

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 621B (RBS)

Defense Reply

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

2 April 2019

1. **Timeliness:** This reply is timely filed.
2. **Law and Argument:**

The Government, while acknowledging that it received evidence from the Government of Germany, maintains that it will not use any of it in its case-in-chief against Mr. Bin al Shibh. *See* AE 619A (GOV) at 5. This does not end the matter. While Mr. Bin al Shibh now relies on this assurance in terms of evidence at trial, it is not enough to satisfy the concerns raised in his Motion. The German government has claimed it received assurances that evidence it provided would not be used directly or indirectly to secure a death sentence, and the Prosecution does not now claim otherwise. Indeed,

Germany was concerned enough about the matter to contemplate sending observers to Mr. Bin al Shibh's proposed trial in New York in 2009.¹

Without access to the agreements, assurances, or conditions at issue, Mr. Bin al Shibh remains unable to discover if the Government bound itself by any commitments. What he asks for now is the ability to determine if the Government has met its obligations. If the United States Government did commit not to use German evidence *indirectly* to secure a death sentence, then the matter is not settled by the Prosecution's commitment not to use such evidence in its case-in-chief. Ultimately, Mr. Bin al Shibh is entitled to know the lengths the United States went to and the assurances it made in order to secure evidence from Germany. Only then can he investigate how the Government has used the evidence, determine whether it broaches any agreement, and challenge the Government's investigation and the evidence it does put on in any future trial.²

The violation of any agreement with Germany could also be powerful mitigating evidence. Mr. Bin al Shibh could demonstrate the Government's misconduct in its investigation and presentation of its case against him. Additionally, the same considerations against arbitrary death sentences that applied in *United States v. Bin Laden*, 156 F. Supp. 2d 359, 368-71 (S.D.N.Y. 2001) could apply here. The Government argues, and Mr. Bin al Shibh agrees, that the facts in *Bin Laden*

¹ 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>. ("In order to verify that the US government keeps its word, the German Justice Ministry will team up with the Foreign Ministry to send German observers to monitor the trial in New York.")

² The charging document issued against Mr. Bin al Shibh makes clear that much of the Government's case against him revolves around activities that allegedly took place in Germany—including travel to and from Germany as well as visa applications, wire transfers, and communications that occurred in Germany. The Government's discovery also demonstrates that German police conducted extensive investigations of Mr. Bin al Shibh in Germany shortly after 9/11 and provided the results to the United States.

were different in several respects. *Id.* (discussing South African Court decision holding that Khalfan Mohamed should not have been extradited and fact that other defendants were only extradited from European countries on condition that they not receive capital sentences). While the *Bin Laden* case had other defendants who were not facing the death penalty, the Court still based its allowance of a non-statutory mitigating factor on the need to prevent arbitrary death sentences. *Id.* at 370 (noting that the South African Court decision “actually bears a more direct relationship to the personal circumstances of the defendant than the statutory factor does”). Importantly, Mr. Bin al Shibh is not arguing for the admission of any specific evidence in mitigation at this point in time. That would be premature. He seeks the discovery of material evidence that could well lead to important mitigation in any future presentencing hearing.

Much of the Government’s response addresses arguments that Mr. Bin al Shibh never actually raised. He is not attempting to argue that Germany would not seek to impose the death penalty against Mr. Bin al Shihbh.³ An agreement is not needed to demonstrate this, whether or not such evidence would be admissible. Rather, Mr. Bin al Shibh argues that the violation of agreements in his prosecution could lead to mitigating evidence because of Government misconduct and arbitrary imposition of the death penalty. The Government seems to be arguing against the admission of these agreements as mitigation. But Mr. Bin al Shibh does not seek to introduce them to demonstrate what Germany would or would not do in its own prosecution (indeed, at this current stage of discovery, he does not seek to introduce them at all). Nor does Mr. Bin al Shibh argue that

³ For this reason, the Government’s extensive reliance on *United States v. Gabrion*, 719 F.3d 511 (6th Cir. 2013) (holding that fact that Michigan did not have the death penalty was not a mitigating factor in federal death penalty trial in Michigan), is misplaced.

he can enforce international agreements or that the Commission's jurisdiction is lost if the Government violates its agreements. Mr. Bin al Shibh was very careful in his motion not to make these arguments, and he does not claim in this motion legal authority now to enforce the kinds of agreements that were at issue in *Kwan v. United States*, 272 F.3d 1360 (Fed. Cir. 2001). Rather, he seeks the means to determine whether the Government made an agreement, specific to his case and evidence in it, and then violated it. It would be premature to claim at this point that he could enforce such an agreement. But that does not mean there may not be due process rights violations or mitigation remedies for Government violations of an agreement.⁴

Mr. Bin al Shibh requests that the Military Commission compel the production of the requested discovery regarding any agreements, conditions, and/or assurances that preceded or accompanied the handing over of evidence against him by any government agency of Germany, as well as any surrounding correspondence.

2. Attachment:

a. Certificate of Service

⁴ The Government also says that Mr. Bin al Shibh might be attempting to "sow discord" between the United States and Germany. Mr. Bin al Shibh simply seeks to ensure his rights to a fair trial. Even so, over the last 18 years, actions of the United States Government have sown far more discord with Germany than Mr. Bin al Shibh ever could. *See, e.g.,* Ray Sanchez, *World Reacts to US Torture Report*, CNN (December 11, 2014), <http://www.cnn.com/2014/12/10/world/senate-torture-report-world-reaction/index.html>; Goetz and Rosenbach, *The Death Penalty Problem: 9/11 Trial Puts German-US Relations Under Strain*, *Der Spiegel*; Julie Hirschfield Davis, *Outrage Over Guantanamo Bay Could Mar Bush Trip to Europe*, *The Baltimore Sun*, (June 20, 2006), <https://www.baltimoresun.com/news/bs-xpm-2006-06-20-0606200023-story.html>.

Respectfully submitted,

//s//

JAMES P. HARRINGTON
Learned Counsel

//s//

ALAINA M. WICHNER
Defense Counsel

//s//

MISHAEL A. DANIELSON, LT, USN
Defense Counsel

//s//

WYATT A. FEELER
Defense Counsel

//s//

JOHN M. BALOUZIYEH, CPT, USA
Defense Counsel

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on 2 April 2019, I electronically filed AE 621B (RBS) Defense Reply To Government Response to Defense Motion to Compel Production of Discovery Related to Evidence Provided by the German Government and served it on all counsel of record by e-mail.

//s//

JAMES P. HARRINGTON
Learned Counsel