

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

UNITED STATES OF AMERICA

v.

MAJID SHOUKAT KHAN

AE 030V

ORDER

**Defense Motion for
Partial Reconsideration of AE030M**

9 August 2019

1. In AE 030N¹ as supplemented by AE 030N (Sup),² the Defense requested “partial reconsideration of the Military Judge’s order granting in part and denying in part Mr. Khan’s motion to compel production of witnesses . . . Mr. Khan moves for reconsideration only as to the Military Judge’s order deferring a ruling on Witness #11, pending submission of an affidavit from that individual, and denying Witnesses #40, 42, 47-49, 53, 54, 63, 73-75, and 85” and “a ruling on his motion to compel production of Witness #44, who is not addressed in AE030M.”³ The Government responded⁴ requesting the motion be denied as “[t]he Defense offers no new facts or evidence for the Military Judge to review, no new law or change in existing law for the Military Judge to consider, nor any persuasive reasoning to conclude that the Military Judge’s ruling in AE 030M was either clearly erroneous or caused manifest injustice. Instead, the Motion simply repeats arguments which the Commission has previously considered and properly rejected.”⁵ The Government also requested the Commission clarify “the status of the request for DWR No. 44” and “whether one or more than one government official is required to meet the Commission’s

¹ AE 030N, Defense Motion for Partial Reconsideration of AE 030M, filed 24 May 2019.

² AE 030N (SUP), Defense Supplemental Filing in Support of AE 030N, Defense Motion for Partial Reconsideration of AE 030M, filed 12 July 2019.

³ AE 030N at 1. [AE 030M, ORDER, Defense Motion to Compel Production of Witnesses dated 17 May 2019.]

⁴ AE 030O, Government Response to Defense Motion for Partial Reconsideration of AE 030M, filed 7 June 2019.

⁵ *Id.* at 1.

ruling in AE 030M at [page] 6 regarding DWR Nos. 28, 29, and 30 . . . ‘Joint Detention Group and Camp VII officials.’”⁶ The Defense replied in AE 030Q⁷ arguing the Government’s arguments against reconsideration are incorrect and the Commission should use the reconsideration motion to clarify the Commission’s intention as to DWR Nos. 28, 29, 30, and 44, thus compelling the Government to produce all the requested witnesses at trial.

2. The Defense, on 3 July 2019, requested permission to supplement its original motion (AE 030)⁸ and its motion to reconsider the ruling on the original motion (AE 030I)⁹ with new legal authority.¹⁰ The Government did not oppose the request to supplement,¹¹ and the Commission granted, in part, the Defense request.¹²

3. The Defense requested oral argument. The Prosecution’s position was oral argument was not required, but if the Defense request was granted, the Prosecution desired to be heard. In accordance with Rule for Military Commission (R.M.C.) 905(h), the decision to grant oral argument on a written motion is within the sole discretion of the Military Judge. In this instance, oral argument is not necessary to the Commission’s consideration of the issue. The Defense request for oral argument is **DENIED**.

4. The Commission may grant reconsideration of any ruling (except the equivalent of a finding of not guilty) prior to authentication of the record of trial.¹³ Either party may move for reconsideration, but granting of the request is in the Military Judge's discretion. Generally, reconsideration should be

⁶ *Id.* at 10.

⁷ AE 030Q, Defense Reply to Motion for Partial Reconsideration of AE 030M, filed 13 June 2019.

⁸ AE 030, Defense Motion to Compel Production of Witnesses, filed 1 March 2019.

⁹ AE 030I, Defense Motion for Reconsideration of AE 030E and for Other Related Relief, filed 22 April 2019.

¹⁰ AE 030R, Motion for Leave to File Supplemental Filings with Respect to AE 030, Defense Motion to Compel Production of Witnesses, and AE 030I, Defense Motion for Reconsideration of AE 030E, filed 3 July 2019.

¹¹ *Id.* at 5.

¹² AE 030S, RULING, Motion for Leave to File Supplemental Filings with Respect to AE 030, Defense Motion to Compel Production of Witnesses, and AE 030I, Defense Motion for Reconsideration of AE 030E, dated 9 July 2019.

