors gave jurors a means to prevent capital punishment from being imposed in an arbitrary and random manner. *Id.* Therefore, the court instructed that Mohamed should be allowed to “argue to the jury that if things had gone as the South African Constitutional Court says they should have” he would not be facing the death penalty – just as other defendants who had been extradited from European countries were not, because those countries had required assurances that the death penalty would not be sought. *Id.* at 369-70.

The same considerations against the arbitrary and random imposition of the death penalty apply here, and evidence related to an agreement may be permissible as mitigating evidence in the Military Commissions. The R.M.C. does not list the federal mitigating factors considered in *Bin Laden*. The provisions governing mitigating evidence in the Military Commissions are even broader—providing that matters in mitigation are those that may “furnish grounds for a recommendation of clemency,” and that the “accused shall be given broad latitude to present evidence in extenuation and mitigation.” R.M.C. 1001(c)(1)(B), 1004(3)(b). Just as Mr. Mohamed would have been allowed to argue that he would not be facing the death penalty but for South Africa’s violation of its law, Mr. Bin al Shibh should be able to argue that he would not be facing a death sentence had Germany followed its Basic Law or the United States Government not violated an international agreement. There is no way for the Defense to determine whether this is the case without reviewing any agreement between Germany and the United States to determine if it violated German law or if the United States Government has violated either the agreement or its own assurances.

An agreement would also provide evidence that the government of Germany does not want to have any part in the execution of Mr. Bin al Shibh. That argument would be strengthened by the existence of an actual agreement and a detailed description of the evidence subject to that agreement. Therefore, the evidence sought is, at a minimum, *Brady* material in the penalty phase of this case. *See United States v. Beckford*, 962 F. Supp. 804, 811 (E.D. Va. 1997) (Payne, J.) (noting that at the pre-trial stage, “the [defendant need only establish a ‘substantial basis for claiming’ that a mitigating factor will apply at the penalty phase, in order to invoke the Government’s obligation under *Brady* and its progeny to produce any evidence which is material to that mitigating factor”). For these reasons, the Defense respectfully requests this Commission grant its motion to compel discovery.

**6. Oral Argument:** Mr. Bin al Shibh requests oral argument on this motion.

**7. Witnesses:** None

**8. Conference with Opposing Counsel:** Counsel for Mr. Bin al Shibh requested the position of Trial Counsel on this Motion at 12:26 p.m. on Friday, 8 March, 2019, and received no response.

**9. Attachments:**

- a. Certificate of Service
- b. Defense Discovery Request, DR-RBS-German Agreement

Respectfully submitted,

//s//

JAMES P. HARRINGTON  
Learned Counsel

//s//

ALAINA M. WICHNER  
Defense Counsel

//s//

MISHAEL A. DANIELSON, LT, USN  
Defense Counsel

# ATTACHMENT A

Filed with TJ  
12 March 2019

Appellate Exhibit 621 (RBS)  
Page 12 of 17

**CERTIFICATE OF SERVICE**

I certify that on 12 March 2018, I electronically filed AE 621 (RBS) Defense Motion to Compel Production of Evidence Evidence Provided by the German Government and served it on all counsel of record by e-mail.

//s//

JAMES P. HARRINGTON  
Learned Counsel

# ATTACHMENT B

Filed with TJ  
12 March 2019

Appellate Exhibit 621 (RBS)  
Page 14 of 17



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

13 December 2018

MEMORANDUM FOR Trial Counsel

FROM: Wyatt Feeler, Defense Counsel for Mr. Ramzi Bin al Shibh

SUBJECT: DEFENSE DISCOVERY REQUEST

Mr. Bin al Shibh, by and through undersigned counsel pursuant to RMC 701, 10 U.S.C. § 949p-4, 10 U.S.C. § 949j, 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, requests the Government provide the following discovery. Failure to provide the requested information will deny Mr. Bin al Shibh his rights to the due process of law, the effective assistance of counsel, and his right to humane treatment under international law as well as the right to be free from cruel and unusual punishment.

