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 709B** **RULING** **Defense Motion to Compel Discovery (Movement and FCE Videos)** **21 April 2020**

1. **Procedural History**. On 30 January 2020, Mr. Hawsawi moved the Commission to order the Government to provide the Defense with a "copy of the video recordings of Mr. Hawsawi documenting his movements from his location of confinement, and video recordings made during Mr. Hawsawi's two forcible cell extractions."[1] On 12 February 2020, the Government responded in opposition to Mr. Hawsawi's motion.[2]

2. **Findings of Fact**. For the purposes of this motion, the Commission adopts as fact those facts asserted by Mr. Hawsawi in paragraph 5 of the motion to compel discovery.

3. **Burden of Proof**. As moving party, the Defense bears the burden of proving any facts prerequisite to the relief sought by a preponderance of the evidence.[3]

4. **Oral Argument**. Mr. Hawsawi requested oral argument on the motion. The Government did not request oral argument, but instead argued that the Commission should dispense with oral argument. In accordance with Rule for Military Commission (R.M.C.) 905(h), "[t]he military judge may, in the judge's discretion, grant the request of either party . . . to present oral argument." In this instance, the issue has been fully briefed in the written pleadings. Oral

[1] AE 709 (MAH), Defense Motion to Compel Discovery (Movement and FCE Videos), filed 30 January 2020.
[2] AE 709A (GOV), Government Response To Defense Motion to Compel Discovery (Movement and FCE Videos), filed 12 February 2020.
[3] Rule for Military Commissions (R.M.C.) 905(c)(1)-(2).

argument is not necessary to the Commission's consideration of the issue presented.[4] The Defense request for oral argument is **DENIED**.

5. **Law - Discovery**.

a. Information is discoverable if it is material to the preparation of the defense or exculpatory.[5] Information is also discoverable if it is material to sentencing.[6] The materiality standard is not normally a heavy burden. Evidence is material if there is a strong indication the information will "play an important role in uncovering admissible evidence, aiding in witness preparation, corroborating testimony, or assisting impeachment or rebuttal."[7]

b. A "mere conclusory allegation that the requested information is material to the preparation of the defense," however, does not satisfy the Defense's burden to show "the reasonableness and materiality of the request."[8] Similarly, a "vague asserted need for potentially exculpatory evidence that might be contained" in the materials sought "does not pass muster."[9] Regarding classified information specifically, the Court of Appeals for the District of Columbia Circuit has held that classified information "is not discoverable on a mere showing of theoretical relevance in the face of the government's classified information privilege, but . . . further requires that a defendant seeking classified information . . . is entitled only to information that is at least helpful to the defense of the accused."[10] Furthermore, the Defense must be able to sufficiently

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[4] *See also* Military Commissions Trial Judiciary Rules of Court 3.5.m. (1 September 2016).
[5] R.M.C. 701(c)(1-3), (e); *Brady v. Maryland*, 373 U.S. 83, 88 (1963). Furthermore, "[u]nder *Brady*, . . . prosecutors have an affirmative duty to search possible sources of exculpatory information, including a duty to learn of favorable evidence known to others acting on the prosecution's behalf, . . . and to cause files to be searched that are not only maintained by the prosecutor's or investigative agency's office, but also by other branches of government 'closely aligned with the prosecution.'" *United States v. Safavian*, 233 F.R.D. 12, 17 (D.D.C. 2005). Note, however, that absent "a specific request . . . that . . . explicitly identifies the desired material and is objectively limited in scope," there is no obligation for "prosecutors to search . . . unrelated files to exclude the possibility, however remote, that they contain exculpatory information." *United States v. Joseph*, 996 F.2d 36, 41 (3d Cir. 1993).
[6] R.M.C. 701(e)(3).
[7] *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993).
[8] *United States v. Conder*, 423 F.2d 904, 910 (6th Cir. 1970) *cert. denied*, 400 U.S. 958 (1970).
[9] *United States v. Apodaca*, 287 F. Supp. 3d 21, 40 (D.D.C. 2017).
[10] *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (citing *Roviaro v. United States*, 353 U.S. 53 (1957)).

establish that the material sought in fact exists.[11] Finally, a Defense discovery request that is overbroad or otherwise objectionable may simply be denied; the Commission is under no obligation to amend or modify the request to render it unobjectionable.[12]

c. As in any criminal case, the Prosecution in a military commission is responsible to determine what information it must disclose in discovery.[13] "Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance."[14] It is incumbent upon the Prosecution to execute this duty faithfully, because the consequences are dire if it fails to fulfill its obligation.[15]

6. **Analysis**.

a. Mr. Hawsawi requests that the Commission order the Government to produce in discovery copies of any video recordings documenting Mr. Hawsawi's movements to and from his confinement location, as well as two video recordings documenting forcible cell extractions (FCE) of Mr. Hawsawi by Joint Task Force-Guantanamo Bay (JTF-GTMO) personnel. Defense Counsel acknowledge that the Government permits Defense Counsel to view, but not retain, the two classified FCE videos in issue, but notes that the Government has repeatedly denied Mr. Hawsawi's request for copies of videos of his movements from Camp 7. Mr. Hawsawi argues that these videos are material to the preparation of the Defense because the videos in question are evidence of his good behavior, passivity, and "peaceful adjustment to life in prison"

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[11] *United States v. Norwood*, 79 M.J. 644, 666 (N-M.Ct. Crim. App. 2019), review granted on other grounds, No. 20-0006/NA, 2020 WL 710633 (C.A.A.F. Jan. 21, 2020) (citing *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004)).

