

UNCLASSIFIED//FOR PUBLIC RELEASE
MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

MAJID SHOUKAT KHAN

AE 030GG

RULING

11 March 2021

1. Procedural History.

a. In AE 030¹ the Defense requested the Military Judge order the production of 32 individuals for in-person testimony at U.S. Naval Station, Guantanamo Bay, Cuba (NSGB) in support of the interlocutory motion on pretrial punishment credit² and for the sentencing hearing. Following receipt of the Prosecution's response,³ the Defense's reply,⁴ and oral argument,⁵ the Commission ordered the production of 18 witnesses; either in person or by video teleconference (VTC); deferred ruling on one witness; and denied production of the remaining 13 witnesses.⁶

b. On 24 May 2019, the Defense filed AE 030N⁷ seeking partial reconsideration of the Commission's order, AE 030M, regarding the one witness (Defense Requested Witness ("DRW") #11),⁸ pending submission of an affidavit, and the denial of production of the

¹ AE 030, Defense Motion to Compel Production of Witnesses, filed 1 March 2019.

² AE 033, Defense Motion for Pretrial Punishment Credit and Other Related Relief, filed 1 May 2019.

³ AE 030A, Government Response to Defense Motion to Compel Production of Witnesses, filed 14 March 2019.

⁴ AE 030B, Defense Reply to Motion to Compel Production of Witnesses, filed 18 March 2019.

⁵ See Unofficial/Unauthenticated Transcript of the *U.S. v. Majid Shoukat Khan* Open Motions Hearing dated 1 April 2019 from 1:28 P.M. to 4:02 P.M. at pp. 303–338 (hereinafter Open Transcript) and the Unauthenticated Transcript of the *U.S. v. Majid Shoukat Khan* Motions Closed Motions Hearing dated 1 April 2019 at pp. 346–418 (hereinafter Closed Transcript).

⁶ AE 030M, ORDER, Defense Motion to Compel Production of Witnesses, dated 17 May 2019.

⁷ AE 030N, Defense Motion for Partial Reconsideration of AE 030M, filed 24 May 2019.

⁸ In AE 030E, RULING, Government Motion (AE 030C) for Substitutions Pursuant to M.C.R.E. 505 and Other Appropriate relief, dated 2 April 2019; and AE 030F, SUPPLEMENTAL RULING, Government Motion (AE 030C) for Substitutions Pursuant to M.C.R.E. 505 and Other Appropriate relief, dated 3 April 2019; the Commission directed the use of the Defense Requested Witness number in lieu of purported names, pseudonyms, or descriptions of certain proposed witnesses, production of whom was sought by the Defense.

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remaining 13 witnesses (DRWs # 40, 42, 44, 47, 48, 49, 53, 54, 63, 73, 74, 75, and 85). The

Prosecution responded⁹ and the Defense filed a supplemental filing¹⁰ and a reply.¹¹

c. The Commission issued an order¹² denying production of DRW #11 and directing the Prosecution to produce not more than three witnesses representing the Joint Detention Group and Camp VII. It is of some significance the Commission recognized that the Defense could not obtain first-person information via in-person or telephonic interviews due to secrecy restrictions imposed by the United States Government concerning DRWs #40, 42, 44, 47, 48, 49, 53, 54, 63, 73, 74, 75, and 85. The Commission directed the Prosecution to provide a reasonable methodology for the Defense to make contact with these witnesses. A final ruling on production of these 13 DRWs was deferred.

d. In response, the Prosecution filed AE 039.¹³ The Defense responded,¹⁴ the Prosecution replied,¹⁵ and following oral argument¹⁶ the Commission issued an Interim Order.¹⁷ The Interim Order acknowledged the Prosecution's proposed plan, but pointed out a significant deficiency: no one knew, or at least the Prosecution could not disclose, who among those 13 DRWs belonged in two of the four categories proposed by the Government for purposes of making contact. The Commission directed the Prosecution and Defense to confer so the Defense could

⁹ AE 030O, Government Response to Defense Motion for Partial Reconsideration of AE 030M, filed 7 June 2019.

¹⁰ AE 030N(SUP), Defense Supplemental Filing in Support of AE 030N, Defense Motion for Partial Reconsideration of AE 030M, filed 12 July 2019.

