

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

UNITED STATES OF AMERICA v. MAJID SHOUKAT KHAN	AE 028 Defense Motion to Compel Production of <i>Brady</i> Material February 25, 2019
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1. Timeliness

This motion is timely filed pursuant to the Amended Litigation and Trial Scheduling Order dated December 12, 2018 (AE 016BB).

2. Relief Sought

Majid Khan, by and through his undersigned counsel, respectfully requests that the Military Judge grant this motion and order the Prosecution to produce favorable evidence in extenuation and mitigation of his sentence, pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and related authorities (“*Brady* material”), as set forth in his request for production that was served on the Prosecution on November 15, 2018. *See* Attachment C.

3. Overview

Majid Khan is the only high-value detainee at Guantánamo who has pled guilty and agreed to cooperate with the government. After many years of providing substantial assistance to the government in the investigation and prosecution of others, he is scheduled to be sentenced in July 2019. Barring any lapse in his continuing cooperation, his pretrial agreement provides for a maximum approved sentence “not to exceed 19 years” of imprisonment with credit for time served from the date of his guilty plea in February 2012. AE 012, ¶ 8; AE 013, ¶ 3.

Mr. Khan's pretrial agreement also entitles him to call "live witnesses and present evidence" in mitigation for sentencing purposes, employ two government-funded experts to assist with his sentencing, and present evidence concerning the nature of his capture, detention, and confinement, including the beatings, waterboarding, sodomy, and other horrific torture he suffered at the hands of the U.S. government in CIA detention. *See* AE 012, ¶¶ 21, 23, 26; AE 013, ¶ 4; *see also* R.M.C. 1001(c). Mr. Khan specifically bargained for these provisions, which are essential to his ability to present arguments in extenuation and mitigation of his sentence, and to his ability to argue for a sentence of less than 19 years in the presentencing proceedings and/or as a matter of clemency. They are also essential to his argument for pretrial punishment credit.

On November 15, 2018, Mr. Khan submitted to the Prosecution a timely request for production of discovery under R.M.C. 701(b)(1) and (d), and a separate request for production of *Brady* material. The Prosecution responded on December 14, 2018, essentially stating that it had already complied with the discovery requests under R.M.C. 701(b)(1) and (d). The Prosecution also denied nearly all of Mr. Khan's specific requests for *Brady* material on the ground that he had waived his right to obtain that information in his pretrial agreement. *See* Attachment D. The Prosecution is wrong in several respects.

First, there is no dispute that the requirements of *Brady* apply at sentencing and in the military commissions. Indeed, *Brady* was decided in the context of a disputed sentencing proceeding like Mr. Khan's. Nor is there any dispute that the categories of information that Mr. Khan requested in extenuation and mitigation of his sentence are favorable and constitute core *Brady* material. The only issue in dispute is whether Mr. Khan waived his right to obtain this material for use in connection with his sentencing proceedings.

Second, Mr. Khan did not waive his right to obtain *Brady* material. The Prosecution's obligation to produce *Brady* material arises from the Fifth Amendment to the U.S. Constitution and exists independently of any request from the Defense for favorable evidence. *Brady* is also not waivable in its entirety as a matter of law: To the extent that *Brady* may be waived in a plea agreement, it is waivable only as to a defendant's right to obtain impeachment material. Though Mr. Khan did not waive his right to impeachment material here, impeachment material is, in any event, not the sort of information that Mr. Khan has requested from the Prosecution. He has requested favorable evidence that bears directly on his punishment, *i.e.*, evidence that bolsters his extenuation and mitigation case and/or casts doubt on proof of any aggravating factors offered by the Prosecution at sentencing.

The purported waiver provision in Mr. Khan's pretrial agreement cited by Prosecution also applies only to the extent that it relieves the Prosecution from having to produce evidence to prove beyond a reasonable doubt that Mr. Khan committed the offenses to which he pled guilty in February 2012. This is clear not only from the plain language of the plea agreement, but also from the plea colloquy conducted by the Military Judge who accepted Mr. Khan's guilty plea. Indeed, there is no mention of *Brady* or waiver of favorable evidence anywhere in the pretrial agreement, the plea colloquy, or elsewhere in the record in this case. This omission stands in marked contrast to the standard form of plea agreement offered in federal terrorism cases in which Department of Justice prosecutors who intend to obtain *Brady* waivers of impeachment material do so explicitly. Indeed, we understand that the prosecutor who was detailed by the Department of Justice to the Office of the Chief Prosecutor for Military Commissions, and who negotiated Mr. Khan's guilty plea and cooperation agreement, would, if permitted, testify that it

was *not* the parties' intention at the time of Mr. Khan's guilty plea that his pretrial agreement would waive his entitlement to obtain *Brady* material in respect of his sentencing. To the contrary, the plea agreement expressly reserved his right to present such evidence in extenuation and mitigation of his sentence.

Third, to the extent that the provision in Mr. Khan's plea agreement on which the Prosecution relies as the sole basis for its denial of his *Brady* requests could be construed to waive his right to obtain evidence beyond what was required to prove his guilt, that waiver could extend only to his right to obtain exculpatory evidence under R.M.C. 701(e). But even if Mr. Khan waived R.M.C. 701(e), that would not waive his right to obtain favorable evidence under *Brady* and the Fifth Amendment. While R.M.C. 701(e) may implement *Brady*, its requirement to provide exculpatory evidence is not coterminous with the requirements of *Brady*. Rather, military law is well-settled that R.M.C. 701(e) provides broader protection to defendants than *Brady*. The law is equally well-settled that while Congress may enact a statute that provides defendants with greater rights than are constitutionally required, it may not attempt to supersede those constitutional protections. The waiver of such a statutory right likewise does not automatically waive the constitutionally required right. Indeed, the legal standard for waiver of any right depends on the nature of the right, and the waiver of fundamental constitutional rights must be intentional and explicit. Nothing in Mr. Khan's pretrial agreement, the plea colloquy, or the record in this case satisfies that standard to establish a *Brady* waiver.

Fourth, even if there were some doubt or ambiguity as to whether Mr. Khan waived his right to obtain *Brady* material in his plea agreement, which there is not, the law is clear that the plea agreement must be construed in his favor. Not only does the agreement explicitly preserve

his right to present evidence about his torture, which would be effectively meaningless without the right to obtain exculpatory evidence to bolster his sentencing case, but, as a matter of contract law principles applicable to plea agreements, such agreements must also be construed against the government and in favor of defendants. The rule of lenity applicable in courts-martial also provides useful guidance in this regard.

4. Burden of Proof

The moving party must demonstrate by a preponderance of the evidence that the requested relief is warranted. *See* R.M.C. 905(c); RC 3.8.

5. Facts

In February 2012, Mr. Khan was charged by military commission with various offenses. He pled guilty pursuant to a pretrial agreement, and agreed to cooperate with the government by providing substantial assistance in its investigation and prosecution of others. *See* AE 012; AE 013. He has continued to fulfill that agreement without exception.

As explained above, barring any lapse in his ongoing cooperation, Mr. Khan faces a maximum sentence not to exceed 19 years. As also set forth above, his plea agreement entitles him to call “live witnesses and present evidence” in mitigation for sentencing purposes, employ two government-funded experts to assist with his sentencing, and present evidence concerning his torture. *See* AE 012, ¶¶ 21, 23, 26; AE 013, ¶ 4. These provisions were negotiated by the parties specifically in order to allow Mr. Khan to put on an extenuation and mitigation case in order to try and beat 19 years. They are also important because unlike Mr. Al Darbi’s case, where there was little practical advantage to presenting an extensive sentencing case because under the terms of Mr. Al Darbi’s plea agreement he would be transferred to Saudi Arabia after

sentencing, Mr. Khan's plea agreement does not contemplate (nor does it foreclose) his transfer to another country for purposes of serving his remaining sentence, if any.

Paragraph 12 of Mr. Khan's plea agreement, cited by the Prosecution as the sole basis for its denial of his *Brady* requests, further provides:

I waive my right to any discovery beyond what the Government is obligated to provide pursuant to R.M.C. 701(b)(1) and 701(d). I additionally waive any request for forensic or scientific testing of any physical evidence in the Government's possession. The Government may dispose of any physical evidence upon completion of any appellate processes not waived by this agreement or otherwise available to me.

AE 012, ¶ 12.

