MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **MAJID SHOUKAT KHAN**	**AE 028N** **RULING** Defense Second Motion for Reconsideration re: Motion to Compel Production of *Brady* Material **13 September 2019**

1. BACKGROUND.

In AE 028K,[1] the Defense moves for reconsideration of AE 028C,[2] the Commission's 15 April 2019 ruling denying AE 028,[3] the Defense motion to compel discovery under *Brady v. Maryland*, 373 U.S. 83 (1963), as well as reconsideration of AE 028G,[4] the Commission's 26 June 2019 ruling denying AE 028D,[5] the first Defense Motion to Reconsider. The Defense argues,

> Here, reconsideration should be granted because controlling law has changed substantially since the Military Judge's initial ruling denying Mr. Khan's motion to compel production of Brady material (AE028C). Reconsideration is also appropriate because the Military Judge's ruling denying Mr. Khan's first motion for reconsideration is inconsistent with case law not previously briefed (AE028G). In each respect, the D.C. Circuit's recent decision in *Qassim*—which is binding on the Commission—has substantially altered the legal landscape regarding extension of the Due Process Clause to Guantanamo, and confirms Mr. Khan's right to production of Brady material pursuant to the Fifth Amendment of the Constitution.[6]

The Government response urged denial,

> Contrary to Defense assertions, the decision of the U.S. Court of Appeals for the District of Columbia Circuit ("Court of Appeals") in *Qassim v. Trump*, 927 F.3d 522 (D.C. Cir. 2019) does not "confirm[] [the Accused's] right to production of

[1] AE 028K, Defense Second Motion to Reconsider Orders Denying Motion to Compel Production of *Brady* Material, filed 8 August 2019.
[2] AE 028C, RULING, Defense Motion to Compel Production of *Brady* Material, dated 15 April 2019.
[3] AE 028, Defense Motion to Compel Production of *Brady* Material, filed 25 February 2019.
[4] AE 028G, RULING, Defense Motion for Reconsideration of AE 028C Denying Motion to Compel Production of *Brady* Material, dated 26 June 2019.
[5] AE 028D, Motion for Reconsideration of AE 028C, filed 18 July 2019.
[6] AE 028K at 4.

> Brady material pursuant to the Fifth Amendment of the Constitution." AE 028K at 4. *Qassim* merely observes that "Circuit precedent leaves open and unresolved the question of what constitutional procedural protections apply to the adjudication of detainee habeas corpus petitions and where those rights are housed in the Constitution (the Fifth Amendment's Due Process Clause, the Suspension Clause, both, or elsewhere)." *Qassim*, 927 F.3d at 530.[7]

The Defense replied.[8] The Defense requested oral argument[9]; the Government opposed.[10] Rule for Military Commissions (R.M.C.) 905(h) provides that the decision to grant oral argument is within the sole discretion of the Military Judge. In this instance, the Commission finds oral argument is not necessary to the Commission's consideration of the issues presented. The Defense request for oral argument on the motion is **DENIED.**

2. ANALYSIS.

a. "There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *see also Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987) ("Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance." (citation omitted)); *United States v. Evanchik*, 413 F.2d 950, 953 (2d Cir. 1969) ("Neither [*Brady*] nor any other case requires the government to afford a criminal defendant a general right of discovery."). "[T]he Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . ." *Weatherford*, 429 U.S. at 559 (quoting *Wardius v. Oregon*, 412 U.S. 470, 474 (1973); *but see* 429 U.S. at 562 (Marshall, J., dissenting)).

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[7] AE 028L, Government Response to Defense Second Motion for Reconsideration of Orders Denying Motion to Compel Production of Brady Material, filed 22 August 2019, at 1.
[8] AE 028M, Defense Reply to Second Motion for Reconsideration of Orders Denying Motion to Compel Production of Brady Material, filed 29 August 2019.
[9] AE 028K at 7.
[10] AE 028L at 10.