¹¹ AE 030Q, Defense Reply to Motion for Partial Reconsideration of AE 030M, filed 13 June 2019.

¹² AE 030V, ORDER, Defense Motion for Partial Reconsideration of AE 030M, dated 9 August 2019.

¹³ AE 039, Government Motion to Protect Against Disclosure of National Security Information, filed 3 September 2019.

¹⁴ AE 039A, Defense Response to Government Motion to Protect Against Disclosure of National Security Information, filed 17 September 2019.

¹⁵ AE 039D, Government Reply to Defense Response to Government Motion to Protect Against Disclosure of National Security Information, filed 1 October 2019.

¹⁶ See Unofficial/Unauthenticated Transcript of the U.S. v. Majid Shoukat Khan Open Motions Hearing dated 20 November 2019 from 1:00 P.M. to 1:49 P.M. at pp. 503-33.

¹⁷ AE 039H, INTERIM ORDER, Government Motion to Protect Against Disclosure of National Security Information, dated 27 February 2020.

make contact with DRWs #40, 42, 63, and 85, and for the Prosecution to arrange introductory phone calls between the Defense and DRWs #44, 47, 48, 49, 53, 54, 73, 74, and 75.

e. The Prosecution filed a motion¹⁸ to partially reconsider the Commission's order at AE 039H. The Prosecution requested clarification concerning whether the Commission was truly requiring the prospective DRWs to accept the introductory phone call, as it might exceed the Commission's authority and/or result in the disclosure of classified information. The Defense filed a response¹⁹ and the Prosecution filed a reply.²⁰ The Commission's order in AE 039N²¹ provided clarification by directing the Prosecution to use its good offices to facilitate introductory telephone calls between the Defense and the DRWs.

f. On 15 June 2020, the Defense reported it was able to talk to only two (DRWs #48 and 53) of the nine prospective witnesses.²² The Defense provided letters for the Prosecution to deliver to the remaining prospective witnesses (DRWs #44, 47, 48, 49, 54, 73, 74, and 75). The Prosecution, for the first time, informed the Defense they did not know the identities of three of the nine prospective witnesses (DRWs #73, 74, and 75) and thus were unable to assist in arranging introductory contact. The Commission thus imposed a bi-weekly reporting requirement on the litigants with a view toward spurring progress.²³ Between 30 June 2020 and 20 October 2020, nine joint reports were filed with the Commission setting forth the progress

¹⁸ AE 039I, Government Motion to Reconsider and Clarify AE 039H, Interim Order, filed 9 March 2020.

¹⁹ AE 039J, Defense Response to Government Motion to Reconsider and Clarify AE 039H, Interim Order, filed 30 March 2020.

²⁰ AE 039M, Government Reply to Defense Response to Government Motion to Reconsider and Clarify AE 039H, Interim Order, filed 6 April 2020.

²¹ AE 039N, CLARIFICATION TO AE 039H INTERIM ORDER, Government Motion to Protect Against Disclosure of National Security Information, dated 10 April 2020.

²² See AE 039O, Defense Report on the Status of Defense Requested Witnesses, filed 15 June 2020.

²³ See AE 039P, INTERIM ORDER, Reporting Status of Contacts with Defense Requested Witnesses, dated 24 June 2020.

made by the Prosecution in facilitating contact and the Defense in making such contact with the remaining DRWs.²⁴

g. Ultimately, all but one DRW was contacted, either by letter or an arranged telephone call. The one DRW who was not contacted, DRW #74, was reported as deceased sometime prior to 2019.²⁵ Additionally, the Defense reported it was withdrawing the request to compel the in-person testimony of DRW #85 and was pursuing a substitute form of testimony.²⁶ As a result of the Prosecution's coordination efforts, the Defense was able to have an introductory telephone conversation with three DRWs (DRWs #40, 48, and 53) which resulted in a substantive conversation with DRW #53.