On February 29, 2012, the Military Judge then detailed to Mr. Khan's case accepted his guilty plea and cooperation agreement as knowing and voluntary. *See* Tr. at 103. Before doing so, he advised Mr. Khan that by pleading guilty he would waive "three important rights": the right not to incriminate himself; the right to a trial of the charges against him; and the right to confront witnesses called against him and to call witnesses on his behalf "in the findings portion of this Commission." Tr. at 31-32. The Military Judge also advised Mr. Khan that he had agreed to waive certain rights in his pretrial agreement, including, for example, any speedy trial rights in relation to the delay of his sentencing for a period of four years (later extended by modification of his pretrial agreement to seven years). *See* Tr. at 85.

The Military Judge further explained to Mr. Khan that Mr. Khan and the government "may present witnesses and evidence regarding matters in aggravation and mitigation for sentencing." *Id.* at 86. However, the Military Judge explained, "the pretrial agreement states you also understand that *the pretrial agreement permits the government to avoid presentation in court of sufficient evidence to prove your guilt.*" *Id.* at 87 (emphasis added). Mr. Khan then

indicated his understanding. *See id.* But there was no further mention of paragraph 12 of Mr. Khan's plea agreement or any waiver of discovery beyond evidence to prove Mr. Khan's guilt. There was also no mention at all of exculpatory evidence or *Brady* material.

Nonetheless, the Prosecution denied Mr. Khan's requests for *Brady* material in relation to his sentencing solely on the basis that he waived his right to that material under paragraph 12 of the pretrial agreement. Its denial states in relevant part as to each request:

This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.

Attachment D. Only as to the last category of *Brady* material requested by Mr. Khan, concerning evidence sufficient to establish that he has fulfilled the terms of his plea agreement, including his ongoing obligation to cooperate with the government, did the Prosecution indicate that it may provide a limited subset of the requested material at the time of his sentencing. *See id.* at 6. As addressed below, however, *Brady* requires that exculpatory evidence be produced in sufficient time to permit the Defense to make effective use of that information at sentencing.

6. Law and Argument

Much has changed since Mr. Khan pled guilty and agreed to cooperate with the U.S. government seven years ago this week. This case has had no fewer than seven convening authorities, three military judges, at least three sets of prosecutors, and four separate detailed defense counsel. All that has remained constant are Mr. Khan's *pro bono* civilian defense counsel, the fact of his confinement at Guantánamo and separation from his family and his

daughter whom he has never met, and his cooperation with the U.S. government, which has never, ever wavered.

For seven years Mr. Khan has provided substantial assistance to the government in the investigation and prosecution of other suspected terrorists. He has served his time without disruption, and has done remarkably well given the difficulty of his torture prior to arriving at Guantánamo in September 2006, as well as the circumstances of his detention at Guantánamo, and the lack of certainty about his future. Indeed, it would be fair to say that seven years ago no one knew when this case would proceed to sentencing, or whether it would proceed to sentencing at all given the prior administration's stated determination to close the prison. No one knew, least of all Mr. Khan, whether he would serve his sentence in Guantánamo, or in federal prison in the United States, or whether he might be transferred to serve his sentence in Pakistan or another country. As Mr. Khan told the Military Judge who accepted his guilty plea, he took "a leap of faith." Tr. at 82. "That is all I can do," he said. *Id.*

Now, nearly a decade later, the way forward in this case is more certain. Mr. Khan has chosen to proceed to sentencing in July, which is his right under the terms of his plea agreement. While it is not possible to predict what will occur at his sentencing or thereafter, Mr. Khan is determined to put on an extensive case in extenuation and mitigation of his sentence, and to try to obtain a sentence of less than 19 years. This should surprise no one given that Mr. Khan specifically bargained for these rights in his plea agreement.

Yet, rather than negotiate with the Defense to try and reach some reasonable accommodation on whether Mr. Khan may obtain some amount of exculpatory evidence such as access to his medical records for use at sentencing (or call witnesses such as his daughter or a

victim in his case, each of whom would provide compelling testimony favorable to him), the Prosecution has adopted the hardline position that Mr. Khan is not entitled to any documents to support his sentencing case; that he is not entitled to call any witnesses except those few identified by the government and who will support the government's own sentencing arguments¹; and, ultimately, that Mr. Khan may not present evidence in mitigation about his torture and other unlawful abuse in CIA detention. Rather, as expressed in Mr. Khan's motion to compel appointment and funding of his expert concerning detention, interrogation, and torture-related matters, it certainly appears that despite his ongoing cooperation—which, again, has never wavered over the last seven years—the government does not want Mr. Khan to put on a vigorous case in extenuation and mitigation of his sentence or otherwise attempt to obtain a sentence below 19 years, which his pretrial agreement allows. *See* AE 026, at 13.

Why the Prosecution may have adopted such a stance with regard to Mr. Khan's sentencing is unclear, if not unfathomable given the lack of success with other military commission cases. Perhaps the Prosecution fears that its one and only high-value cooperator may get a little more time off of his sentence because he was tortured for more than three years, which would be perceived as weakness rather than justice. It certainly is not consistent with the more helpful, constructive, policy-driven approach that experienced federal prosecutors take toward cooperating witnesses who provide truthful information and substantial assistance to the government over a period of several years without incident. But whatever the Prosecution's

¹ The Prosecution's blanket denial of nearly all of Mr. Khan's requested sentencing witnesses, including most notably his young daughter, and a victim in this case whom the Prosecution brought to Guantánamo for purposes of Mr. Khan's guilty plea but now claims is not relevant to his sentencing, will be addressed in a separate motion to compel production of witnesses.

motivation may be, at the present moment Mr. Khan has no choice but to litigate the instant motion. Whether or not the Prosecution may wish in hindsight that it had drafted the pretrial agreement differently, the fact remains that Mr. Khan did not waive his right to put on an extensive case in extenuation and mitigation or to obtain *Brady* material in relation to his sentencing.

I. There Is No Dispute that *Brady* Applies or that Mr. Khan Has Requested Core *Brady* Material

As set forth above, there is no dispute that *Brady* applies both at sentencing and in the military commissions. *See United States v. Hawkins*, 73 M.J. 605, 609 (A. Ct. Crim. App. 2014) (finding *Brady* violation based on prosecution's withholding of exculpatory information material to guilt or punishment following guilty plea). Nor is there any dispute that the categories of information that Mr. Khan has requested are favorable and constitute core *Brady* material. Each relates to his CIA torture and other unlawful abuse, including the nature of his capture, detention, and confinement; the impact of that trauma, including the lasting, damaging impact on his physical and mental health; the significance of his decision to trust the U.S. government, and to plead guilty and cooperate despite what had happened to him; his conditions of confinement at Guantánamo; and/or whether he poses a future threat to the United States or its allies if released from custody.

The Prosecution does not dispute that this information is favorable to Mr. Khan's punishment and would bolster his extenuation and mitigation case and/or cast doubt on proof of any aggravating factors offered by the Prosecution at sentencing. *See United States v. Manos*, 37 C.M.R. 274, 278 (C.M.A. 1967) (explaining that because a military panel imposes punishment in post-finding proceedings, military rules "clearly envision" that an accused is entitled to present

evidence and witnesses who may testify in mitigation and extenuation); *id.* at 279 (explaining that because the government may obtain an “easy conviction” via an accused’s guilty plea, it is particularly important for an accused to try to mitigate his or her punishment with reference to applicable sentencing factors, including without limitation his or her character and background, and service to the government).

In addition, as the Military Judge stated in this case during *voir dire*:

[T]his commission is not designed to just punish offenses but to sentence appropriately the accused in light of his offenses . . . in light of his background and rehabilitative potential and what are the needs of society and all of the legitimate sentencing principles that are discussed in military courts-martial.

I’m committed to that philosophy, and . . . I’m absolutely committed to all of the sentencing principles involved in military courts-martial. So I bring that philosophy with me to the commissions, and I think any panel members that are senior would probably share that philosophy.

Tr. at 222. The Military Judge also stated that Mr. Khan’s decision to cooperate was “absolutely” a significant factor among those sentencing principles in terms of mitigation and extenuation. *Id.* at 223. All of the *Brady* material requested by Mr. Khan bears directly on these factors. *See* R.M.C. 1001(h) (addressing generally accepted sentencing principles, including rehabilitation, general deterrence, specific deterrence, and social retribution); *see also* 18 U.S.C. § 3553(a) (setting forth various factors to be considered in imposing a federal sentence). Again, the Prosecution does not contend otherwise.

The only issue in dispute here is whether Mr. Khan waived his right to obtain this material for use in connection with his sentencing proceedings. The answer to that question is decidedly no for several reasons.

