

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
BINALSHIBH, ALI ABDUL AZIZ ALI,
MUSTAFA AHMED ADAM
AL HAWSAWI

AE 621A (GOV)

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

26 March 2019

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 that the Commission deny, without oral argument, the requested relief set forth within AE 621 (RBS), Defense Motion to Compel Production of Discovery Related to Evidence Provided by the German Government.

3. Burden of Proof

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

4. Facts

On September 11, 2001, four planes were hijacked and 2,976 people were killed on the sovereign territory of the United States in coordinated attacks on the World Trade Center and the Pentagon. Mr. Binalshibh, and three of the four pilots of the hijacked planes, had lived with or associated together in Germany during times relevant to the conspiracy, and had committed overt acts in furtherance of the conspiracy from Germany.

Shortly after September 11, 2001, and for several years thereafter, the Government of Germany provided the United States certain documents relating to those overt acts in various forms, and through various legal means, as part of the investigation conducted by the Federal Bureau of Investigation (“FBI”) into the attacks.

On 14 December 2018, Defense counsel for Mr. Binalshibh submitted a request for discovery to the Prosecution requesting any agreement between the United States and Germany regarding the production of evidence related in any way to the prosecution of Mr. Binalshibh; whether such evidence was provided specifically for this prosecution, the prosecution of Zacarius Moussaoui, or the prosecution of any other 9/11 defendant. *See* AE 621 (RBS), Attach. B.

On 12 March 2019, Defense counsel for Mr. Binalshibh filed AE 621 (RBS), requesting that this 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. Binalshibh by any government agency of Germany, as well as any surrounding correspondence.” *Id.* at 1. Additionally, Defense counsel for Mr. Binalshibh seeks “a listing of the evidence that would be subject to the relevant agreements, conditions, and/or assurances.” *Id.* at 1.

5. Law and Argument

I. The Prosecution’s Discovery Obligations Are Defined by the Relevant Rules and Statutes

The Military Commissions Act of 2009 (“M.C.A.”) affords the Defense a reasonable opportunity to obtain evidence through a process comparable to other United States criminal courts. *See* 10 U.S.C. § 949j. Pursuant to the M.C.A., the Rules for Military Commissions (“R.M.C.”) require that the Prosecution produce evidence that is material to the preparation of the defense. Specifically, R.M.C. 701(c)(1) requires the Prosecution to permit defense counsel to examine,

[a]ny books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, 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.

See R.M.C. 701(c)(1). However, notwithstanding this requirement, no authority grants defendants an unqualified right to receive, or compels the Prosecution to produce, discovery merely because the defendant has requested it. Rather, the relevant rules and statutes define the Prosecution's discovery obligations. *See generally United States v. Agurs*, 427 U.S. 97, 106 (1976) (noting that "there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor").

A criminal defendant has a right to discover certain materials, but the scope of this right and the government's attendant discovery obligations are not without limit. For example, upon request, the government must permit the defendant to inspect and copy documents in the government's possession, but only if the documents meet the requirements of R.M.C. 701. Military courts have adopted a standard by which "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *United States v. Graner*, 69 M.J. 104, 107–08 (C.A.A.F. 2010). In instances where the Defense did not present an adequate theory of relevance to justify the compelled production of evidence, C.A.A.F. has applied the relevance standard in upholding denials of compelled production. *See Graner*, 69 M.J. at 107–09. A defense theory that is too speculative, and too insubstantial, does not meet the threshold of relevance and necessity for the admission of evidence. *See United States v. Sanders*, 2008 WL 2852962 (A.F.F.C.A. 2008) (citing *United States v. Briggs*, 46 M.J. 699, 702 (A.F.C.C.A. 1996)). A general description of the material sought or a conclusory argument as to its materiality is insufficient. *See Briggs*, 46 M.J. at 702 (citing *United States v. Branoff*, 34 M.J. 612, 620 (A.F.F.C.A.) (remanded on other grounds) (citing *United States v. Cadet*, 727 F.2d

1453, 1468 (9th Cir. 1984))). The Prosecution takes its discovery obligations seriously and will provide the Defense with that which is material to this case.