h. On 23 September 2020, the Defense filed AE 030N (2ND SUP)²⁷ requesting reconsideration of the Commission's order at AE 030M concerning production of DRWs #40, 42, 44, 47, 48, 49, 53, 54, 63, 73, and 75. The Defense withdrew its request to compel DRW #85 and acknowledged the report that DRW #74 was deceased. The Defense provided an expanded proffer of a synopsis of expected testimony as to each of these DRWs. The Defense again requested the in-person testimony of these DRWs for both the interlocutory pretrial punishment motion and for extenuation and mitigation during the sentencing case. The Prosecution filed a response urging denial, arguing production was not required under Rules for Military Commission (R.M.C.) 703(b)(2), R.M.C. 703(c)(2)(ii) and R.M.C. 1001(e), as the Defense had

²⁴ See AE 039Q, Joint Report on the Status of Defense Requested Witnesses, filed 30 June 2020; AE 039R, Joint Report on the Status of Defense Requested Witnesses, filed 14 July 2020; AE 039S, Joint Report on the Status of Defense Requested Witnesses, filed 28 July 2020; AE 039T, Joint Report on the Status of Defense Requested Witnesses, filed 11 August 2020; AE 039U, Joint Report on the Status of Defense Requested Witnesses, filed 25 August 2020; AE 039V, Joint Report on the Status of Defense Requested Witnesses, filed 8 September 2020; AE 039W, Joint Report on the Status of Defense Requested Witnesses, filed 21 September 2020; AE 039X, Joint Report on the Status of Defense Requested Witnesses, filed 5 October 2020; and AE 039Y, Joint Report on the Status of Defense Requested Witnesses, filed 20 October 2020.

²⁵ See AE 039U.

²⁶ See AE 039Q.

²⁷ AE 030N (2ND SUP), Defense Supplement to AE 030N, Defense Motion for Partial Reconsideration of AE 030M, filed 23 September 20.

not met its burden and the Prosecution was still willing to “stipulate to the facts about which such witnesses may testify, so long as the stipulation is tethered to reality.”²⁸

i. The Commission intended to hear oral argument on AE 030 / AE 030N / AE 030N (2ND SUP) and AE 045 on 17-18 November 2020 in a facility in the National Capital Region (NCR).²⁹ The hearings were cancelled on 14 November 2020 due to “grave concerns that the pandemic [was] no longer being managed to a relatively safe degree and that travel to the National Capital Region to the site of the hearing will place participants at significant risk.”³⁰ The Commission then planned to hear the motions during a previously scheduled session on 26-27 January 2021. Again, the Commission found it was “not safe or practicable at the present time to conduct hearings in the NCR due to the recent very significant increase in COVID-19 cases caused by the rapid spread of the virus throughout most of the United States.”³¹ Instead of waiting for the possibility that travel to the NCR and on to NSGB might become safe and practicable, the Commission provided the Defense another opportunity to submit any “additional information or argument to . . . the Commission concerning the 11 Defense Requested Witnesses.”³² The Commission instructed the Defense that the pleading should “consist of a clear ‘synopsis of the testimony’ each of the 11 Defense Requested Witnesses will provide, accompanied by a statement as to the factual basis of the Defense’s knowledge of this information.”³³ The Prosecution was provided the opportunity to respond.³⁴

²⁸ AE 030Y, Government Response To Defense Second Supplemental Filing in Support of AE 030N, Defense Motion for Partial Reconsideration of AE 030M, filed 7 October 2020, at 2.

²⁹ See AE 048B, Litigation Schedule Order, dated 21 September 2020.

³⁰ See AE 049C, CANCELLATION ORDER, dated 14 November 2020 at 2.

³¹ See AE 048M, RULING, Defense Motion for Partial Reconsideration of AE 048B, Litigation Schedule Order, dated 23 December 2020.

³² AE 048M at 3.

³³ *Id.* at 4

³⁴ *Id.* at 3.

j. On 13 January 2021, the Defense submitted AE 030CC³⁵ as their final argument and proffer concerning production of the 11 remaining DRWs—DRWs #40, 42, 44, 47, 48, 49, 53, 54, 63, 73, and 75. The Prosecution filed a response.³⁶ Both the Defense and the Prosecution continued to assert the same legal arguments as in previous pleadings, but the Defense's pleading contained additional factual context in the format directed by the Commission.

k. Finally, on 10 February 2021, the Prosecution filed a proposed stipulation of fact it developed as a starting point for negotiations³⁷ and to bolster its offer to stipulate to any fact to which a DRW would testify that was "tethered to reality."