II. Mr. Khan Did Not Waive His Right to *Brady* Material**A. Production of Exculpatory Evidence Is Required by the Constitution and by Statute to Ensure that Mr. Khan's Presentencing Proceedings Are Fair and His Punishment Is Correct in Law and Fact**

The Prosecution's obligation to produce favorable information arises from the right to a fair trial, including a fair sentencing, guaranteed by the Fifth Amendment to the Constitution. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). In *Brady*, defendant John Brady admitted to participation in a murder but claimed that another individual did the actual killing. *Id.* at 84. He requested a sentence of life imprisonment but was given a death sentence by a jury. *Id.* After he was sentenced, Brady learned that the prosecution had withheld a statement from the other individual who admitted to the actual killing. *Id.* at 84. Brady petitioned for a new trial, which was granted but only on the issue of punishment. *See id.* at 84-85.

The Supreme Court granted review to address the question of whether Brady was denied due process when the lower court limited his new trial to the question of punishment. *See id.* at 84. Although the Court rejected Brady's request for a new trial on the question of his guilt and affirmed the lower court decision limiting his retrial to the question of his punishment, it 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 the bad faith of the prosecution." *Id.* at 87 (emphases added). The Court explained that the principle underlying its holding is "avoidance of an unfair trial to the accused." *Id.* It also reasoned that "*a prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape*

a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that *does not comport with standards of justice.*” *Id.* at 87-88 (emphases added).

In subsequent decisions, the Supreme Court clarified that due process requires the disclosure of all favorable evidence—whether exculpatory or impeachment evidence—that is relevant to guilt or punishment. *See Skinner v. Switzer*, 562 U.S. 521, 536 (2011); *Giglio v. United States*, 405 U.S. 150, 154 (1972). Because the right to such evidence is fundamental to the guarantee of a fair trial, disclosure must occur regardless of whether it has been requested by a defendant. *See Kyles v. Whitley*, 514 U.S. 419, 433 (1995). Prosecutors also have a duty to learn of any favorable evidence known to others acting on the government’s behalf, including other government agencies closely aligned with the prosecution. *See id.* at 437; *see also United States v. Libby*, 429 F. Supp. 2d 1, 6, 11 (D.D.C. 2006) (concluding CIA and Office of the Vice President are closely aligned with prosecution). Disclosure also must be made in sufficient time to permit the defendant to make effective use of that information at trial. *See, e.g., Leka v. Portuondo*, 257 F.3d 89, 103 (2d Cir. 2001).

A prosecutor’s disclosure obligation under *Brady* is broad. *See In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 897 (D.C. Cir. 1999). While *Brady* does not provide a general right of criminal discovery, “the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed—with the benefit of hindsight—as affecting the outcome of the trial.” *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005). “The only question before (and even during) trial is whether the evidence at issue may be ‘favorable to the accused’; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the

outcome of the upcoming trial.” *Id.*² Nor does the fact that a defendant may already possess certain exculpatory information, including, for example, witness statements, relieve the prosecution of its obligation to turn over information from the government itself that could be used to corroborate (or impeach) the defendant’s information. *See In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d at 897.

In addition,

[t]he meaning of the term “favorable” under *Brady* is not difficult to discern. It is any information in the possession of the government—broadly defined to include all Executive Branch agencies—that relates to guilt or punishment and that tends to help the defense by either bolstering the defense case or impeaching potential prosecution witnesses. It covers both exculpatory and impeachment evidence.

Safavian, 233 F.R.D. at 16-17. “Where doubt exists as to the usefulness of the evidence to the defendant, the government must resolve all such doubts in favor of full disclosure.” *Id.* at 17; *see also* U.S. Dep’t of Justice, Justice Manual § 9-5.001(B)(1) (“Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence.”);

² The standard for determining on post-trial review whether a *Brady* violation occurred that warrants reversal of a conviction or sentence is different. That standard examines whether the information withheld by the prosecution was exculpatory or impeaching, and whether the withholding caused prejudice to the defendant. *See In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d at 892 (citing *Strickler v. Greene*, 527 U.S. 263 (1999)). To establish prejudice, the evidence withheld must be material in the sense that had the evidence been disclosed to the defense the result of the proceeding may have been different. *Kyles*, 514 U.S. at 433. That requirement is met when the withholding of evidence undermines confidence in the outcome of the trial. *See id.* at 434. In other words, disclosure of the favorable evidence would have put the whole case in such a different light as to undermine confidence in the result. *See id.* at 435. But again, that is not the standard for determining in the first instance whether a prosecutor must produce exculpatory evidence for trial or sentencing. *See, e.g., United States v. Safavian*, 233 F.R.D. 205, 206-07 (D.D.C. 2006) (observing that the “post-trial ‘materiality’ standard is irrelevant to pretrial and in-trial *Brady* decisions to be made by prosecutors and trial judges”).

Andrew Weissmann & Katya Jestin, “*Brady*” and Sentencing, Nat’l L.J., Oct. 27, 2008, at 2 (“[T]he scope of information that is material for *Brady* purposes at sentencing has expanded coextensively with the Supreme Court’s expansion of judicial discretion in sentencing.”), available at <https://bit.ly/2NmdQv5>.

This obligation continues through sentencing and extends to matters affecting a defendant’s punishment. See, e.g., *United States v. Quinn*, 537 F. Supp. 2d 99, 117 (D.D.C. 2008) (prosecutors concede *Brady* obligation extends through sentencing and punishment); *United States v. Hawkins*, 73 M.J. 605, 609 (A. Ct. Crim. App. 2014); see also U.S. Dep’t of Justice, Justice Manual § 9-5.001(D)(3) (“Exculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing, but that does not relate to proof of guilt, must be disclosed no later than the court’s initial presentence investigation.”).

In the military context, as in the civilian context, a defendant’s entitlement to disclosure of *Brady* material is also guaranteed by statute. See 10 U.S.C. §§ 846, 949j; R.C.M. 701(a)(6); R.M.C. 701(e); see also 18 U.S.C. § 3500; Fed. R. Crim. P. 16. Indeed, military law provides defendants with broader rights to obtain discovery and other information than is available in civilian trials or mandated by *Brady*. See *United States v. Williams*, 50 M.J. 436, 440 (C.A.A.F. 1999) (“We also have interpreted these rules to ensure that 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.”); *United States v. Trigueros*, 69 M.J. 604, 609 (A. Ct. Crim. App. 2010) (noting that “the statutory and executive order standards” are “broader than the *Brady* constitutional standard”). Also in the military context, as in the civilian context, there is no limit on the ability

of a defendant to use favorable evidence produced by the prosecution at sentencing. *See* R.M.C. 1001(c) (defense may present all matters in extenuation and mitigation of sentencing); *see also* 18 U.S.C. § 3661 (“No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”). This is particularly important in the military commission context because a reviewing court “may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved.” 10 U.S.C. § 950f(d).

B. *Brady* Is Not Waivable in Its Entirety as a Matter of Law, and Was Not Waived in Mr. Khan’s Plea Agreement in Any Event

The Prosecution in this case places great reliance—indeed, exclusive reliance—on paragraph 12 of Mr. Khan’s plea agreement as the basis for its denial of his *Brady* requests. It does so based on the language of that paragraph stating that Mr. Khan waives his right to “any discovery beyond what the Government is obligated to provide pursuant to R.M.C. 701(b)(1) and 701(d).” AE 012, ¶ 12. The Prosecution undoubtedly believes that “any discovery” includes *Brady* material for use in connection with Mr. Khan’s sentencing. But that is wrong.

As an initial matter, consistent with importance of *Brady* and the fundamental right to a fair trial, including a fair sentencing, a prosecutor’s obligation to produce favorable evidence is not waivable in its entirety as a matter of law. To the extent that *Brady* may be waived at all in a plea agreement, it is waivable only as to a defendant’s right to obtain impeachment material. *See United States v. Ruiz*, 536 U.S. 622, 633 (2002); *see also United States v. Ohiri*, 133 F. App’x 555, 562 (10th Cir. 2005) (explaining that in *Ruiz*, the defendant’s constitutional rights were

protected by preservation of the right to non-impeachment *Brady* material); *McCann v. Mangialardi*, 337 F.3d 782, 787-88 (7th Cir. 2003) (“[I]t is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant’s factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea.”). That is because non-impeachment *Brady* material is “closely related to the fairness of the trial,” *Ruiz*, 536 U.S. at 633, and can be “so fundamental to the reliability of the factfinding process that [it] may never be waived without irreparably ‘discrediting the . . . courts.’” *United States v. Mezzanatto*, 513 U.S. 196, 204 (1995). In short, Mr. Khan and the government could not have agreed to a sentencing without disclosure of non-impeachment *Brady* material because such material is necessary to preserve the fundamental fairness and dignity of the proceeding itself. *See id.* (“No doubt there are limits to waiver; if the parties stipulated to trial by 12 orangutans the defendant’s conviction would be invalid notwithstanding his consent, because some minimum civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept.”) (quoting *United States v. Josefik*, 753 F.2d 585, 588 (7th Cir. 1985)).