II. Any Agreements Between the United States and the Government of Germany Regarding German-Provided Evidence Are Not Discoverable

The United States has abided by all agreements it has with other countries regarding the assistance those countries provided to the investigation of, and any subsequent prosecution alleging involvement in, the attacks of September 11, 2001. However, while the Prosecution is certain the Defense would like the opportunity to see and no doubt audit all agreements between the United States and other countries regarding the use of the evidence in this case (as well as perhaps sow discord between the countries through litigation of any perceived discrepancies) such information is simply not discoverable under R.M.C. 701, nor are the agreements mitigating factors for the panel to consider in sentencing.

A. The Prosecution is Not Presenting Any Evidence In Its Case-in-Chief or Sentencing That Was Provided to the United States by the Government of Germany

The Prosecution has received evidence from the Government of Germany relating to the attacks against the United States on September 11, 2001 for which charges against Mr. Binalshibh have been brought. None of the evidence is exculpatory in nature.

Counsel for Mr. Binalshibh argue that the Prosecution must produce “any agreements, assurances, or conditions that preceded the transfer of evidence in this case between the German Government and the United States,” and any “clear listing of the evidence turned over pursuant to it.” AE 621 (RBS) at 6. The Defense argues that it is material to the preparation of the Defense in that if it “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.” *Id.* at 6–7.

The Defense is simply mistaken when it asserts that the information derived from the Government of Germany is “key” evidence in this case. In fact, none of the evidence that the Prosecution intends to use against the five Accused in its case-in-chief or in sentencing is

evidence obtained from the Government of Germany. Nor is any of the documentary evidence exculpatory. As none of the evidence acquired from the Government of Germany will be utilized in this case against the Accused, the Defense is not entitled to the agreements under the speculative theory that the agreement will “govern the use and admissibility of key evidence in this case.” *Id.* at 6–7.

B. Any Agreement Between the United States and Germany Regarding Evidence of the September 11, 2001 Attacks on the United States is Not Mitigating Evidence

If in fact the Government of Germany (which does not permit the death penalty) had placed certain limitations on the disclosure of documents it provided to the United States as a result of its position on the death penalty, such limitations would not be a mitigating factor the Defense is entitled to introduce in any pre-sentencing hearing.

In *United States v. Gabrion*, the United States Court of Appeals for the Sixth Circuit held that a federal district court did not err in holding that a murder's location in a state that lacked the death penalty was inadmissible as a mitigating factor in the sentencing phase of federal capital trial. *See United States v. Gabrion*, 719 F.3d 511, 521–25 (6th Cir. 2013) (*en banc*). In deciding what “counts as ‘constitutionally relevant mitigating evidence,’¹” the *Gabrion* Court cited Supreme Court precedent indicating that the evidence must be relevant to “the defendant’s personal culpability for his crime,” or the “defendant’s character.” *Id.* at 521; *see also id.* at 522 (“In summary: mitigation evidence is evidence relevant to a ‘reasoned moral response to the defendant’s background, character, and crime.’”).

The *Gabrion* Court further explained:

[T]hat does not mean that judges must act as moral filters in determining whether evidence is mitigating for purposes of the Eighth Amendment. The Supreme Court has spared us that task, by itself identifying certain categories of evidence – broadly stated, culpability and character – that are morally significant and thus mitigating under the Eighth Amendment. Our task, therefore, is not ourselves to determine the moral significance of a particular fact, but rather to determine whether the fact

¹ *Gabrion*, 719 F.3d at 521 (quoting *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998)).

falls within one of the morally significant bins that the Supreme Court has already identified.

Id. at 523. *See also United States v. Higgs*, 353 F.3d 281, 328 (4th Cir. 2003) (citations omitted). (“An assertion that the death penalty is improper in one jurisdiction because it is not allowed in another is, at bottom, a reflection of the debate surrounding the propriety of the death penalty, which is a matter of policy for the legislative branch”).

