

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

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

~~(U)~~ AE 722A (GOV)

~~(U)~~ Government Response

Mr. Binalshibh's Motion to Compel
Production of Discovery Related to Forced
Shaving

13 February 2020

1. ~~(U)~~ Timeliness

~~(U)~~ The Prosecution timely files this Response pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.

2. ~~(U)~~ Relief Sought

~~(U)~~ The Prosecution respectfully requests that this Commission deny the requested relief set forth within AE 722 (RBS), Mr. Binalshibh's Motion to Compel Production of Discovery Related to Forced Shaving, without oral argument.

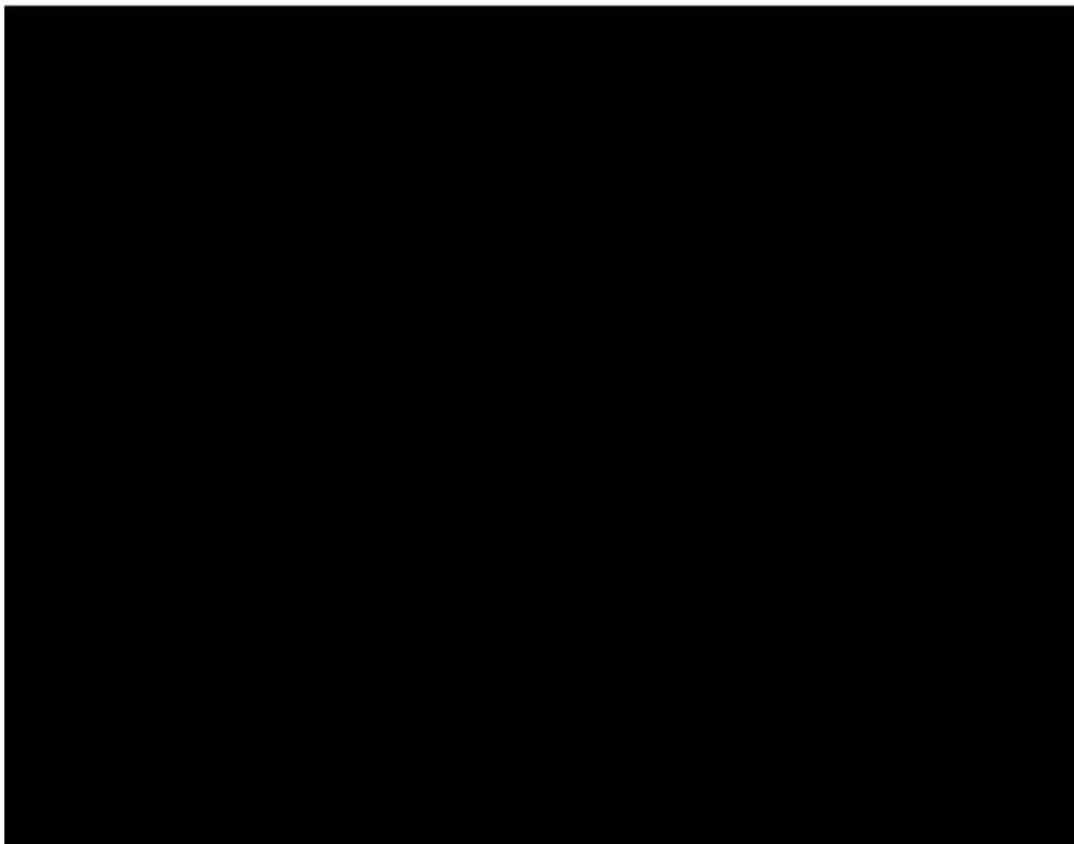
3. ~~(U)~~ Burden of Proof

~~(U)~~ 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. ~~(U)~~ Facts



~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

AE 722 (RBS), Attach. B at 2–3.

~~(S)~~ On 17 December 2019, the Prosecution responded to the Defense request and asserted that it had disclosed all discoverable information in accordance with its compliance with the ten category construct set forth within AE 397F and that it was not aware of any additional forced shaving incidents prior to January 2007. Further, the Prosecution declined to produce any further identities than those it had already provided in substituted form and noted that it would stipulate to the fact that the forced shaving occurred. *Id.*, Attach. C.

