

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

UNITED STATES OF AMERICA**v.****MAJID SHOUKAT KHAN****AE 030M****ORDER****Defense Motion to Compel
Production of Witnesses****17 May 2019**

1. In AE 030 the Defense requested “the Military Judge order production of the 29 individuals identified as Witnesses #1, 2, 6-11, 14, 17, 27, 31-33, 40, 42, 44, 47-49, 53, 54, 63, 66, 67, 73-75, and 85 [hereinafter Defense Witness Request # (DWR #) unless referred to by name] in the Defense’s request for production that was served on the Prosecution on January 2, 2019” and included in the Defense motion [REDACTED]. The Defense further requested “the Military Judge order the Prosecution to meet and confer in good faith with the Defense as to each of the Defense’s other requested witnesses.”¹ The Government responded² requesting the motion be denied as the “Defense failed to meet its burden of establishing the vast majority of their requested witnesses were relevant and necessary for production on sentencing” and had “failed to comply with the minimal requirements under Rules for Military Commissions (R.M.C.s) 1001(e) and 703.”³ The Government further explained they had agreed to produce seven (7) of the 110 originally requested witnesses and were willing to enter into stipulations concerning information the denied witnesses might have testified. The Defense replied in AE 030B.⁴ In a series of pleadings and orders the Commission initially ruled the parties would refer to all defense requested

¹ AE 030, Defense Motion to Compel Production of Witnesses, filed 28 February 2019 at 1-2.

² AE 030A, Government Response to Defense Motion to Compel Production of Witnesses, filed 14 March 2019.

³ *Id.* at 1.

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

witnesses by DWR#. Following a Military Commission Rule of Evidence (M.C.R.E.) 505(h) session and the submission of a Government motion to amend the original order, the restriction was limited to 14 of the 29 requested witnesses.⁵ The motion was argued in open and closed sessions on 1 and 3 April 2019.⁶

2. The rules for the production of Defense requested witnesses are clearly set forth in R.M.C. 703(c)(2) and 1001(e). R.M.C. 703(c)(2) requires the Defense to set forth for each witness requested the following information: “the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence, a synopsis of the testimony that it is expected the witness will give, and the reasons why the witness’ personal appearance will be necessary under the standards set forth in R.M.C. 1001(e).” R.M.C. 1001(e)(2) authorizes the production of witnesses for in court testimony if five (5) conditions are satisfied. The five conditions are:

(1) The testimony expected to be offered by the witness is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence, including evidence necessary to resolve an alleged inaccuracy or dispute as to a material fact;

(2) The weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence;

(3) The other party refuses to enter into a stipulation of fact containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation of fact would be an insufficient substitute for the testimony;

(4) Other forms of evidence, such as oral depositions, written interrogatories, telephonic testimony, two-way video teleconference or other similar technology, or former testimony would not be sufficient to meet the needs of the military commission

⁵ See generally AE 030C, Government Motion for Substitutions Pursuant to M.C.R.E. 505 and Other Appropriate Relief, filed 27 March 2019; AE 030D, Defense Response to Government Unclassified Notice of Ex Parte, In Camera, Under Seal Classified Filing, filed 28 March 2019; AE 030E, RULING, Government Motion (AE 030C) for Substitutions Pursuant to M.C.R.E. 505 and Other Appropriate Relief, dated 2 April 2019; AE 030F, SUPPLEMENTAL RULING Government Motion (AE 030C) for Substitutions Pursuant to M.C.R.E. 505 and Other Appropriate Relief, dated 3 April 2019; AE 030G, Government Request of the Commission to amend AE 030E and AE 030F, dated 18 April 2019; and AE 030H, RULING, Government Request for the Commission to Amend AE 030E and AE 030F, dated 22 April 2019.

⁶ See Unofficial/Unauthenticated Transcript of the *U.S. v. Majid Shoukat Khan* Open Motions Hearing dated 1 April 2019 from 1:28 P.M. to 4:02 P.M. at pp. 303–338 (hereinafter Open Transcript) and the Unauthenticated Transcript of the *U.S. v. Majid Shoukat Khan* Motions Closed Motions Hearing dated 1 April 2019 at pp. 346–418 (hereinafter Closed Transcript).

in the determination of an appropriate sentence; and

(5) The significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production of the witness. Factors to be considered include the costs of producing the witness, the timing of the request for production of the witness, the potential delay in the presentencing proceeding that may be caused by the production of the witness, and the likelihood of significant interference with intelligence activities, military operations or deployments, mission accomplishment, or essential training.