Indeed, courts and experienced prosecutors are careful to ensure that *Brady* waivers included in plea agreements are explicit, and limited only to impeachment material. *See Ruiz*, 536 U.S. at 625, 631; *see also* ABA Model Rule of Professional Conduct 3.8(d) (“The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this

responsibility by a protective order of the tribunal.”); Weissmann & Jestin, *supra*, at 1.

Consequently, the language of paragraph 12 could not waive *Brady* in its entirety as a matter of law. That a defendant may waive impeachment material in a plea agreement is irrelevant here. Mr. Khan’s requests for production of *Brady* material do not include requests for impeachment material. Rather, he has requested evidence that is material to his punishment, *i.e.*, that bolsters his extenuation and mitigation case and/or casts doubt on proof of any aggravating factors offered by the Prosecution at sentencing. To put it another way, he requests production of documents and information (and witness testimony) that are exculpatory because they will establish and bolster his sentencing arguments in extenuation and mitigation about his torture, his threat of future dangerousness, his cooperation, and the other factors articulated above. *See supra* at 10.

Consistent with these principles, the discovery waiver language in paragraph 12 makes no reference to a waiver of *Brady* whatsoever. Though the Prosecution seems to interpret the “any discovery” language as including an implicit waiver of the Prosecutor’s obligations under *Brady*, that interpretation ignores the simple fact that “*Brady* is ‘not a discovery rule, but a rule of fairness and minimum prosecutorial obligation.’” *Flores v. Satz*, 137 F.3d 1275, 1278 n.8 (11th Cir. 1998) (quoting *United States v. Campagnuolo*, 592 F.2d 852, 859 (5th Cir. 1979)).

Instead, the “any discovery” waiver language in paragraph 12 simply means that the Prosecution does not have to produce evidence to prove beyond a reasonable doubt that Mr. Khan committed the offenses with which he was charged and to which he pled guilty. This is clear from the plain language of that provision, which states not only that he agrees to waive discovery beyond R.M.C. 701(b)(1) and 701(d), but additionally that he waives any “request for

forensic or scientific testing of any physical evidence in the Government's possession." AE 012,

¶ 12. If the "any discovery" language were meant to apply as broadly as the Prosecution suggests, and to foreclose entirely any discovery from that point forward, then the added language about testing of physical evidence would be redundant and superfluous. *See, e.g., United States v. Brye*, 146 F.3d 1207, 1210-11 (10th Cir. 1998) (concluding that scope of plea agreement provision should not be interpreted as to render it redundant or superfluous). That paragraph 12 was meant to waive only evidence necessary to prove Mr. Khan's guilt is also clear from the plea colloquy in which the Military Judge advised Mr. Khan that while he and the government "may present witnesses and evidence regarding matters in aggravation and mitigation for sentencing," Tr. at 86, "*the pretrial agreement permits the government to avoid presentation in court of sufficient evidence to prove your guilt.*" *Id.* at 87 (emphasis added). Again, there was no mention of *Brady* or waiver of exculpatory evidence relevant to punishment.

The absence of any mention of *Brady* or exculpatory evidence in Mr. Khan's plea agreement stands in marked contrast to the standard form of plea agreement offered in federal terrorism cases in which Department of Justice prosecutors who intend to obtain *Brady* waivers of impeachment material do so explicitly. In the 1998 Embassy Bombing trial in the Southern District of New York, for example, the U.S. Attorney's Office and defendant Adel Abdel Bary entered into a plea agreement that included an explicit waiver of impeachment material. Consistent with federal precedent, it also stated that the defendant retained his right to obtain *Brady* information that was material to his guilt. *See* Attachment E. The sort of explicit provision, which is routinely included in federal plea agreements, stated in relevant part that the defendant waived "exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963),

other than information establishing the factual innocence of the defendant, and impeachment material pursuant to *Giglio v. United States*, 405 U.S. 150 (1972).” *Id.* at 5.

By contrast, again, the entire record in Mr. Khan’s case is silent as to *Brady*, including impeachment material. This was not a mistake or a failed meeting of the minds. As noted above, the lead prosecutor detailed to Mr. Khan’s case in connection with his guilty plea was an experienced federal prosecutor from the Department of Justice, who was detailed to the Office of the Chief Prosecutor for Military Commissions. She negotiated Mr. Khan’s cooperation agreement with his defense team, led by Ms. Jestin, an experienced former federal prosecutor. Indeed, we understand that if the prosecutor who negotiated Mr. Khan’s plea agreement were called to testify, she would confirm (and the Defense could provide contemporaneous emails and documents to corroborate) that it was not the parties’ intention at the time of Mr. Khan’s guilty plea that paragraph 12 of his pretrial agreement would foreclose entirely his entitlement to obtain *Brady* material. To the contrary, we understand that she would explain that the plea agreement expressly preserved Mr. Khan’s right to present evidence in extenuation and mitigation of his sentence because it was important to him, which would be hollow without the right also to obtain from the government corroborative, exculpatory information. *See also In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d at 897 (holding that defendant’s possession of certain exculpatory evidence does not substitute for or relieve the prosecution of its obligations under *Brady*).

III. Even if Mr. Khan Waived His Right to Obtain Evidence Beyond What Was Required to Prove His Guilt, that Waiver Does Not Encompass *Brady*

Even if paragraph 12 of Mr. Khan’s plea agreement could be construed to waive his right to obtain evidence beyond what was required to prove his guilt at trial, which it cannot, that

provision does not waive his right to obtain exculpatory evidence under *Brady* and the Fifth Amendment. At most that waiver could extend only to his right to obtain exculpatory evidence under R.M.C. 701(e). That is so because while R.M.C. 701(e) may implement *Brady*, as explained above, its requirement to provide exculpatory evidence is not coterminous with the requirements of *Brady*. Rather, military law is well-settled that Rule 701 provides greater protection to defendants than *Brady*'s protections under the Fifth Amendment. *See supra* at 15 (citing cases).³ The law is equally well-settled that while Congress may enact a statute that provides defendants with greater rights than are constitutionally required, it may not attempt to supersede those constitutional protections. *See Dickerson v. United States*, 530 U.S. 428, 437 (2000).

The waiver of such a statutory right likewise does not automatically waive the constitutionally required right. Indeed, the legal standard for waiver of any right depends on the nature of the right. *See United States v. Olano*, 507 U.S. 725, 733 (1993). Fundamental constitutional rights like *Brady* may only be waived knowingly, intentionally, and explicitly, and “courts indulge every reasonable presumption against waiver of fundamental constitutional rights.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). But again, nothing in Mr. Khan’s pretrial agreement, the plea colloquy, or the record in this case satisfies that standard to establish a *Brady* waiver.

³ If the requirements of *Brady* and Rule 701(e) were the same it would render the latter superfluous, and courts are required to interpret statutes in ways that would not render them meaningless. *See, e.g., Bridger Coal Co./Pac. Minerals, Inc. v. Director, Office of Workers’ Compensation Programs*, 927 F.2d 1150, 1153 (10th Cir. 1991) (“We will not construe a statute in a way that renders words or phrases meaningless, redundant, or superfluous.”) (citing cases); *United States v. Kowalczyk*, 805 F.3d 847, 857 (9th Cir. 2015) (same).

IV. Even if There Were Some Ambiguity About Whether Mr. Khan Waived His Right to *Brady* Material, His Plea Agreement Must Be Construed in His Favor

The terms and meaning of Mr. Khan's plea agreement are clear and unambiguous for the reasons set forth above. Even if there were some doubt or ambiguity as to whether Mr. Khan waived his right to obtain *Brady* material in his plea agreement, however, which there is not, the law is clear that the plea agreement must be construed in his favor. *See In re Sealed Case*, 702 F.3d 59, 63 n.2, 65 (D.C. Cir. 2012) (plea agreements are construed against the government as the drafting party).

“In interpreting . . . plea agreements, . . . which are invariably drafted by the Government, fundamental fairness requires that the Government be held to the highest standards of ‘both promise and performance.’” *United States v. Gotti*, 457 F. Supp. 2d 411, 415 (S.D.N.Y. 2006) (quoting *In re Altro*, 180 F.3d 372, 375 (2d Cir. 1999)). “But if there is any ambiguity, the terms of a plea agreement, like the terms of a contract, must be construed against the drafter. In interpreting plea agreements drafted by federal prosecutors, ‘the courts’ concerns run even wider than protection of the defendant’s individual constitutional rights—to concerns for the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government.” *Id.* (quoting *United States v. Ready*, 82 F.3d 551, 558 (2d Cir. 1996)). “[A]ware of the Government’s advantage in bargaining power and recognizing that the Government usually drafts plea agreements, we construe such agreements *strictly* against the Government.” *Id.* at 424 (alterations and emphasis in original) (quoting *United States v. Cunningham*, 292 F.3d 115, 117 (2d Cir. 2002)).

