**MILITARY COMMISSIONS TRIAL JUDICIARY**
**GUANTANAMO BAY, CUBA**

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| **UNITED STATES OF AMERICA**<br><br>**v.**<br><br>**MAJID SHOUKAT KHAN** | **AE 028C**<br><br>**RULING**<br><br>**Defense Motion to Compel Production of *Brady* Material**<br><br>15 April 2019 |

## 1. BACKGROUND:

a. The Accused's guilty plea was submitted to the Convening Authority on 13 February 2012 and discovery specifically set forth in the pretrial agreement ("PTA")[1] was completed later that month.[2] On 1 October 2015, the Defense submitted a modification to the PTA.[3] The original Charge IV and its specifications alleging violations of 10 U.S.C. § 950t(25), Providing Material Support for Terrorism, were dismissed upon a joint motion pursuant to *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (en banc). At a hearing conducted on 14 September 2016, the Commission conducted an inquiry with the Accused on the modifications.[4]

b. On 25 October 2018, the Military Judge issued AE 016Y, a Litigation and Trial Scheduling Order. In that order, the Military Judge set 15 November 2018 as the date whereby Defense was required to submit discovery requests "in accordance with paragraph 12 of the pretrial agreement" and, due on the same day, any "Defense request for discovery beyond the scope set forth in paragraph 12 of the PTA." *See* AE 016Y at 1. On 15 November 2018, the Defense submitted to

[1] *See* AE 012, Offer for Pretrial Agreement, dated 13 February 2012.
[2] AE 028A, Government Response to Defense Motion to Compel Production of *Brady* Material, filed 11 March 2019, at 2-4.
[3] *See* AE 012A, Modification to February 13, 2012 Offer for Pretrial Agreement, dated 1 October 2015.
[4] *See* Unofficial/Unauthenticated Transcript of the *US v. Khan* Motions Hearing Dated 14 September 2016 from 11:03 A.M. to 11:59 A.M. at pp. 147-81.

the Government two requests for discovery under R.M.C. 701 and *Brady v. Maryland*, 373 U.S. 83 (1963).[5]

c. On 25 February 2019, the Accused moved[6] the Commission to compel the Government to produce favorable evidence in extenuation and mitigation of his sentence, pursuant to *Brady* and related authorities.[7] In its response, the Government stated it had already complied and the Accused had waived such rights under the PTA.[8] The Defense argues the Accused did not waive his right to obtain *Brady*/R.M.C. 701(e) discovery material; such rights cannot be waived; and any ambiguity in the PTA must be construed in his favor.[9] On 11 March 2019, the Government filed its response, AE 028A,[10] and requested the motion be denied, arguing the issue was waived and the Government's discovery obligations are complete.[11] On 15 March 2019, the Defense filed a reply, AE 028B,[12] asserting principally the Accused did not waive *Brady* and "*Brady* is not a discovery rule, but rather a rule of fundamental fairness."[13] The Commission heard oral argument on the motion on 1 April 2019.[14]

d. The questions before the Commission on this motion are the meaning of paragraph 12 of the PTA, and whether the Accused waived his right to obtain further discovery material through

[5] AE 028, Defense Motion to Compel Production of *Brady* Material, filed 25 February 2019, at 2; Attachment C.
[6] AE 028.
[7] *Id.* at 1.
[8] *Id.* at Attachment D.
[9] *Id.* at 3-4.
[10] AE 028A, Government Response to Defense Motion to Compel Production of Brady Material, filed 11 March 2019.
[11] *Id.* at 1.
[12] AE 028B, Defense Reply to Motion to Compel Production of *Brady* Material, filed 15 March 2019.
[13] *Id.* at 1-2. The Defense argues that *Brady* is not a discovery rule but is instead a fair trial rule. "*Brady* protects an accused's due process right to a fair trial." *Flores v. Satz*, 137 F.3d 1275, 1278 (11th Cir. 1998) (quoting *McMillian v. Johnson*, 88 F.3d 1554, 1567 (11th Cir. 1996)). The Defense cites two cases wherein the Fifth Circuit stated that "*Brady* is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation." *United States v. Campagnuolo*, 592 F.2d 852, 859 (5th Cir. 1979) (quoting *United States v. Beasley*, 576 F.2d 626, 630 (5th Cir. 1978)). These cases, however, cite back to the Supreme Court case of *United States v. Agurs*, which made no such explicit holding. *See* 427 U.S. at 107 ("We are not considering the scope of discovery … or the wisdom of amending those Rules to enlarge the defendant's discovery rights. We are dealing with the defendant's right to a fair trial.").
[14] Transcript Dated 1 April 2019 from 1:28 P.M. to 4:02 P.M. at pp. 272-303.