2. Law and Analysis.

a. The Commission accepts the uncontested assertion by the Prosecution that DRW #74 is deceased and thus cannot be compelled to testify. As such the Defense motion to compel DRW #74's presence and testimony is **MOOT**.

b. The Commission also accepts the Defense's withdrawal of its request for the Commission to compel the presence and in-person testimony of DRW #85. The Commission will address admissibility of any defense request for admission of a substitute form of testimony at a later date. As such, the defense motion to compel DRW #85's presence and testimony is **MOOT**.

c. The analysis concerning the request to compel the physical production and in-court testimony of the remaining DRWs, DRWs #40, 42, 44, 47, 48, 49, 53, 54, 63, 73, and 75, begins with the recognition that the Defense desires to present the testimony of each of these witnesses in court at NSGB at both the evidentiary hearing on the interlocutory motion on pretrial punishment credit (AE 033) and in extenuation and mitigation during the sentencing hearing.

³⁵ AE 030CC, Defense Pleading in Response to AE 048M, Additional Argument on AE 030, filed 13 January 2021.

³⁶ AE 030DD, Government Response to Defense Pleading in Response to AE 048M, Additional Argument on AE 030, filed 27 January 2021.

³⁷ AE 030EE, Government Notice of Proposed Stipulation of Fact, filed 10 February 2021.

This recognition is important as each witness must be analyzed by two separate and distinct standards. The standard for production at the evidentiary hearing on the interlocutory motion on pretrial punishment credit (AE 033) is R.M.C. 703(b)(1) and 703(c)(2)(B)(i). The standard for production at the sentencing hearing is R.M.C. 703(b)(2), 703(c)(2)(B)(ii), and R.M.C. 1001(e).

d. Evidentiary Hearing on Interlocutory Motion:

(i.) R.M.C. 703(b)(1) requires the production of available witnesses whose testimony is relevant and necessary on a matter in issue. R.M.C. 703(c)(2)(B)(i) requires the synopsis provided by the Defense to be sufficient to show the relevance and necessity of the testimony. “Relevance” is not a term used in the Military Commissions Rule of Evidence (M.C.R.E.) in defining admissibility of evidence. Instead, M.C.R.E. 402 speaks in terms of evidence being admissible if a “reasonable person” would find the evidence to have “probative value.” M.C.R.E. 401 states “evidence has ‘probative value to a reasonable person’ when a reasonable person would regard the evidence as making the existence of any fact that is of consequence to a determination of the commission action more probable or less probable than it would be without the evidence.”

(ii). The issue as framed by the Defense in AE 033 is whether the Accused’s treatment by U.S. Government actors and the conditions to which he was allegedly subjected—between the time of his capture in Karachi, Pakistan in March 2003, his transfer to a detention facility on NSGB in September 2006, and further until the acceptance of his guilty plea in February 2012—amount to illegal pretrial punishment, and if so, what relief should be due. Testimony from individuals who: were present at the time of capture; observed, directed, or subjected the Accused to the allegedly abusive treatment throughout the relevant time period; have first-hand knowledge of the conditions of the Accused’s detention, i.e. what his detention cells were like, what amenities, if any, were available to him, what food he consumed and how

he was clothed, etc.; is information a reasonable person would find to have probative value on the existence of the alleged abusive and potentially illegal treatment the Accused endured. This information, in the form of the proposed testimony as set forth in the synopsis of expected testimony provided by the Defense in its various pleadings from DRWs #40, 42, 44, 47, 48, 49, 53, 54, 63, 73, and 75, makes the existence of abusive treatment and harsh conditions more probable than it would be without the proposed testimony. Therefore, the Commission finds the relevance prong of R.M.C. 703(b)(1) is satisfied.