Such an argument is precisely what the Defense is attempting here in seeking discovery of all agreements with German authorities. The Defense wishes to provide as mitigating evidence the fact that Germany would not bring capital charges against Mr. Binalshibh. They wish to do so by utilizing any agreement between the United States and Germany in which the evidence provided to the United States was precluded from being used against Mr. Binalshibh in a capital case. The fact that the Government of Germany does not wish evidence it provided to the United States to be used in this capital case is simply not a mitigating factor, but rather a “reflection of the debate surrounding the propriety of the death penalty.” *Id.* As such, the Defense is not entitled to the evidence under the theory that the agreements constitute mitigating evidence.

C. *United States v. Bin Laden* Considered Differences in Extradition Agreements Amongst Equally Culpable Defendants in a Joint Capital Trial and is Inapposite to the Defense Motion

In its motion, the Defense equates the facts in this case to those in *United States v. Bin Laden*, 156 F. Supp.2d 359 (S.D.N.Y. 2001) (hereinafter “East Africa Embassy Bombings case”), arguing that the “same considerations against arbitrary and random imposition of the death penalty apply here, and evidence related to an agreement may be permissible as mitigating evidence in Military Commissions.” AE 621 (RBS) at 9. The facts in the present case are easily distinguishable from those in East Africa Embassy Bombings case.

In the East Africa Embassy Bombings case, the court held that Khalfan Mohamed could “present to the jury, as a mitigating factor, the fact that the Constitutional Court [of South Africa] has ruled that had the proper procedures been followed by South African authorities, Mohamed’s

delivery to United States officials would have been conditioned on an assurance that he would not be eligible for the death penalty.” *Bin Laden*, 156 F. Supp.2d at 362. The court stated that “the decision to permit Khalfan Mohamed to present the decision of the Constitutional Court as a mitigating factor [was] largely informed by the particular facts of th[e] case.” *Id.* at 370. The particular facts of that case were that certain other defendants facing charges for the same crimes in the same case would not face the death penalty specifically because the terms of their relevant extradition treaties did not permit it, but that Mr. Mohamed would face the death penalty due solely to a failure of South Africa in not following its own procedures on extradition. *Id.* While it did not rule that Mr. Mohamed was ineligible for the death penalty, ultimately the court found that “because of its similarity to the statutory mitigating factor regarding equally culpable defendants . . . Khalfan Mohamed may present a focused summary holding . . . of the South African Constitutional Court to the jury as a mitigating factor during his penalty hearing.” *Id.* at 370–371.

The agreement(s) the Defense seeks in the instant case are quite different, and regard the use of foreign evidence, not an extradition agreement that places Mr. Binalshibh in a position to face capital charges while certain of his co-Accused do not. All of the Accused in this case lawfully face the death penalty under the sovereign authority of the United States, and there are no living “equally culpable” defendants being prosecuted in this court or elsewhere. Nor were any of the Accused (to include Mr. Binalshibh) in this case captured in Germany, or formally extradited to the United States under any extradition agreement whatsoever with any other country. Hence, the East Africa Embassy Bombings case decision to permit a South African court decision as a mitigating factor to be considered, based on the nuanced specific facts of that joint trial and the South African Supreme Court’s ruling, is completely inapposite to the present motion seeking inter-governmental agreements regarding evidence, not extradition. When coupled with the fact that the Prosecution is not using any of the German-provided evidence in this case, the East Africa Embassy Bombings case offers Mr. Binalshibh no relief.

III. The United States has Jurisdiction Over Mr. Binalshibh, and Principles of Sovereignty Permit the United States to Prosecute Mr. Binalshibh Without Reference to German Law or Agreements

A. The Accused Has No Standing to Require the United States to Abide by Any Agreements and Thus is Not Entitled to Said Agreements in Discovery

The United States affirmatively states that it is abiding by any and all agreements it made with the Government of Germany in the disclosure of German-provided evidence. That said, even if it were not, the Accused would have no standing to enforce such agreements in this commission as a personal right of action. *See Kwan v. United States*, 272 F.3d 1360, 1363 (Fed. Cir. 2001). Any agreement between the United States and Germany “does not raise issues of fundamental liberty interests and personal rights, but manifests its character as a government-to-government agreement within the sole authority of the executive, and confers no private right of action.” *Id.* at 1364. “When the foundation document is an agreement between governments, non-governmental entities cannot ordinarily challenge either their interpretation or their implementation, in the absence of express authorization for such private action.” *Id.* at 1362. As the Accused lacks standing to challenge or enforce the agreement, he also cannot establish how such information is material to the preparation of the defense, or otherwise discoverable under R.M.C. 701.