R.M.C. 701(e) and *Brady*. *See* AE 012. The PTA provides, in relevant part, "I waive my right to any discovery beyond what the Government is obligated to provide pursuant to R.M.C. 701(b)(l) and 701(d)." AE 012, paragraph 12.

**2. ANALYSIS:**

a. The Commission need not reach the question of whether the Constitution applies to detainees at Guantanamo.[15] However, the Commission applies the constitutional principles set forth in various judicial opinions, statutes, and rules.

b. In *Brady*, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Strickler v. Greene*, 527 U.S. 263, 280 (1999); *Brady*, 373 U.S. at 87. The duty to disclose such evidence is applicable even if there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107 (1976), and the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 473 U.S. at 682; *see also Kyles v. Whitley*, 514 U.S. 419, 433–34 (1995) (noting that the question is whether, in the absence of the evidence sought, the defendant received a fair trial "resulting in a verdict worthy of confidence").

c. The *Brady* right is a trial right. *United States v. Moussaoui*, 591 F.3d 263, 285 (4th Cir. 2010), *as amended* (Feb. 9, 2010); *see Brady*, 373 U.S. at 87; *United States v. Ruiz*, 536 U.S. 622,

[15] The U.S. District Court for the District of Columbia recently stated, "the due process clause does not apply to Guantanamo detainees." *Al-Hela v. Trump*, No. 05-cv-01048 (D.D.C. March 15, 2019); *see also Kiyemba v. Obama*, 555 F.3d 1022, 1026-27 (D.C. Cir. 2009), *vacated and remanded*, 559 U.S. 131, *reinstated in relevant part*, 605 F.3d 1046, 1047-48 (D.C. Cir. 2010); *Zadvydas v. Davis*, 533 U.S. 678 (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269, 274-75 (1990); *Johnson v. Eisentrager*, 339 U.S. 763, 783-84 (1950).

628 (2002) (noting that *Brady* rights are part of the constitutional principle of a "fair trial guarantee"). When an accused pleads guilty, those concerns are almost completely eliminated because his guilt is admitted. *See Menna v. New York,* 423 U.S. 61, 62 n.2 (1975) (per curiam); *Matthew v. Johnson,* 201 F.3d 353, 361 (5th Cir. 2000) (explaining that "[t]he *Brady* rule's focus on protecting the integrity of trials suggests that where no trial is to occur, there may be no constitutional violation"); *Orman v. Cain,* 228 F.3d 616, 617 (5th Cir. 2000) ("*Brady* requires a prosecutor to disclose exculpatory evidence for purposes of ensuring a fair trial, a concern that is absent when a defendant waives trial and pleads guilty."). *Ruiz* upheld a PTA term requiring waiver of the right to receive impeachment evidence *and* evidence supporting any affirmative defenses. *Ruiz*, 536 U.S. at 622. In *Bagley*, where the appellate court treated impeachment evidence as more important than exculpatory evidence and the failure to disclose it as more egregious, the Supreme Court stated that *Brady* equally implicates both types of evidence and "rejected any such distinction between impeachment evidence and exculpatory evidence." 473 U.S. at 676.

d. "The interpretation of a pretrial agreement is a question of law, which is reviewed under a de novo standard." *United States v. Acevedo,* 50 M.J. 169, 172 (C.A.A.F.1999); *United States v. Cron*, 73 M.J. 718, 729 (A.F. Ct. Crim. App. 2014) *review denied*, 74 M.J. 184 (C.A.A.F. 2014). "[W]hile signing an appeal waiver means giving up some, many, or even most appellate claims, some claims nevertheless remain." *Garza v. Idaho*, 139 S. Ct. 738, 745 (2019). Even in the guilty-plea context, the Commission must consider all relevant factors, such as whether the Accused received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights. *See Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). Although receiving both exculpatory and impeachment evidence from the Government is part of the fair-trial right, "a defendant who pleads guilty forgoes a fair trial as well as various other accompanying

constitutional guarantees." *Ruiz*, 536 U.S. at 623 (quoting *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)); *see also United States v. King*, 27 M.J. 664, 670 (A.C.M.R. 1988), *aff'd*, 30 M.J. 59 (C.M.A. 1990) ("A plea of guilty usually waives nonjurisdictional errors."). There may not always be prejudice—even if the Government breaks an agreement—either because the defendant already obtained the benefit of the bargain or would not have been able to obtain it at all. *Puckett v. United States*, 556 U.S. 129, 141–42 (2009). Unless the accused is deprived of a fair trial, there is no constitutional violation. *Agurs*, 427 U.S. at 107–08.