(iii). Concerning the “necessary” prong of R.M.C. 703(b)(1), relevant evidence is “necessary when it is (a) not cumulative and (b) when it would contribute to a party’s presentation of the case in some positive way on a matter in issue.” R.M.C. 703(f)(1), *Discussion*. Testimony from individuals who: were present at the time of capture; observed, directed, or subjected the Accused to the allegedly abusive treatment throughout the relevant time period; have first-hand knowledge of the conditions of the Accused’s detention, i.e. what his detention cells were like, what amenities, if any, were available to him, what food he consumed and how he was clothed, etc.; would clearly “contribute to [the Defense’s] presentation of the case in some positive way on the issue” of pretrial punishment. Testimony of more than one witness on a topic is not cumulative if the witnesses, *inter alia*, bring unique perspectives, either by virtue of their physical vantage point, level of participation in the events, or hierarchical position in the common organization, the time period of their involvement in the events, or otherwise add distinct facts to the presentation on the issue. The Commission finds the testimony of the witnesses to be necessary and not cumulative under R.M.C. 703(b)(1).

e. Sentencing Hearing:

(i). For a Defense Requested Witness to be produced for testimony at the Accused’s sentencing hearing, the request must satisfy R.M.C. 703(b)(2), 703(c)(2)(B)(ii), and

R.M.C. 1001(e). R.M.C. 703(b)(2) refers the Commission directly to R.M.C. 1001(e) and R.M.C. 703(c)(2)(B)(ii), which requires a “synopsis of the testimony that [the Defense expects] each witness to give, and the reasons why the witness’ personal appearance will be necessary under the standards set forth in R.M.C. 1001(e).” R.M.C. 1001(e) requires production only if:

- (A) The testimony expected to be offered is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence, including evidence necessary to resolve an alleged inaccuracy or dispute as to a material fact;
- (B) The weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence;
- (C) The other party refuses to enter into a stipulation of fact containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation of fact would be an insufficient substitute for the testimony;
- (D) Other forms of evidence, such as oral depositions, written interrogatories, telephonic testimony, two-way video teleconference or other similar technology, or former testimony would not be sufficient to meet the needs of the military commission in the determination of an appropriate sentence; and,
- (E) The significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production of the witness. Factors to be considered include the costs of producing the witness, the timing of the request for production of the witness, the potential delay in the presentencing proceeding that may be caused by the production of the witness, and the likelihood of significant interference with intelligence activities, military operations or deployments, mission accomplishment, or essential training.

(ii). Limitations (A) and (B) are satisfied by the Defense as to DRWs #40, 42, 44, 47, 48, 49, 53, 54, 63, 73, and 75, based on the analysis of compliance with R.M.C. 703(b)(1) above, concerning production for the evidentiary hearing on the interlocutory issue. However, limitations (C), (D), and (E) require additional discussion.

(iii). The Prosecution has consistently, throughout the litigation of the AE 030 series, stated a willingness to enter into stipulation(s) as to the facts to which DRWs #40, 42, 44, 47, 48, 49, 53, 54, 63, 73, and 75, would testify, as long as the defense proposal was “tethered to reality.”³⁸ The Prosecution went so far as to file a “proposed stipulation of fact related to the

³⁸ See AE 030A at 15; AE 030Y at 2; and AE 030DD at 12-13.

Accused's time in the custody of the Central Intelligence Agency (CIA) solely for purposes of sentencing proceedings and any pretrial punishment hearing that may occur”³⁹ as a means to initiate discussions with the Defense. The Defense argues a stipulation of fact is insufficient as this sentencing hearing is extraordinary because, according to the Defense, the Accused is the first High Value Detainee subject to the CIA’s Rendition, Detention, and Interrogation (RDI) Program to plead guilty and cooperate with the Government.

(iv) The Prosecution points to *United States v. Gonzalez*, 14 M.J. 501 (A.F.C.M.R. 1982), and *United States v. Briscoe*, 56 M.J. 903 (A.F.C.M.R. 2002), for the proposition that if the Prosecution is willing to stipulate to the *facts* to which the defense witnesses would testify at the sentencing hearing, production is not required.⁴⁰ The *Briscoe* court interpreted R.C.M. 1001(e)(2)(C) to be a “limit[ation on] the discretion of the military judge when the opposing party is willing to enter into a stipulation of fact containing the matters to which the witness is expected to testify. The military judge [can] only order the production of the witness if he found that it was an ‘extraordinary case’ where the stipulation of fact would be an insufficient substitute for the testimony.”⁴¹ The *Gonzalez* court, in a footnote, made it clear “a compelled stipulation of *expected testimony* is not an adequate substitute for the personal appearance of a witness.”⁴² The difference, according to both *Gonzalez* and *Briscoe*, was “the result of this hybrid form of stipulation is to afford the defense a *quid pro quo* for the lack of ... personal appearance on the witness stand[:] the *facts* as to which that witness would testify may not be contested by the prosecution.”⁴³ The *Briscoe* court also noted that the “argument that a