**DEFINITIONS**

For purposes of these requests for production, the following definitions apply:

1. The terms “document” or “record” should be construed as broadly as possible, and include any tangible recording, however made, of information or data; any written, printed, recorded, taped, electronically or digitally encoded, graphic, or other information. These terms include (without limitation) notes, correspondence, papers, communications of any nature, telegrams, telexes, memoranda, facsimiles, material stored electronically, electronic mail messages, electronic mail or text messages sent or received from a handheld device, notebooks of any character, summaries or records of personal conversations, diaries and calendars, routing slips or memoranda, reports, publications, books, minutes or recordings of meetings, transcripts of oral testimony, contracts and agreements, court papers, reports or summaries of negotiations, reports or summaries of investigations, photographs, films, videotapes, sketches, court papers, brochures, advertisements, promotional literature, pamphlets, press releases, instructions, tape recordings, records, computer databases, and revisions and drafts of any documents.
2. “You” and “your” refer to the Government, its agents, its representatives, its attorneys, and/or any other person acting on its behalf.
3. “Known to you” and “knowledge of” mean all matters known to the Government, its attorneys, its agents, its representatives, its employees, or to anyone whom the Government may control.
4. “Communications” means the imparting or exchanging of information regardless of the method used to impart or exchange the information.

**BACKGROUND**

This case involves pieces of evidence that originated in Germany. Mr. Bin al Shihb seeks discovery of any agreement, correspondence, or assurances between the governments of the United States and Germany related to the production of this evidence.

**DISCOVERY REQUESTS**

1. Any agreement between the United States and Germany regarding the production of evidence related in any way to the prosecution of Mr. Bin al Shihb – whether the evidence was provided specifically for this prosecution, the prosecution of Zacarias Moussaoui, or the prosecution of any other 9/11 defendant. This would include, but is not limited to:
  - a. Any oral or written agreement or understanding that limits or seeks to limit the use of any evidence produced by Germany so that such evidence may not be used to seek or obtain a death sentence.
  - b. Any oral or written agreement or understanding that limits or seeks to limit the use of any evidence produced by Germany so that such evidence may not be used in a prosecution before an extraordinary court.
  - c. Any oral or written conditions placed on the handing over of evidence by Germany conditioning the transfer on an assurance that the evidence will not be used to seek or obtain a death sentence.
  - d. Any oral or written conditions placed on the handing over of evidence by Germany conditioning the transfer on an assurance that the evidence will not be used in a prosecution before an extraordinary court.
  - e. Any oral or written assurance given by the United States that evidence handed over by Germany would not be used to seek or obtain a death sentence.
  - f. Any oral or written assurance given by the United States that evidence handed over by Germany would not be used in a prosecution before an extraordinary court.
  - g. Any oral or written agreement or understanding that evidence produced by Germany would only be used by the United States in the court proceeding upon which the request for evidence was based, as well as any assurances to the same effect.
2. Any letters rogatory from the United States seeking evidence from Germany for use in this prosecution.
3. Any correspondence that relates to any of the evidence or other information responsive to requests 1 and 2.
4. A list of the evidence that has been produced by Germany that is subject to any agreements,



assurances, conditions, or correspondence referenced in requests 1 through 3.

5. A list of the evidence referenced in request 4 that the Government plans to use in its case against Mr. Bin al Shibh.

The Government must produce information that is both “material to the preparation of the defense” of Mr. Bin al Shibh and “within the possession, custody, or control of the Government.” R.M.C. 701(c). Any documents related to Mr. Bin al Shibh’s conduct are relevant to the preparation of his defense. This requested discovery is within the government’s control and is directly related to mitigation or aggravation in this Capital case.

Mr. Bin al Shibh requests a response by **Friday, 11 January 2019**. The point of contact for this request is Wyatt Feeler at wyatt.a.feeler.civ [REDACTED]

Respectfully Submitted,

    //s//    

Wyatt Feeler,  
Defense Counsel