~~(S)~~ On 3 February 2020, Defense counsel for Mr. Binalshibh filed the instant motion requesting that “the Military Commission compel the production of requested discovery related to multiple forced shaving incidents in 2003, 2005, and 2007.” *Id.* at 1.

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~5. ~~(U)~~ Law and ArgumentI. ~~(U)~~ The Government's Discovery Obligations Are Defined by the Relevant Rules and Statutes

~~(U)~~ The Military Commissions Act of 2009 ("MCA") 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 MCA, the Rules for Military Commissions ("R.M.C.") require that the government 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,

~~(U)~~ [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.

R.M.C. 701(c)(1). However, notwithstanding this requirement, no authority grants defendants an unqualified right to receive, or compels the government to produce, discovery merely because the defendant has requested it. Rather, the government's discovery obligations are defined by the relevant rules and statutes. *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"); *United States v. Yunis*, 867 F.2d 617, 625 (D.C. Cir. 1989) ("In short, we hold that the District Court abused its discretion in ordering the disclosure of classified information to a defendant where the statements in question were no more than theoretically relevant and were not helpful to the presentation of the defense or essential to the fair resolution of the cause.").

~~(U)~~ 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

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

government's possession, but only if the documents meet the requirements of R.M.C. 701. Similarly, due process requires the government to disclose evidence favorable to the accused, but only when the evidence is "material" to guilt or punishment, *see Brady v. Maryland*, 373 U.S. 83, 87 (1963), or may be used to impeach the credibility of government witnesses, *see Giglio v. United States*, 405 U.S. 150, 154–55 (1972). Information that is favorable to the Defense includes evidence that "would tend to exculpate [the defendant] or reduce the penalty." *Brady*, 373 U.S. at 88. Although the materiality standard is not a heavy burden for the Defense to meet under R.M.C. 701, trial counsel must disclose information "only if it 'enable[s] the [Accused] significantly to alter the quantum of proof in his favor.'" *United States v. Graham*, 83 F.3d 1466, 1474 (D.C. Cir. 1996) (quoting *United States v. Caicedo-Llanos*, 960 F.2d 158, 164 n.4 (D.C. Cir. 1992) (quoting *United States v. Ross*, 511 F.2d 757, 763 (5th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975))).

~~(U)~~ 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 (C.A.A.F. 2010) (quoting Military Rule of Evidence 401). 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 id.* 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*, No. ACM 36443, 2008 WL 2852962, at *3 (A.F. Ct. Crim. App. 2008) (citing *United States v. Briggs*, 46 M.J. 699, 702 (A.F. Ct. Crim. App. 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.C.M.R. 1992) (citing *United States v. Cadet*, 727 F.2d 1453, 1468 (9th Cir. 1984)), *rev'd on other grounds*, 38 M.J. 98 (C.M.A. 1993)).

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~**II. ~~(S)~~ The Prosecution Has Provided the Defense with Relevant and Material Information**

~~(U)~~ Within the instant motion, Defense counsel for Mr. Binalshibh request that the Commission “compel production of requested discovery related to multiple forced shaving incidents in 2003, 2005, and 2007.” AE 722 (RBS) at 1. In making this request, the Defense asserts that such “records are relevant and necessary to support Mr. Binalshibh’s motions to suppress his statements as involuntary, to support future motions to suppress statements, to rebut the Government’s arguments about the attenuation of his interrogations at Guantanamo Bay, and as potential mitigating evidence.” *Id.* at 2. However, where the Prosecution has already disclosed all noncumulative, relevant, and helpful information regarding the incidents in question, the Commission should deny the Defense motion, without oral argument.

~~(U)~~ In this case, the Prosecution has undertaken a multi-year effort to identify discoverable materials that would be responsive to this motion to compel discovery related to the Accused’s conditions of confinement and in particular the CIA’s former RDI Program. The keystone of the Prosecution’s RDI discovery efforts involved identifying information detailing the Accused’s conditions of confinement and treatment in the program from the known repositories of such information.