e. The Defense argues that "while Congress may enact a statute that provides defendants with greater rights than are constitutionally required, it may not attempt to supersede" "or displace those constitutional protections."[16] It is true that "[w]hile Congress has ultimate authority to modify or set aside any such rules that are not constitutionally required, it may not supersede [Supreme Court] decisions interpreting and applying the Constitution." *Dickerson v. United States*, 530 U.S. 428 (2000) (internal citations omitted). The military, like the federal and state systems, has hierarchical sources of rights. These sources include, inter alia, constitutional rights; federal statutes, including the Uniform Code of Military Justice and the Military Commissions Act; executive orders; directives; and case law. Some of these sources codify the constitutional rules. "Normal rules of statutory construction provide that the highest source authority will be paramount, unless a lower source creates rules that are constitutional and provide greater rights for the individual." *United States v. Lopez*, 35 M.J. 35, 39 (C.M.A. 1992); *United States v. Czeschin*, 56 M.J. 346, 348 (C.A.A.F. 2002).

For example, generally, an accused must be informed of his *Miranda* rights prior to custodial interrogation. *United States v. Ramos*, 76 M.J. 372 (C.A.A.F. 2017) (citing *Miranda v. Arizona*, 384

[16] AE 028 at 4; AE 028B at 10.

U.S. 436 (1966); *United States v. Swift*, 53 M.J. 439, 445 (C.A.A.F. 2000)). In military jurisprudence, Congress has provided military members, under Article 31(b), with a rights' warning requirement that is broader than those required by *Miranda*. Article 31, UCMJ, 10 USC § 831; *see also United States v. Ellis*, 57 M.J. 375, 378 (C.A.A.F. 2002); *United States v. Baird*, 851 F.2d 376, 383 (D.C. Cir. 1988); *United States v. Tempia*, 37 C.M.R. 249 (1967).

> The mere fact that Article 31(b), UCMJ, rights have a constitutional analog does not change the means by which those rights are ultimately conferred—that is, by statute—nor does it otherwise convert those statutory rights into constitutional rights. Indeed, we have explicitly recognized that Article 31(b), UCMJ, derives primarily from "statutory enactment, not constitutional adjudication." We further have held that Article 31(b), UCMJ, rights are in certain respects more extensive than those provided under the Fifth Amendment. Therefore, when it comes to such rights, "the Constitution prescribes [a] floor ... [not] a ceiling."

*United States v. Evans*, 75 M.J. 302, 305 (C.A.A.F. 2016) (internal citations omitted). Although *Miranda* is a constitutional rule that may not be superseded by statute, Article 31 governs because it provides greater rights for the individual. *See, e.g., Dickerson*, 530 U.S. at 444; *Miranda*, 384 U.S. 436. It follows that a valid waiver of Article 31 rights waives *Miranda* rights. *See, e.g., United States v. French*, 38 M.J. 420 (C.M.A. 1993); *United States v. McLellan*, 1 M.J. 575, 578 (A.C.M.R. 1975). Likewise, although *Brady* is a constitutional, fair-trial rule, it is also a discovery rule codified by R.M.C. 701(e), which provides even greater individual rights. Because the rule provides greater rights to discovery, waiver of R.M.C. 701(e) waives *Brady* discovery rights as well. *Brady* is a floor, not a ceiling.

The Defense concedes that R.M.C. 701(e) implements *Brady* and provides even broader protections.[17] *See, e.g., United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990); *United States v.*

[17] "R.M.C. 701(e) may implement the requirements of *Brady*, or provide greater protection than *Brady*;" "to the extent that [paragraph 12] could be construed to [as waiver,] that waiver could extend only to his right to obtain exculpatory evidence under R.M.C. 701(e);" "military law is well-settled that R.M.C. 701(e) provides broader protection to defendants than *Brady*." AE 028B at 10, n.6; AE 028 at 4, 21.