[12] *See, e.g.*, *Benham v. Rice*, 238 F.R.D. 15, 19 (D.D.C. 2006), on reconsideration in part, No. CIV.A. 03-01127, 2007 WL 8042488 (D.D.C. Sept. 14, 2007)("[I]t is not the court's function to modify plaintiff's demands so that, as revised, they are reasonable and legitimate." *Id.*) (interrogatories in civil case).

[13] R.M.C. 701(b)-(c); *United States v. Briggs*, 48 M.J. 143 (C.A.A.F. 1998); *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987).

[14] *Ritchie*, 480 U.S. at 59.

[15] *See United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015) (finding no abuse of discretion in military judge's dismissal with prejudice of charges due to a Prosecution discovery violation); *United States v. Bowser*, 73 M.J. 889 (A.F. Ct. Crim. App. 2014), *summarily aff'd* 74 M.J. 326 (C.A.A.F. 2015) (same).

as well as his "probable future conduct,"[16] and are, therefore, relevant to a case in mitigation. Mr. Hawsawi also suggests that the videos are relevant to show the conditions under which he lives, to include the security measures applied to him on a daily basis. Finally, Mr. Hawsawi argues that the requirement for Counsel to review the videotapes at U.S. Naval Station, Guantanamo Bay, Cuba (as opposed to obtaining copies) prevents them from showing the videos to retained expert consultants and prevents them from incorporating the videos into a sentencing presentation.[17]

b. The Government notes "the Prosecution has and will continue to facilitate Defense reviews of the two classified JTF-GTMO FCE movement videos and any other classified movement videos of Mr. Hawsawi the Defense requests."[18] The Government also promises to facilitate in-court display of any videos during trial proceedings. But the Government objects to providing the Defense with physical copies of the videos "in order to preserve the integrity of the tactics, techniques, and procedures employed by the guard force personnel, as well as their identities and likenesses." The Government represents that an Original Classification Authority (OCA) has determined that the distribution of such videos must be limited and controlled and has thus categorized them as "DISPLAY ONLY."[19] The Government also asked, in the event the Commission disagrees, to allow the Government to seek a protective order pursuant to R.M.C. 701(f) and 10 U.S.C. § 949p-3.[20]

c. Mr. Hawsawi has persuasively argued that access to FCE recordings and at least some number of the other movement recordings are material to the preparation of a potential mitigation case. The Commission, however, does not find that Mr. Hawsawi has established that

[16] AE 709 (MAH) at p. 6.
[17] *Id.* at fn. 19.
[18] AE 709 (GOV) at p. 4.
[19] *Id.*
[20] *Id.* at fn. 1.

access to and possession of all movement recordings made during Mr. Hawsawi's time in detention is material to the preparation of the Defense. The Government has articulated a legitimate security concern related to distribution of the recordings. However, the Commission finds that a protective order will effectively strike the balance between the Government's security concerns while allowing appropriately cleared Defense Counsel and expert consultants to access the recordings in issue for the purposes of preparing a mitigation case.

7. **Ruling**. The Defense motion to compel discovery is **GRANTED in part**.

8. **Order**.

a. Within **seven (7) days** of issuance of an appropriate protective order by this Commission, the Government is ordered to provide copies of the two FCE recordings in issue to Defense Counsel.

b. The Government shall allow Defense Counsel to review at least ten other movement recordings, if such recordings exist. Defense Counsel may request to review specific movement recordings. If the Defense makes no specific requests, the Government shall allow Defense Counsel to view movement recordings that represent, to the greatest extent possible, Mr. Hawsawi's entire period of confinement at Guantanamo Bay.

c. Based on Defense Counsel's review of the ten movement recordings, Defense Counsel may request (and the Government shall provide) copies of two specific movement recordings, which shall be subject to the same protective order referenced previously.

d. The Government will move for a protective order in accordance with 10 U.S.C. § p-3 and R.M.C. 701(f) not later than **15 May 2020**. The Government shall provide the proposed protective order to the Defense in accordance with this Commission's ruling in AE 650O.[21]

So **ORDERED** this 21st day of April, 2020.

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W. SHANE COHEN, Colonel, USAF
Military Judge
Military Commissions Trial Judiciary

[21] AE 650O Ruling, Commission's Authority to Consider Government Motions for Protective Orders and Substituted Evidentiary Foundations *Ex Parte*, dated 25 October 2019.