B. The Jurisdiction of this Commission and the Admissibility of Evidence Can Never Be Limited by German Law or Agreement

This Commission’s jurisdiction is established by Congress (in the Military Commissions Act of 2009) and its rules of evidence are set forth by the Secretary of Defense (in the Manual for Military Commissions); neither of which can be circumscribed by German authority. Therefore, any agreements that the United States and the German government had regarding the information at issue would neither divest this court of jurisdiction, nor impact the admissibility of any competent evidence the Prosecution sought to admit. As the Court of Appeals for the Armed Forces stated:

One accused of a crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended, but he has no more

than that He may not complain if one sovereignty waives its strict right to exclusive custody of him for vindication of its laws in order that the other may also subject him to conviction of crime against it.

United States v. Murphy, 50 M.J. 4, 10 (C.A.A.F. 1998) (quoting *Ponzi v. Fessenden*, 258 U.S. 254, 260, 66 L. Ed. 607, 42 S. Ct. 309 (1922); citing *Wilson v. Girard*, 354 U.S. 524, 1 L. Ed. 2d 1544, 77 S. Ct. 1409 (1957)).

Based on the principles of sovereignty espoused in *Murphy*, even if the United States were not abiding by its agreement with the German Government (which it is), and were to use competent admissible evidence obtained from the Germans against the Accused contrary to any such agreement (which it is not), the Accused still would have no standing or other legal recourse to enforce the agreement in this Commission and move to exclude such evidence. *See generally id.* at 10 (“Accordingly, even if the conduct of United States military authorities in Germany misled German authorities into a decision not to seek the return of appellant to the custody of Germany for prosecution, appellant was, nevertheless, lawfully subject to the jurisdiction of the court-martial.”). As the Accused lacks standing to challenge or require enforcement of the agreements, he also cannot show how such agreements are material to the preparation of the defense, or otherwise discoverable under R.M.C. 701, and his motion should be denied.

6. Conclusion

Whereas the United States does not intend to use any German-provided evidence in the case-in-chief or sentencing hearing in the case against any of the Accused; whereas the agreements sought do not go to the “reasoned moral response to the defendant’s background, character, and crime,” and thus are not an appropriate mitigating factor in sentencing; whereas the United States has jurisdiction over these Accused that is not dependent on any extradition agreements with any countries; whereas the United States has the sovereign legal authority to impose the death penalty for the charges that have been alleged; whereas the United States has the sovereign legal authority to admit evidence pursuant to its own rules of evidence; whereas

there are no living “equally culpable” Accused in this case that are not facing capital punishment due to an extradition agreement the United States has with Germany or any other country; and whereas the Accused lack standing to enforce any agreements that exist between the United States and Germany, the agreements sought by the Defense are not material to the preparation of the Defense pursuant to R.M.C. 701. Therefore, the Defense motion should be denied by the Commission without oral argument..

7. Oral Argument

The Prosecution does not request oral argument. Further, the Prosecution strongly posits that this Commission should dispense with oral argument as the facts and legal contentions are adequately presented in the material now before the Commission and argument would not add to the decisional process. However, if the Commission decides to grant oral argument to the Defense, the Prosecution requests an opportunity to respond.

8. Witnesses and Evidence

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

9. Additional Information

The Prosecution has no additional information.

10. Attachments

A. Certificate of Service, dated 26 March 2019.

Respectfully submitted,

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Clay Trivett
Managing Trial Counsel

Nicole Tate
Assistant Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 26th day of March 2019, I filed AE 621A (GOV), Government Response to Defense Motion to Compel Production of Discovery Related to Evidence Provided by the German Government, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//

Nicole A. Tate
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Office of the Chief Prosecutor