¹³ R.M.C. 905(f).

based on a change in the facts or law, or instances where the ruling is inconsistent with case law not previously briefed. Reconsideration may also be appropriate to correct a clear error or prevent manifest injustice.¹⁴ Motions for reconsideration are not appropriate to raise arguments that could have been, but were not, raised previously and arguments the Commission has previously rejected.¹⁵ Nor are motions for reconsideration appropriate for the proffer of evidence available when the original motion was filed, but, for unexplained reasons, not proffered at that time.¹⁶

5. The Commission finds the Defense has failed to proffer new facts or provide argument sufficient to demonstrate a clear error or manifest injustice. In their request to supplement their filings in this series, the Defense did proffer new case law in its supplemental filing; however, the Commission is not persuaded the new case law cited and argued by the Defense changes the calculus. The Commission reads *Qassim v. Trump*, No. 18-5148, 2019 WL 2553829 (D.C. Cir. June 21, 2019), for the proposition that “Circuit precedent leaves open and unresolved the question of what constitutional procedural protections apply to the adjudication of detainee habeas corpus petitions, and where those rights are housed in the Constitution (the Fifth Amendment’s Due Process Clause, the Suspension Clause, both, or elsewhere).” This is much more limited and circumspect than the Defense’s expansive reading. Thus, the Defense in its reconsideration motion argues why the Commission’s ruling is wrong by returning to the reasoning in the original motion; the Commission declines to change the original ruling, AE 030M,¹⁷ based on the Defense request for reconsideration. However, the Commission will take this opportunity to clarify its intent as to DWR Nos. 11, 28, 29, 30, and 44.

DWR #11, Patricia Pond. The Defense did not provide a declaration from the prospective witness as to what the witness would testify to if called to testify. The Commission

¹⁴ See *U.S. v. Libby*, 429 F. Supp. 2d 46 (D.D.C. 2006); *U.S. v. McCallum*, 885 F. Supp. 2d 105 (D.D.C. 2012).

¹⁵ See *U.S. v. Booker*, 613 F. Supp. 2d 32 (D.D. C. 2009); *U.S. v. Bloch*, 794 F. Supp. 2d 15, 19 (D.D.C. 2011).

¹⁶ See *Bloch*, 794 F. Supp. 2d at 19–20.

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

finds the Defense has not satisfied the requirements of R.M.C. 703(c)(2) and 1001(e). The Defense motion to compel the in-court or video teleconference testimony of this witness is **DENIED**.

DWRs #28, 29, and 30, Joint Detention Group and Camp VII Officials. The Government will confer once again with the Defense and produce for live, in-court testimony not more than three (3) witnesses representing the Joint Detention Group and Camp VII who can testify concerning the Accused's conditions of confinement since September 2006 and his conduct while being confined since September 2006. The Defense request for personal production of these witnesses is **GRANTED**.

DWR #44. This witness should have been included with DWRs #40, 42, 47, 48, 49, 53, 54, 63, 73, 74, 75, and 85 with production being **DENIED**. The Commission finds the Defense has not satisfied the requirements of R.M.C. 703(c)(2) and 1001(e). The Defense's proffer was based upon their described extensive research of open-source materials from a variety of sources and not on the Defense Team's personal knowledge and/or interaction with the witness. The Commission observes *sua sponte* and upon additional reflection that the Defense appears to be hampered in their efforts to obtain any first-person information via in-person or telephonic interviews which would assist the Defense in satisfying the requirements of R.M.C. 703(c)(2) and 1001(e) due to secrecy restrictions put in place by the United States Government.¹⁸ Not later than **31 August 2019**, the Prosecution will provide the Defense a methodology whereby members of the Defense can reasonably initiate contact with these prospective witnesses in order to gauge their amenability to participate in in-person or telephonic interviews and thus potentially submit proffers based on these investigative efforts. If the Government does not

¹⁸ The Commission is not implying the counsel representing the United States in this military commission are acting in an unethical manner in performing their representational duties.

provide the Defense a reasonable methodology by which to gauge the potential witnesses' amenability to participate in in-person or telephonic interviews and continues to prevent access to these witnesses because of hindrances put in place by the United States Government, the Commission will consider a petition for appropriate relief.¹⁹

The Defense motion to compel the in-court or video teleconference testimony of DWRs #40, 42, 44, 47, 48, 49, 53, 54, 63, 73, 74, 75, and 85 is thus **DEFERRED**.

So **ORDERED** this 9th day of August, 2019.

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

¹⁹ This relief is consistent with the alternate relief requested by the Defense in AE 030N at pg. 1.