3. The Commission has reviewed the Defense request against these standards and makes a determination as to each witness, noting as appropriate when the Parties have reached an agreement on production or an alternative form of presentation of the information. The Commission makes the following findings and **ORDERS**:

DWR #1, [REDACTED] The Commission finds the Defense has satisfied the requirements of R.M.C. 703(c)(2) and 1001(e). The Government will produce the witness for live testimony at U.S. Naval Station Guantanamo Bay, Cuba. The Defense request for personal production of this witness is **GRANTED**.

DWR #2, [REDACTED] The Commission finds the Defense has satisfied the requirements of R.M.C. 703(c)(2), but not the requirements of R.M.C. 1001(e)(1)(D) and (E) as the practical difficulty of arranging travel for this witness from his home in Pakistan, first to the United States, and then to U.S. Naval Station Guantanamo Bay, Cuba, outweighs the significance of personal appearance. Because the Commission finds Mr [REDACTED] testimony to be relevant and necessary to the panel's determination of an appropriate sentence and the requirements of R.M.C. 703 are otherwise satisfied, the Government is directed to arrange for the presentation of his testimony via video teleconference from an appropriate location in Pakistan. The Defense request for personal production of this witness is **DENIED**, but appearance by video teleconference is **GRANTED**.

DWR #6, [REDACTED] The Commission finds the Defense has satisfied the requirements of R.M.C. 703(c)(2) and 1001(e). The Government will produce the witness for live testimony at U.S. Naval Station Guantanamo Bay, Cuba. The Defense request for personal production of this witness is **GRANTED**.

DWR #7, [REDACTED] The Commission finds the Defense has satisfied the requirements of R.M.C. 703(c)(2) and 1001(e). If [REDACTED] is medically cleared to travel to U.S. Naval Station Guantanamo Bay, Cuba, the Government will produce the witness for live testimony at U.S. Naval Station Guantanamo Bay, Cuba. If [REDACTED] is not medically cleared to travel to U.S. Naval Station Guantanamo Bay, Cuba, the Government will arrange for the presentation of her testimony via video teleconference from the Office of Military Commission video teleconference suite at the Mark Center. The Defense request for personal production of this witness is **GRANTED**, conditioned on her medical status.

DWR #8, [REDACTED] The Commission finds the Defense has satisfied the requirements of R.M.C. 703(c)(2) and 1001(e). If [REDACTED] is medically cleared to travel to U.S. Naval Station Guantanamo Bay, Cuba, the Government will produce the witness for live testimony at U.S. Naval Station Guantanamo Bay, Cuba. If [REDACTED] is not medically cleared to travel to U.S. Naval Station Guantanamo Bay, Cuba, the Government, as it previously agreed to do, will arrange for the presentation of his testimony via video teleconference from the Office of Military Commission video teleconference suite at the Mark Center.⁷ The Defense request for personal production of this witness is **GRANTED**, conditioned on his medical status.

⁷ The Commission observes the Government manages to arrange for the movement of numerous media representatives, non-governmental organization representatives, other observers, and Victim Family Members to observe military commission proceedings. Thus, the argument of security concerns associated with the Accused's U.S. resident family members is of little merit.

DWR #9, [REDACTED] and DWR #10, [REDACTED] The Commission finds the Defense has satisfied the requirements of R.M.C. 703(c)(2) and 1001(e). The Commission finds their testimony as the wife and only child of the Accused to be more relevant than the testimony of DWR #2, [REDACTED] the Accused's brother. The Government is directed to produce DWR #9, [REDACTED] and DWR #10, [REDACTED] for live testimony at U.S. Naval Station Guantanamo Bay, Cuba. The Defense request for personal production of these witnesses is **GRANTED**.

DWR #11, [REDACTED] The Commission defers ruling on the Defense request as there is a substantial disagreement between the Defense proffer and the Prosecution proffer concerning what the witness would testify to if called to testify.

ORDER: Not later than 30 May 2019, the Defense will secure an affidavit from Ms. [REDACTED] as to what she would testify to at trial if called to testify and file it with the Commission as a supplemental pleading to AE 030. The Defense request for personal production of this witness is **DEFERED** pending the Commission's receipt of the affidavit from Ms. [REDACTED]

DWR #13, FBI Special Agent (SA) [REDACTED] The Government agreed to produce SA [REDACTED] for in-court testimony.⁸ The Defense request for personal production of this witness is **GRANTED**.

DWR #15, FBI SA [REDACTED] The Government agreed to produce SA [REDACTED] for in-court testimony.⁹ The Defense request for personal production of this witness is **GRANTED**.

⁸ See AE 030A at pg. 17.

⁹ See Open Transcript at pg. 307.