The rule of lenity likewise requires that ambiguity in the criminal law, including military law, must be resolved in the defendant's favor. *See United States v. Ehsan*, 163 F.3d 855, 857-58 (4th Cir. 1998); *United States v. Ferguson*, 40 M.J. 823, 830 (N-M. Ct. Mil. Rev. 1994) (UCMJ subject to strict construction and rule of lenity).

Applying these principles here, to the extent the Prosecution may claim there is ambiguity in paragraph 12 of Mr. Khan's plea agreement, which the Defense would dispute, that ambiguity must be resolved in Mr. Khan's favor and in favor of protection of his fundamental right to a fair trial, including a fair sentencing, and thus his right to obtain the *Brady* material that he has requested for use in connection with his sentencing proceedings. *See also* R.M.C. 705(c)(1)(B) (plea agreement terms that would deprive accused of "indispensable judicial guarantees" may not be enforced).

7. Conclusion

The motion should be granted, and the Military Judge should order the Prosecution to produce the *Brady* material requested by Mr. Khan in sufficient time to permit the Defense to make effective use of that information in connection with the presentencing proceedings.

8. Oral Argument

The Military Judge has scheduled a hearing for the week of April 1, 2019 to resolve discovery issues. *See* AE 016BB, at 2.

9. Witnesses and Evidence

If the Military Judge determines that an evidentiary hearing is necessary and appropriate to resolve this motion, the Defense requests that the Military Judge compel the Prosecution to

Natalie K. Orpett
Karthik P. Reddy
Civilian Defense Counsel
JENNER & BLOCK LLP
1099 New York Avenue, NW, Suite 900
Washington, D.C. 20001

Jared A. Hernandez
Detailed Defense Counsel
Lieutenant Commander, JAGC, U.S. Navy

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ATTACHMENT A

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ATTACHMENT B

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

UNITED STATES OF AMERICA v. MAJID SHOUKAT KHAN	AE ____ [Proposed Order] Defense Motion to Compel Production of <i>Brady</i> Material March ___, 2019
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Majid Khan's motion to compel production of *Brady* material (AE 028) is hereby GRANTED.

The Prosecution is hereby ORDERED to produce the *Brady* material requested by Mr. Khan in AE 028, Attachment C, in sufficient time to permit the Defense to make effective use of that information in connection with the presentencing proceedings in this case, including any pretrial punishment motion that Mr. Khan may intend to file on or before the current April 1, 2019, deadline for submission of evidentiary and substantive law motions. See AE 016BB.

SO ORDERED, this ___ day of March 2019.

Military Judge

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ATTACHMENT C

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666 Broadway, 7th Floor
New York, New York 10012
212-614-6464
ccrjustice.org

November 15, 2018

Lt Col Joy Primoli, USAF
Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

Re: Request for Production of *Brady* Material
Related to Sentencing in *United States v. Majid Khan*

Dear Lt Col Primoli:

We represent the accused Mr. Majid Khan in the above-captioned case pending before a military commission at the U.S. Naval Station at Guantánamo Bay, Cuba. Pursuant to the Military Judge's litigation and trial scheduling order dated October 25, 2018 (AE016Y), the Fifth and Sixth Amendments to the U.S. Constitution, *Brady v. Maryland*, 373 U.S. 83 (1963), and related authorities, Mr. Khan hereby requests that the Government produce exculpatory evidence in extenuation and mitigation of his sentence ("*Brady* material") as follows:

1. All exculpatory evidence in the Government's possession, custody, or control that might reasonably be considered favorable to the accused's sentencing, and without regard to whether the failure to disclose it likely would affect the outcome of his case, including his approved sentence.
2. In this context, "favorable to the accused" means any information within the possession, custody, or control of the Government that relates to the accused's sentencing, and that tends to help the accused either by bolstering his sentencing case or impeaching potential Government sentencing witnesses, including without limitation evidence that would reduce the accused's degree of guilt or punishment with respect to the offenses to which he pled guilty.
3. Where doubt exists as to the usefulness of the evidence to the accused, the Government must resolve all such doubts in favor of full disclosure. In addition, attorneys that have prepared the Government's case against the accused have an affirmative duty to search possible sources of exculpatory information, including a duty to learn of favorable evidence known to attorneys that have prepared other military commission cases against other detainees, or others acting on their behalf, and any other evidence the Government discovers or has discovered while preparing other cases involving detainees at Guantánamo or any other United States military or detention facility.
4. Based on the unique facts and circumstances of this case, the Government's obligation to produce exculpatory information also specifically includes documents maintained by other agencies of the U.S. government which are closely aligned with the prosecution of the accused, including those

agencies with knowledge of and access to exculpatory information such as the Central Intelligence Agency (CIA).

5. In addition, the Government shall notify the accused of the existence of any evidence known to counsel for the Government but not available to the Government that might reasonably be considered favorable to the accused's sentencing, and without regard to whether the failure to disclose it likely would affect the outcome of his case, including his approved sentence.

6. If evidence described in the preceding paragraphs becomes known to the Government after the date on which the Government is required to disclose exculpatory evidence related to the accused's sentencing, the Government shall promptly provide the evidence to the accused, or if not reasonably available to the Government, notice of the existence of the evidence.

7. The Defense further requests that the Government produce the following specific, non-exclusive categories of *Brady* material:

- a. The full, unredacted report prepared by the Senate Select Committee on Intelligence entitled *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (the "SSCI Report"), which the Military Judge ordered preserved in connection with this case. See AE 023F.
- b. The full, unredacted report prepared by the CIA in parallel to the SSCI Report, which became known as the "Panetta Review."
- c. The full, unredacted report prepared by the CIA Inspector General entitled *Special Review, Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)* (2003-7123-IG) (7 May 2004).
- d. The covert action Memorandum of Notification signed by the President on September 17, 2001, granting the CIA authority to covertly capture and detain certain individuals including the accused.
- e. All legal memoranda concerning the capture, detention and confinement of the accused, including without limitation memoranda prepared by the U.S. Department of Justice, Office of Legal Counsel, concerning specific interrogation techniques relating to the accused.
- f. All documents concerning the nature of the accused's capture, detention and confinement, including without limitation intelligence reports or operational cables describing his torture and other abuse. For example, and without limitation, the accused requests documents describing each instance in which:
 - i. He was subjected to "rectal rehydration," "rectal feeding," enemas or other forms of sexual assault, including full, unredacted copies of each document concerning him referenced in footnotes 584, 673, 677-84, 2657, and 2661 of the SSCI Report.

- ii. He engaged in acts of actual or attempted self-harm, including hunger strikes and self-mutilation, including full, unredacted copies of each document concerning him referenced in footnotes 677-84 of the SSCI Report.
- iii. He was subjected to waterboarding, “water dousing,” ice water baths, or other forms of torture or abuse with water that could be considered tantamount to or indistinguishable from waterboarding.
- iv. He was subjected to sleep deprivation and other forms of sensory or dietary manipulation or deprivation.
- v. He was subjected to any other form of physical and psychological abuse, including beatings and threats to his family.
- vi. He was involved in his own torture and abuse.
- g. Any photographs and audio or video recordings of the accused between the time of his capture in March 2003 and his arrival at Guantánamo in September 2006.
- h. The name and contact information for each of the accused’s interrogators between the time of his capture in March 2003 and his arrival at Guantánamo in September 2006.
- i. The name and contact information for each individual who authorized, directed, supervised, or was otherwise involved in overseeing the accused’s interrogations between the time of his capture in March 2003 and his arrival at Guantánamo in September 2006, including without limitation the name and contact information for the Deputy Chief of ALEC Station referenced throughout the SSCI Report.
- j. A list of the location(s) of the accused’s detention between the time of his capture in March 2003 and his arrival at Guantánamo in September 2006.
- k. Access to any location in which the accused was detained between the time of his capture in March 2003 and his arrival at Guantánamo in September 2006, or, in the alternative, access to any digital, photographic and physical substitute that may have been created to preserve such location(s).
- l. Access to Camp 7 and the accused’s current place of detention at Guantánamo.
- m. The name and contact information for each medical doctor, psychologist, physician’s assistant, nurse, medic or corpsman, “psych tech,” social worker, behaviorist, or other health care individual who evaluated or provided treatment or care to the accused between the time of his guilty plea and continuing through the Convening Authority’s approval of his sentence.