b. Pretrial discovery "is not and never was [ ] 'intended to provide the defendant with access to the entirety of the government's case against him.'" *United States v. Scully*, 108 F. Supp. 3d 59, 123 (E.D.N.Y. 2015) (citing *United States v. Percevault*, 490 F.2d 126, 130 (2d Cir. 1974)). Discovery of evidence in criminal prosecutions "does not entitle a criminal defendant to a broad and blind fishing expedition among [items] possessed by the Government on the chance that something impeaching might turn up." *Sully*, 108 F. Supp. 3d at 123 (internal citation omitted); *see also Jencks v. United States*, 353 U.S. 657, 667 (1957) (quoting *Gordon v. United States*, 344 U.S. 414, 419 (1953)).

c. "Of course, the more information the defendant has, the more aware he is of the likely consequences of a plea, waiver, or decision, and the wiser that decision will likely be. But the Constitution does not require the prosecutor to share all useful information with the defendant." *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (citing *Weatherford*, 429 U.S. at 559). "And the law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply in general in the circumstances—even though the defendant may not know the specific detailed consequences of invoking it." *Id.* at 629. The Constitution permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor. *Id.* at 630 (citing *Brady v. United States*, 397 U.S. 742, 757 (1970) (defendant "misapprehended the quality of the State's case")).

> The criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.

Middendorf v. Henry, 425 U.S. 25, 48 (1976) (citing *McMann v. Richardson*, 397 U.S. 759, 769 (1970); *McGautha v. California*, 402 U.S. 183, 213 (1971)) (internal citations omitted).

d. The Commission's reading of *Qassim v. Trump* is consistent with the Government's reading. The Commission reads *Qassim v. Trump* for the proposition that "Circuit precedent leaves open and unresolved the question of what constitutional procedural protections apply to the adjudication of detainee habeas corpus petitions, and where those rights are housed in the Constitution (the Fifth Amendment's Due Process Clause, the Suspension Clause, both, or elsewhere)." 927 F.3d 522, 530 (D.C. Cir. 2019). This is much more limited and circumspect than the Defense's expansive reading. The Commission declines, yet again, to define what constitutional rights extend to this Accused in this military commission as it has already determined the Accused waived *all Brady* claims with his waiver of R.M.C. 701(e). The Accused, while represented by at least three counsel, knowingly and voluntarily waived discovery, except as required by R.M.C. 701(b)(l) and R.M.C. 701(d), in order to obtain the benefits of his PTA. AE 012 at 3, para. 12. The Commission finds this determination is not clearly erroneous.

e. The Commission applies constitutional principles. *See* AE 028C at 3. It is elementary that "a fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). "Neither *Mathews v. Eldridge*, nor *Medina v. California*, provides a due process analysis that is appropriate to the military context, in which judicial deference to Congress" is greatest. *Weiss v. United States*, 510 U.S. 163, 164 (1994) (internal citations omitted). The Supreme Court has held the appropriate standard is whether the factors at issue are so "extraordinarily weighty" "as to overcome the balance struck by Congress." *Middendorf*, 425 U.S. at 44; *Weiss*, 510 U.S. at 179.

f. "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings." *Weiss*, 510 U.S. at 176–77; *see Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). The specific rights afforded by due process "depends upon an analysis of the interests of the individual and those of the regime to which he is subject." *Middendorf*, 425 U.S. at 43 (citing *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974)). In considering due process claims in the military context, courts "must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, § 8." *Id.*; *Rostker*, 453 U.S. at 66; *see also Parker v. Levy*, 417 U.S. 733, 756 (1974); *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Lichter v. United States*, 334 U.S. 742, 755 (1948). "[T]he tests and limitations [of due process] to be applied may differ because of the military context." *Rostker*, 453 U.S. at 67; *see also Chappell v. Wallace*, 462 U.S. 296, 301 (1983). "[T]he applicable provisions of the UCMJ, and corresponding regulations . . . satisfy the Due Process Clause." *Weiss*, 510 U.S. at 179. "We of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice." *Rostker*, 453 U.S. at 67.

3. RULING.

The Commission has reconsidered its previous two rulings[11] on the Defense Motion to Compel *Brady* Material in Light of *Qassim v. Trump*. The Defense's various requests for relief in AE 028K and AE 028M are **DENIED**.

So **ORDERED** this 13th day of September 2019.

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DOUGLAS K. WATKINS
COL, JA, USA
Military Judge

[11] *See* AE 028C and AE 028G.