DWR #17, FBI SA [REDACTED] The Parties agreed to the introduction of some sort of stipulated or substituted testimony in lieu of in-court testimony.¹⁰ Thus, the request for personal production of this witness is **DENIED**.

DWR #21, FBI SA [REDACTED] The Government agreed to produce SA [REDACTED] for in-court testimony.¹¹ The Defense request for personal production of this witness is **GRANTED**.

DWR #27, Captain Thomas J. Welsh, USN, JAGC. The Commission finds the Defense has satisfied the requirements of R.M.C. 703(c)(2) and 1001(e). The Government will produce the witness for live testimony at U.S. Naval Station Guantanamo Bay, Cuba. The Defense request for personal production of this witness is **GRANTED**.

DWRs #28, 29, and 30, Joint Detention Group and Camp VII Officials. The Government agreed to produce appropriate officials for in-court testimony who can “address information regarding the Accused’s conduct during detention and his interaction with the guard force, i.e., the information desired from the requested individuals.”¹² **ORDER:** The Government will produce the agreed upon Joint Detention Group and Camp VII officials for live in-court testimony. The Defense request for personal production of these witnesses is **GRANTED**.

DWR #31, Senior Medical Officer, Joint Task Force Guantanamo. The Commission finds the Defense has satisfied the requirements of R.M.C. 703(c)(2) and R.M.C. 1001(e). The Commission further finds this witness would be a fact witness and not an expert witness. The witness would be a medical professional who has access to the Accused’s medical records and the Accused and can provide a factual rendition of the Accused’s medical conditions. The

¹⁰ See Open Transcript at pp. 307–308.

¹¹ See Open Transcript at pg. 307.

¹² AE 030A at 17.

Government will produce the witness for live testimony at U.S. Naval Station Guantanamo Bay, Cuba. The Defense request for personal production of this witness is **GRANTED**.

DWR #32, Dr. [REDACTED] The Accused and the Convening Authority agreed on the production of two (2) expert witnesses. Dr. [REDACTED] is the first expert requested by the Defense. The Commission directs his production for live testimony at U.S. Naval Station Guantanamo Bay, Cuba. The Defense request for personal production of this witness is **GRANTED**.

DWR #33, Mr. Steven Kleinman. The Accused and the Convening Authority agreed on the production of two (2) expert witnesses. Mr. Kleinman is the second expert requested by the Defense. The Commission directed the Convening Authority in AE 026E¹³ to either retain Mr. Kleinman to assist the Khan Defense Team or in the alternative retain a qualified substitute as an expert in the field of interrogation and detention. The Commission expects this order to be carried out in time for the sentencing hearing and directs the production of Mr. Kleinman or a qualified replacement for live testimony at U.S. Naval Station Guantanamo Bay, Cuba. The Defense request for personal production of this witness or a qualified substitute is **GRANTED**.

DWRs #40, 42, 47, 48, 49, 53, 54, 63, 73, 74, 75, and 85. As to each of these witnesses, the Commission finds the Defense has not satisfied the requirements of R.M.C. 703(c)(2) and 1001(e). The Defense's proffer was based upon their described extensive research of open source materials from a variety of sources and not on the Defense Team's personal knowledge and/or interaction with the witnesses. Additionally, part of the justification for the presentation of live, in-court testimony was to demonstrate some of the witnesses' hostility in court, which is not only not a recognized justification for the production of a witness, but is also a further indication that

¹³ AE 026E, ORDER, Defense Motion to Compel Appointment and Funding of Expert Consultant (Mr. Steven Kleinman), dated 15 February 2019.

the proffers are not based on what the witnesses will actually testify to in the Commission. The Defense motion to compel the in-court or video teleconference testimony of these witnesses is **DENIED**.¹⁴

DWRs #66 and 67. The Parties agreed to utilize an alternative form of testimony or some sort of stipulation to submit the information from these Defense Witnesses to the panel. Thus, the Defense request for personal production of these witnesses is **DENIED**.

4. The Defense request for an order directing the Prosecution to meet and confer in good faith as to the other Defense requested witnesses is **DENIED**.

So **ORDERED** this 17th day of May, 2019.

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DOUGLAS K. WATKINS
COL, JA, USA
Military Judge

¹⁴ The Commission notes the Government agreed pursuant to R.M.C. 1001(e)(2)(C) to enter into some sort of stipulation as to the information the Defense asserts these individuals might provide based on their research of open source materials. The Commission encourages the Defense to confer with the Government on this matter as the Commission recognizes the manner in which the Accused was treated between the time he was detained and the time he was transferred to the custody and control of the Department of Defense could be relevant to the panel's determination of an appropriate sentence. (See AE 030A, pg. 27.)