- n. The accused's medical records between the time of his capture in March 2003 and continuing through the Convening Authority's approval of his sentence.
- o. Evidence sufficient to establish that the accused has fulfilled the terms of his pretrial agreement, including his obligation to cooperate with the Government by providing substantial assistance to the Government in the investigation and prosecution of others. For example, and without limitation, the accused requests documents sufficient to establish for the record the number of times the accused has met with or been debriefed by the Government in connection with his ongoing cooperation, the truthfulness of the information provided by the accused, and the value of his assistance.

Mr. Khan reserves the right to amend or supplement these requests for *Brady* material as may be necessary and appropriate prior to approval of his sentence.

Please let us know if you have any questions or would like to meet and confer regarding these requests. We are happy to provide more detailed information concerning the basis for each request, at an appropriate secure facility.

Sincerely,

//s// J. Wells Dixon

J. Wells Dixon
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
Tel: (212) 614-6423
Fax: (212) 614-6451
wdixon@ccrjustice.org

Katya Jestin
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
Tel: (212) 891-1685
Fax: (212) 909-0818
KJestin@jenner.com

Natalie K. Orpett
JENNER & BLOCK LLP
1099 New York Avenue NW, Suite 900
Washington, D.C. 20001
Tel: (202) 639-6893
Fax: (202) 639-6066
NOrpett@jenner.com

Civilian Defense Counsel

- and -

Jared A. Hernandez
Lieutenant Commander, JAGC, U.S Navy

Tel: [REDACTED]

jared.a.hernandez.mi [REDACTED]

Detailed Defense Counsel

Counsel for Majid Khan

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ATTACHMENT D

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CHIEF PROSECUTOR

DEPARTMENT OF DEFENSE

OFFICE OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

December 14, 2018

MEMORANDUM FOR DEFENSE COUNSEL, UNITED STATES v. MAJID SHOUKAT KHAN

SUBJECT: GOVERNMENT'S RESPONSE TO DEFENSE REQUEST PRODUCTION OF *BRADY* MATERIAL

1. The Government, through undersigned counsel, hereby responds to the Defense Request for Discovery concerning *Brady* material.¹ For clarity, each request will be repeated below and the Government response will be in bold next to the request:

- All exculpatory evidence in the Government's possession, custody, or control that might reasonably be considered favorable to the accused's sentencing, and without regard to whether the failure to disclose it likely would affect the outcome of his case, including his approved sentence. **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**
- In this context, "favorable to the accused" means any information within the possession, custody, or control of the Government that relates to the accused's sentencing, and that tends to help the accused either by bolstering his sentencing case or impeaching potential Government sentencing witnesses, including without limitation evidence that would reduce the accused's degree of guilt or punishment with respect to the offenses to which he pled guilty. **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**
- Where doubt exists as to the usefulness of the evidence to the accused, the Government must resolve all such doubts in favor of full disclosure. In addition, attorneys that have prepared the Government's case against the accused have an affirmative duty to search possible sources of exculpatory information, including a duty to learn of favorable evidence known to attorneys that have prepared other military commission cases against other detainees, or others acting on their behalf, and any other evidence the Government discovers or has discovered while preparing other cases involving detainees at Guantánamo or any other United States military or detention facility. **This request**

¹ *Brady v. Maryland*, 373 U.S. 83 (1963).

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SUBJECT: GOVERNMENT'S RESPONSE TO DEFENSE REQUEST FOR DISCOVERY
UNDER RMC 701(b)(1) and (d)

does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.

- Based on the unique facts and circumstances of this case, the Government's obligation to produce exculpatory information also specifically includes documents maintained by other agencies of the U.S. government which are closely aligned with the prosecution of the accused, including those agencies with knowledge of and access to exculpatory information such as the Central Intelligence Agency (CIA). **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**
- In addition, the Government shall notify the accused of the existence of any evidence known to counsel for the Government but not available to the Government that might reasonably be considered favorable to the accused's sentencing, and without regard to whether the failure to disclose it likely would affect the outcome of his case, including his approved sentence. **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**
- If evidence described in the preceding paragraphs becomes known to the Government after the date on which the Government is required to disclose exculpatory evidence related to the accused's sentencing, the Government shall promptly provide the evidence to the accused, or if not reasonably available to the Government, notice of the existence of the evidence. **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**
- The full, unredacted report prepared by the Senate Select Committee on Intelligence entitled Committee Study of the Central Intelligence Agency's Detention and Interrogation Program (the "SSCI Report"), which the Military Judge ordered preserved in connection with this case. See AE 023F. **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**

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SUBJECT: GOVERNMENT'S RESPONSE TO DEFENSE REQUEST FOR DISCOVERY
UNDER RMC 701(b)(1) and (d)

- The full, unredacted report prepared by the CIA in parallel to the SSCI Report, which became known as the “Panetta Review.” **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**
- The full, unredacted report prepared by the CIA Inspector General entitled Special Review, Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003) (2003-7123-IG) (7 May 2004). **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**
- The covert action Memorandum of Notification signed by the President on September 17, 2001, granting the CIA authority to covertly capture and detain certain individuals including the accused. **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**
- All legal memoranda concerning the capture, detention and confinement of the accused, including without limitation memoranda prepared by the U.S. Department of Justice, Office of Legal Counsel, concerning specific interrogation techniques relating to the accused. **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**
- All documents concerning the nature of the accused's capture, detention and confinement, including without limitation intelligence reports or operational cables describing his torture and other abuse. For example, and without limitation, the accused requests documents describing each instance in which:
 - i. He was subjected to “rectal rehydration,” “rectal feeding,” enemas or other forms of sexual assault, including full, unredacted copies of each document concerning him referenced in footnotes 584, 673, 677-84, 2657, and 2661 of the SSCI Report. **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government**

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SUBJECT: GOVERNMENT'S RESPONSE TO DEFENSE REQUEST FOR DISCOVERY UNDER RMC 701(b)(1) and (d)

is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.

- ii. He engaged in acts of actual or attempted self-harm, including hunger strikes and self-mutilation, including full, unredacted copies of each document concerning him referenced in footnotes 677-84 of the SSCI Report. **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**
- iii. He was subjected to waterboarding, "water dousing," ice water baths, or other forms of torture or abuse with water that could be considered tantamount to or indistinguishable from waterboarding. **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**
- iv. He was subjected to sleep deprivation and other forms of sensory or dietary manipulation or deprivation. **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**
- v. He was subjected to any other form of physical and psychological abuse, including beatings and threats to his family. **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**
- vi. He was involved in his own torture and abuse. **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**

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SUBJECT: GOVERNMENT'S RESPONSE TO DEFENSE REQUEST FOR DISCOVERY
UNDER RMC 701(b)(1) and (d)

- Any photographs and audio or video recordings of the accused between the time of his capture in March 2003 and his arrival at Guantánamo in September 2006. **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**
- The name and contact information for each of the accused's interrogators between the time of his capture in March 2003 and his arrival at Guantánamo in September 2006. **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**
- The name and contact information for each individual who authorized, directed, supervised, or was otherwise involved in overseeing the accused's interrogations between the time of his capture in March 2003 and his arrival at Guantánamo in September 2006, including without limitation the name and contact information for the Deputy Chief of ALEC Station referenced throughout the SSCI Report. **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**
- A list of the location(s) of the accused's detention between the time of his capture in March 2003 and his arrival at Guantánamo in September 2006. **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**
- Access to any location in which the accused was detained between the time of his capture in March 2003 and his arrival at Guantánamo in September 2006, or, in the alternative, access to any digital, photographic and physical substitute that may have been created to preserve such location(s). **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**

OMC-OCF

SUBJECT: GOVERNMENT'S RESPONSE TO DEFENSE REQUEST FOR DISCOVERY
UNDER RMC 701(b)(1) and (d)