³⁹ AE 030EE, Government Notice of Proposed Stipulation of Fact, filed 10 February 2021, at 1.

⁴⁰ *Gonzalez* and *Briscoe* interpreted Rule for Courts-Martial 1001(e)(2)(C) which is identical to R.M.C. 1001(e)(2)(C).

⁴¹ *Briscoe*, 56 M.J. at 906.

⁴² *Gonzalez*, 14 M.J. at 504 n.7 (emphasis added); *see also* 56 M.J. at 907.

⁴³ 14 M.J. at 504 (emphasis in original); *see* 56 M.J. at 907.

live witness is more compelling than a ‘piece of paper’ is almost always true, and does not serve to explain why this is an extraordinary case.”⁴⁴

(v). In the context of military commissions, the Commission finds this non-capital referred case—the guilty plea and sentencing of a High Value Detainee apparently cooperating with the Government—to be unique, but not extraordinary. All current military commission cases deal with highly classified information. Almost all those accused in current cases referred to a military commission were held by the CIA’s RDI Program. This Accused is not the first to plead guilty, to be sentenced by a military commission, or to have cooperated with the Government in other cases. The sentencing of the Accused is unique, but in the totality of military commissions jurisprudence is not extraordinary. The Defense has not shown why, in the context of their extenuation and mitigation case for sentencing this accused, the uncontested facts “tethered to reality” (which they can build into the stipulation of fact which will go back with the panel as it deliberates on an appropriate sentence) is not sufficient to convey the information proffered in the synopses of expected testimony. This, combined with any sworn or unsworn statement from the Accused describing, in the first person, his life experience while in custody, could provide a powerful basis upon which the Defense could build its sentencing case.

(vi). Given the inability of the Defense to overcome the limitation of R.M.C. 1001(e)(2)(C), the Commission finds it unnecessary to address the limitations found in R.M.C. 1001(e)(2)(D) and (E).

3. Order.

- a. The Defense request to compel the production of DRW #74 is **DENIED** as **MOOT**.
- b. The Defense request to compel the production of DRW #85 is **DENIED** as **MOOT**.

⁴⁴ 56 M.J. at 906.

c. The Defense request to compel the production of DRWs #40, 42, 44, 47, 48, 49, 53, 54, 63, 73, and 75 for purposes of in-person testimony at NSGB during the evidentiary hearing on the interlocutory issue presented in AE 033 is hereby **GRANTED** to the extent these individuals are U.S. Government employees. If any are not U.S. Government employees, they shall provide testimony via an appropriate VTC system from an appropriate facility in the NCR. Any civilian witness ordered to be produced by the Prosecution who is willing to voluntarily travel to NSGB at U.S. Government expense will be permitted to testify in person in the courtroom at NSGB.⁴⁵

d. The defense request to compel the production of DRWs #40, 42, 44, 47, 48, 49, 53, 54, 63, 73, and 75 for purposes of in-person testimony at NSGB or by VTC from a facility in the NCR during the sentencing hearing is hereby **DENIED**. The Prosecution and Defense can create, and the Commission will admit into evidence, a stipulation of *fact* containing the *facts* to which DRWs #40, 42, 44, 47, 48, 49, 53, 54, 63, 73, and 75 would testify if called to present testimony.

So **ORDERED** this 11th day of March, 2021.

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

⁴⁵ The Commission recognizes it does not have the authority to order an individual who is not a U.S. Government employee to travel to NSGB to provide testimony. See Regulation for Trial by Military Commission (2011) chapter 13, paragraphs 13-4 and 13-5.