*Williams*, 50 M.J. 436, 439-40 (C.A.A.F. 1999) ("discovery and disclosure procedures in the military justice system, which are designed to be broader than in civilian life, provide the accused, at a minimum, with the disclosure and discovery rights available in federal civilian proceedings"); *see also United States v. Stellato*, 74 M.J. 473, 481 (C.A.A.F. 2015) ("These discovery rules 'ensure compliance with the equal-access-to-evidence mandate.'"). Therefore, waiver of R.M.C. 701(e) waives any further *Brady* claims because the Defense cannot show what evidence they would be entitled to receive under *Brady* that would not have been encompassed, and therefore waived, by R.M.C. 701(e).

f. *Cron* provides an illustrative example upholding a PTA provision by which the accused agreed to "[w]aive my right to all future discovery with the exception of discovery pursuant to *Brady*." 73 M.J. at 733 (citing *Ruiz*, 536 U.S. at 622). Similar to the case at bar, in negotiating the PTA, the accused in *Cron* had the services of an extensive defense team. The Military Judge in that case specifically asked Defense Counsel if they had any discovery concerns and if they had the discovery they needed to prepare. Cron indicated he had discussed the provisions with counsel and was able to assist in preparing for sentencing. The Air Force Court of Criminal Appeals concluded, "[t]he accused made a voluntary, knowing, and intelligent waiver of his right to further discovery with sufficient awareness of the relevant circumstances and its consequences." 73 M.J. at 733.

No magic words are required to establish a waiver. *United States v. Smith*, 50 M.J. 451, 456 (C.A.A.F. 1999). "Statements such as those made here are more than sufficient to show that defense counsel made a purposeful decision to agree." *Id*. "Counsel need not have literally told the judge that she waived the issue of the Government's failure to produce discovery." *United States v. Avery*, 52 M.J. 496, 498 (C.A.A.F. 2000). A clear statement evidencing a tactical decision is sufficient. *See United States v. Voorhees*, 50 M.J. 494, 500 (C.A.A.F. 1999) (this Court will not second guess

trial defense counsel's tactical decision to forgo possible objection). The plain meaning of the PTA specifically and explicitly waived "any discovery beyond what the Government is obligated to provide pursuant to R.M.C. 701(b)(l) and 701(d)." Discovery under R.M.C. 701(e) (and therefore, under *Brady*) is "beyond" those provisions.[18]

g. The Accused, while represented by at least three counsel, knowingly and voluntarily waived discovery, except as required by R.M.C. 701(b)(l) and R.M.C. 701(d), in order to obtain the benefits of his PTA. AE 012 at 3, paragraph 12. Immediately before the Accused's signature, the final page of the PTA states the agreement includes all of the agreed-upon terms and no other inducements were made. AE 012 at 7. The Accused clearly articulated his understanding that the PTA contained all relevant terms of the agreement between himself and the Convening Authority. *See id*. The Military Judge ensured the Accused had read the PTA with counsel, that the Accused understood every provision, and all parties agreed.[19] Additionally, in September 2016, after accepting the modifications to the PTA, the Military Judge inquired as to the status of discovery.[20] The Government indicated there was an "agreement to a limited amount of discovery."[21] The Defense offered no further comment as to discovery, save the right to amend the proposed litigation schedule.[22]

h. As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2). The Defense has failed to carry its burden to establish that the Government should be required to produce *Brady*/R.M.C.

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[18] The "interpretive canon, *expressio unius est exclusio alterius*, expressing one item of [an] associated group or series excludes another left unmentioned" applies when "circumstances support [ ] a sensible inference that the term left out must have been meant to be excluded." *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 933 (2017) (citing *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002)); *see also Cron*, 73 M.J. at 733 (showing an example of a PTA which specifically noted that "all discovery" was waived except *Brady*).
[19] Transcript Dated 29 February 2012 from 9:00 A.M. to 11:49 A.M. at pp. 16, 68-73, 100-01.
[20] Transcript 14 September 2016 from 11:03 A.M. to 11:59 A.M. at pp. 176-77.
[21] *Id*.
[22] *Id*.

701(e) discovery material or to establish that he would be deprived of a fair trial without the requested discovery. The Accused waived production of "all discovery beyond what is required by R.M.C. 701(b)(1) and (d)." He bargained for and received the benefit of the agreement.

**RULING.**

a. Accordingly, the Defense Motion to Compel Production of *Brady* Material is **DENIED**.

b. The Commission notes that, if the Government attempts to rebut the Defense's case in extenuation and mitigation at sentencing with material it refused to disclose, the Government must provide such evidence to the Defense in a timely manner.

So **ORDERED** this 15th day of April, 2019.

***//s//***
DOUGLAS K. WATKINS
COL, JA, USA
Military Judge