~~(U)~~ The Prosecution has complied with this Commission’s order in AE 397F, which orders the Prosecution to provide explicit information regarding the RDI Program, including those individuals that had direct and substantial contact with the Accused. The culmination of that multi-year effort, which included the Prosecution’s compliance with AE 397F, is that the Prosecution has produced all discoverable RDI-related information from the known repositories of information. See AE 676 (GOV), Government Notice of Compliance of R.M.C. 701 Discovery Obligations, at 8–10. This includes but is certainly not limited to, all discoverable information from various investigations into the RDI program, including, records from investigation conducted by Assistant U.S. Attorney John Durham and internal investigations conducted by the CIA’s Office of the Inspector General (OIG) and other components.

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

~~(S)~~ The same effort has gone into identifying and providing the Defense with information detailing the Accused's conditions of confinement while in the custody of the Department of Defense. The Prosecution has provided and continues to provide, Detainee Information Management System (DIMS) records, psychological records, medical records, standard operating procedures and, for the times during which it was operational, detainee socialization management program records.

~~(S)~~ As outlined above, the Prosecution has provided the Defense with voluminous discovery regarding the Accused's conditions of confinement and treatment. Of course, the Prosecution has also stated its continued willingness to stipulate to the Accused's own recollections and experiences while detained by the CIA, so long as it is tethered to reality. In sum, what information the Prosecution knows about the Accused's treatment, including any "forced shaving," whether in the RDI Program, or in the custody of the Department of Defense, the Defense possesses. The Prosecution is in possession of no further documentary information regarding the incidents in question, therefore the Commission should deny this Defense request.

III. ~~(S)~~ The Defense Can Request to Interview CIA Personnel As Established in Amended Protective Order #4

~~(S)~~ In addition to the above, Defense counsel for Mr. Binalshibh also request the identities of all personnel—other than the ones previously provided by the Prosecution—who were involved in approving, carrying out, or following-up on the February 2003 and February 2005 forced shaving incidents. Initially, the Prosecution notes that the Defense has already filed a motion to compel certain individuals involved with the forced shaving incidents at issue. *See* AE 629T (RBS). That said, and notwithstanding the fact that the Prosecution has agreed to stipulate to the Accused's verifiable descriptions of their experiences while in the RDI Program, so long as those descriptions are "tethered to reality," should the Defense desire to interview a particularized¹ CIA person who was involved in the forced shaving of the Accused, counsel can

¹~~(S)~~ The Defense can do so through reference to a UFI and/or Bates Number to a specific piece of discovery.

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

submit a request to interview such person under the provisions of *Amended* Protective Order #4 and the Prosecution will conduct reasonable efforts to locate such person and deliver the Defense interview request. Given this information, the Commission should deny the Defense motion, without oral argument.

6. ~~(U)~~ Conclusion

~~(U)~~ The Prosecution respectfully requests that this Commission deny the requested relief set forth within AE 722 (RBS), Mr. Binalshibh's Motion to Compel Production of Discovery Related to Forced Shaving, without oral argument.

7. ~~(U)~~ Oral Argument

~~(U)~~ 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 Military Commission decides to grant oral argument to the Defense, the Prosecution requests an opportunity to respond.

8. ~~(U)~~ Witnesses and Evidence

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

9. ~~(U)~~ Additional Information

~~(U)~~ The Prosecution has no additional information.

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

10. ~~(S)~~ Attachments

- A. ~~(S)~~ Certificate of Service, dated 13 February 2020

~~(S)~~ Respectfully submitted,

//s//

Clay Trivett
Managing Trial Counsel

Nicole Tate
Assistant Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

~~(U)~~ ATTACHMENT A

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

~~(U)~~ CERTIFICATE OF SERVICE

~~(U)~~ I certify that on the 13th day of February 2020, I filed AE 722A (GOV), Government Response to Mr. Binalshibh's Motion to Compel Production of Discovery Related to Forced Shaving, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//

Christopher Dykstra
Assistant Trial Counsel

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~