- Access to Camp 7 and the accused's current place of detention at Guantánamo. **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**
- The name and contact information for each medical doctor, psychologist, physician's assistant, nurse, medic or corpsman, "psych tech," social worker, behaviorist, or other health care individual who evaluated or provided treatment or care to the accused between the time of his guilty plea and continuing through the Convening Authority's approval of his sentence. **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**
- The accused's medical records between the time of his capture in March 2003 and continuing through the Convening Authority's approval of his sentence. **This request does not fall under RMC 701(b)(1) or (d). The Accused on 13 February 2012 agreed in paragraph 12 of the PTA to waive his right to any discovery beyond what the Government is obligated to provide under RMC 701(b)(1) and 701(d). The Government will continue to comply with the terms of the PTA.**
- Evidence sufficient to establish that the accused has fulfilled the terms of his pretrial agreement, including his obligation to cooperate with the Government by providing substantial assistance to the Government in the investigation and prosecution of others. For example, and without limitation, the accused requests documents sufficient to establish for the record the number of times the accused has met with or been debriefed by the Government in connection with his ongoing cooperation, the truthfulness of the information provided by the accused, and the value of his assistance. **The Government will notify the Commission at the time of his presentencing hearing if the Accused has fulfilled the terms of his PTA. In addition, the Government has agreed to make representations to the Convening Authority on the level of the Accused's cooperation at the time the Convening Authority decides to take action on the sentence. If the Government intends to introduce evidence of the Accused's participation, the Government will provide that information as the time gets closer to the actual presentencing date, to ensure that it accurately reflects any such participation up to the time of sentencing. Furthermore, the Government proffers that the Federal Bureau of Investigation has kept all logs of any visitors where the Accused has participated in interviews with either prosecution attorneys or investigators.**

OMC-OCP

SUBJECT: GOVERNMENT'S RESPONSE TO DEFENSE REQUEST FOR DISCOVERY
UNDER RMC 701(b)(1) and (d)

2. Should you have any question, I may be reached in the office at [REDACTED], by cell at [REDACTED] or by e-mail at joy.l.primoli.mil [REDACTED]

Respectfully,

//s//

JOY L. PRIMOLI, Lt Col, USAF
Trial Counsel

//s//

David L. O'Dowd, CDR, JAGC, USN
Assistant Trial Counsel

Office of the Chief Prosecutor
Office of Military Commission

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ATTACHMENT E

UNCLASSIFIED//FOR PUBLIC RELEASE

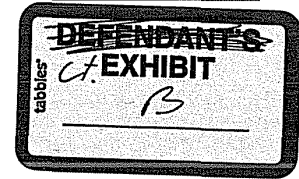


U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

September 18, 2014



Andrew G. Patel, Esq.
Lauren Kessler, Esq.
111 Broadway
Suite 1305
New York, NY 10006

Linda Moreno, Esq.
P.O. Box 10985
Tampa, FL 33679

Re: United States v. Adel Abdel Bary,
S15 98 Cr. 1023 (LAK)

Dear Mr. Patel, Ms. Kessler, and Ms. Moreno:

On the understandings specified below, the Office of the United States Attorney for the Southern District of New York ("this Office") will accept a guilty plea from Adel Abdel Bary, a/k/a "Adel Mohammed Abdul Almagid Abdel Bary," a/k/a "Abbas," a/k/a "Abu Dia" ("the defendant") to Counts One through Three of the above-referenced Superseding Information (the "Information"). Count One charges the defendant with conspiring, from at least in or about February 1998 up to and including at least in or about July 1999, to make a threat concerning an attempt to be made to kill, injure, and intimidate an individual and unlawfully to damage and destroy any building, vehicle and other real or personal property by means of an explosive through the use of the mail, telephone, telegraph, or other instrument of foreign commerce, in violation of Title 18, United States Code, Sections 844(n) & (e). Count One carries a maximum term of imprisonment of 10 years, a maximum term of supervised release of 3 years, a maximum fine, pursuant to Title 18, United States Code, Section 3571 of the greatest of \$250,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to persons other than the defendant resulting from the offense, and a \$100 mandatory special assessment. In addition to the foregoing, the Court must order restitution as specified below.

Count Two charges that the defendant, in August 1998, made a threat concerning an attempt to be made to kill, injure, and intimidate an individual and unlawfully to damage or destroy any building, vehicle and other real or personal property by means of an explosive through the use of the mail, telephone, telegraph, or other instrument of foreign commerce, in violation of Title 18, United States Code, Sections 844(e). Count Two carries a maximum term of imprisonment of 10 years, a maximum term of supervised release of 3 years, a maximum fine, pursuant to Title 18, United States Code, Section 3571 of the greatest of \$250,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to persons other than the defendant resulting from the offense, and a \$100 mandatory special assessment. In addition to the foregoing, the Court must order restitution as specified below.

Rev. 09.04.2014

Filed with TJ
25 February 2019

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Count Three charges the defendant with conspiring, from at least in or about 1996 up to and including at least in or about July 1999, to commit a crime against the United States, to wit, murdering nationals of the United States while such nationals were outside the United States, in violation of Title 18, United States Code, Sections 371 and 2332(a)(1).

The total maximum term of imprisonment on Counts One through Three is 25 years.

In consideration of the defendant's plea to the above offenses, the defendant will not be further prosecuted criminally by this Office (except for criminal tax violations, if any, as to which this Office cannot, and does not, make any agreement) for: (i) conspiring in August 1998 to distribute the claims of responsibility for the bombing of the U.S. Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, and further terrorist threats, as described in Count One of the Information; (ii) making telephone calls in August 1998 conveying the claims of responsibility for the bombings of the U.S. Embassies in Nairobi, Kenya, and in Dar es Salaam, Tanzania, and further terrorist threats, as described in Count Two of the Information; and/or (iii) conspiring, from at least in or about 1996 up to and including in or about July 1999, to murder nationals of the United States while such nationals were outside the United States, as described in Count Three of the Information. The defendant understands that this agreement does not bar the use of such conduct as a predicate act or as the basis for a sentencing enhancement in a subsequent prosecution including, but not limited to, a prosecution pursuant to 18 U.S.C. §§ 1961 *et seq.* In addition, at the time of sentencing, the Government will move to dismiss any open Counts against the defendant. The defendant agrees that with respect to any and all dismissed charges he is not a "prevailing party" within the meaning of the "Hyde Amendment," Section 617, P.L. 105-119 (Nov. 26, 1997), and will not file any claim under that law.

The defendant further agrees to make restitution in an amount ordered by the Court in accordance 18 U.S.C. §§ 3663A and 3664, which shall be no less than \$33,816,561.75 and that the obligation to make such restitution shall be made a condition of probation, *see* 18 USC §3563(b)(2), or of supervised release, *see* 18 USC §3583(d), as the case may be.

In consideration of the foregoing and pursuant to United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") Section 6B1.4, the parties hereby stipulate to the following:

A. Offense Level

1. The November 1, 1998 Guidelines manual, as amended, applies to the instant offenses.
2. Pursuant to U.S.S.G. § 3D1.2(b), Counts One through Three are grouped together because they involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

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3. Pursuant to U.S.S.G. § 3D1.3(a), the offense level applicable to the group is determined pursuant to U.S.S.G. § 2A1.1, which provides for a base offense level of 43.
4. Because the offenses involved the intentional selection of both victims and property based on national origin, a three-level increase is appropriate pursuant to U.S.S.G. § 3A1.1(a).
5. Because the offenses were felonies that involved and were intended to promote a federal crime of terrorism, a further 12-level increase is appropriate pursuant to U.S.S.G. § 3A1.4(a).
6. Because the victims of the conspiracies included Government officials and employees, and the offenses of conviction were motivated by this status, a further three-level increase is warranted pursuant to U.S.S.G. § 3A1.2(a).
7. Assuming the defendant clearly demonstrates acceptance of responsibility, to the satisfaction of the Government, through his allocution and subsequent conduct prior to the imposition of sentence, a two-level reduction will be warranted, pursuant to U.S.S.G. § 3E1.1(a). Furthermore, assuming the defendant has accepted responsibility as described in the previous sentence, the Government will move at sentencing for an additional one-level reduction, pursuant to U.S.S.G. § 3E1.1(b), because the defendant gave timely notice of his intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial and permitting the Court to allocate its resources efficiently.

In accordance with the above, the applicable Guidelines offense level is 58.

B. Criminal History Category

Pursuant to U.S.S.G. § 3A1.4(b), the defendant's Criminal History Category is VI.

C. Sentencing Range

Based upon the calculations set forth above, the defendant's Guidelines range is life imprisonment. Because the sentence imposed on the count carrying the highest statutory maximum (*i.e.*, ten years) is less than the total recommended punishment (*i.e.*, life imprisonment), the sentence imposed on each count is to run consecutively pursuant to U.S.S.G. § 5G1.2(d). Because the total statutory maximum on Counts One, Two, and Three is 25 years, which is less than the total punishment of life recommended, the stipulated Guidelines range is 25 years (the "Stipulated Guidelines Range"). In addition, after determining the defendant's ability to pay, the Court may impose a fine pursuant to U.S.S.G. § 5E1.2. At Guidelines level 58, the applicable fine range is \$25,000 to \$250,000.

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The parties agree that neither a downward nor an upward departure from the Stipulated Guidelines Range set forth above is warranted. Accordingly, neither party will seek any departure or adjustment pursuant to the Guidelines that is not set forth herein. Nor will either party suggest that the Probation Office consider such a departure or adjustment under the Guidelines, or suggest that the Court *sua sponte* consider any such departure or adjustment.

The parties agree not to seek a sentence outside of the Stipulated Guidelines Range, suggest that the Probation Office consider a sentence outside of the Stipulated Guidelines Range, or suggest that the Court *sua sponte* consider a sentence outside of the Stipulated Guidelines Range.

The defendant further agrees to waive any defense relating to the statute of limitations that might otherwise apply to Counts One, Two, and Three of the Information.

Except as provided in any written Proffer Agreements that may have been entered into between this Office and the defendant, nothing in this Agreement limits the right of the parties (i) to present to the Probation Office or the Court any facts relevant to sentencing; (ii) to make any arguments regarding where within the Stipulated Guidelines Range (or such other range as the Court may determine) the defendant should be sentenced; (iii) to seek an appropriately adjusted Guidelines range if it is determined based upon new information that the defendant's criminal history category is different from that set forth above; and (iv) to seek an appropriately adjusted Guidelines range or mandatory minimum term of imprisonment if it is subsequently determined that the defendant qualifies as a career offender under U.S.S.G. § 4B1.1. Nothing in this Agreement limits the right of the Government to seek denial of the adjustment for acceptance of responsibility, *see* U.S.S.G. § 3E1.1, regardless of any stipulation set forth above, if the defendant fails clearly to demonstrate acceptance of responsibility, to the satisfaction of the Government, through his allocution and subsequent conduct prior to the imposition of sentence. Similarly, nothing in this Agreement limits the right of the Government to seek an enhancement for obstruction of justice, *see* U.S.S.G. § 3C1.1, regardless of any stipulation set forth above, should it be determined that the defendant has either (i) engaged in conduct, unknown to the Government at the time of the signing of this Agreement, that constitutes obstruction of justice or (ii) committed another crime after signing this Agreement.

It is understood that pursuant to U.S.S.G. § 6B1.4(d), neither the Probation Office nor the Court is bound by the above Guidelines stipulation, either as to questions of fact or as to the determination of the proper Guidelines to apply to the facts. In the event that the Probation Office or the Court contemplates any Guidelines adjustments, departures, or calculations different from those stipulated to above, or contemplates any sentence outside of the stipulated Guidelines range, the parties reserve the right to answer any inquiries and to make all appropriate arguments concerning the same.

It is understood that the sentence to be imposed upon the defendant is determined solely by the Court. It is further understood that the Guidelines are not binding on the Court. The defendant acknowledges that his entry of a guilty plea to the charged offenses authorizes the sentencing court to impose any sentence, up to and including the statutory maximum sentence.

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This Office cannot, and does not, make any promise or representation as to what sentence the defendant will receive. Moreover, it is understood that the defendant will have no right to withdraw his plea of guilty should the sentence imposed by the Court be outside the Guidelines range set forth above.

It is agreed (i) that the defendant will not file a direct appeal; nor bring a collateral challenge, including but not limited to an application under Title 28, United States Code, Section 2255 and/or Section 2241; nor seek a sentence modification pursuant to Title 18, United States Code, Section 3582(c), of any sentence at or below the Stipulated Guidelines Range of 25 years, and (ii) that the Government will not appeal any sentence at or above the Stipulated Guidelines Range. This provision is binding on the parties even if the Court employs a Guidelines analysis different from that stipulated to herein. Furthermore, it is agreed that any appeal as to the defendant's sentence that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) the above stipulation. The parties agree that this waiver applies regardless of whether the term of imprisonment is imposed to run consecutively to or concurrently with the undischarged portion of any other sentence of imprisonment that has been imposed on the defendant at the time of sentencing in this case. The defendant further agrees not to appeal any term of supervised release that is less than or equal to the statutory maximum. The defendant also agrees not to appeal any restitution amount that is less than or equal to \$33,816,561.75, and the Government agrees not to appeal any restitution amount that is greater than or equal to \$33,816,561.75.

The defendant hereby acknowledges that he has accepted this Agreement and decided to plead guilty because he is in fact guilty. By entering this plea of guilty, the defendant waives any and all right to withdraw his plea or to attack his conviction, either on direct appeal or collaterally, on the ground that the Government has failed to produce any discovery material, Jencks Act material, exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), other than information establishing the factual innocence of the defendant, and impeachment material pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), that has not already been produced as of the date of the signing of this Agreement.

The defendant recognizes that because he is not a citizen of the United States, his guilty plea and conviction make it very likely that his deportation from the United States is presumptively mandatory and that, at a minimum, he is at risk of being deported or suffering other adverse immigration consequences. The defendant acknowledges that he has discussed the possible immigration consequences (including deportation) of his guilty plea and conviction with defense counsel. The defendant affirms that he wants to plead guilty regardless of any immigration consequences that may result from the guilty plea and conviction, even if those consequences include deportation from the United States. It is agreed that the defendant will have no right to withdraw his guilty plea based on any actual or perceived adverse immigration consequences (including deportation) resulting from the guilty plea and conviction. It is further agreed that the defendant will not challenge his conviction or sentence on direct appeal, or through litigation under Title 28, United States Code, Section 2255 and/or Section 2241, on the basis of any actual or perceived adverse immigration consequences (including deportation) resulting from his guilty plea and conviction.

Mr. Patel, Ms. Kessler, and Ms. Moreno
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If the defendant is eligible and applies to transfer his sentence pursuant to the international prisoner transfer program, this Office agrees that it will take no position with respect to any such application. The defendant understands and acknowledges, however, that this Office may provide to any relevant agencies any and all information regarding the defendant, his conduct, and the offenses of conviction in connection with any such application. The defendant further understands that the transfer decision rests in the sole discretion of the Office of Enforcement Operations (“OEO”) of the Criminal Division of the United States Department of Justice. The fact that this Office takes no position is neither binding on nor determinative of the position of any federal agency other than this Office, or on the final transfer decision of OEO. The defendant further understands that, in addition to OEO, federal law and the underlying transfer treaties require that the foreign government must also approve the transfer. The defendant agrees that he will not challenge his conviction or sentence, either on direct appeal or collateral challenge, if any such application is ultimately denied.

The parties understand this Agreement reflects the unique facts of this case and circumstances of this defendant, and is not intended as precedent for other cases.

It is further agreed that should the convictions following the defendant’s pleas of guilty pursuant to this Agreement be vacated for any reason, then any prosecution that is not time-barred by the applicable statute of limitations on the date of the signing of this agreement (including any counts that the Government has agreed to dismiss at sentencing pursuant to this Agreement) may be commenced or reinstated against the defendant, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement or reinstatement of such prosecution. It is the intent of this Agreement to waive all defenses based on the statute of limitations with respect to any prosecution that is not time-barred on the date that this Agreement is signed.

It is further understood that this Agreement does not bind any federal, state, or local prosecuting authority other than this Office.

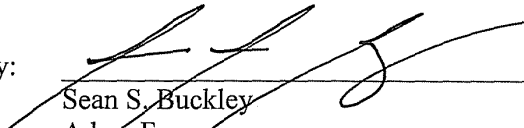
Mr. Patel, Ms. Kessler, and Ms. Moreno
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Apart from any written Proffer Agreements that may have been entered into between this Office and defendant, this Agreement supersedes any prior understandings, promises, or conditions between this Office and the defendant. No additional understandings, promises, or conditions have been entered into other than those set forth in this Agreement, and none will be entered into unless in writing and signed by all parties.

Very truly yours,

PREET BHARARA
United States Attorney

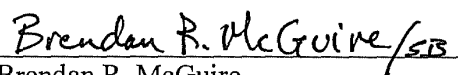
By:



Sean S. Buckley

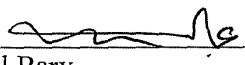
Adam Fee
Nicholas J. Lewin
Stephen J. Ritchin
Assistant United States Attorneys
(212) 637-2261 / 1589 / 2337 / 2503

APPROVED:

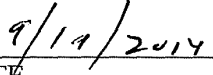


Brendan R. McGuire
Chief, Terrorism & International Narcotics

AGREED AND CONSENTED TO:




Adel Abdel Bary

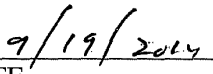


DATE

APPROVED:



Andrew G. Patel, Esq.
Attorney for Adel Abdel Bary



DATE