

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

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>MAJID SHOUKAT KHAN</p>	<p>AE 047O</p> <p>RULING</p> <p>Government Motion to Reconsider AE 047K</p> <p>18 February 2021</p>
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1. BACKGROUND:

a. On 26 March 2020, the Defense filed AE 047,¹ a Motion for Appropriate Relief to regulate government discovery regarding alleged conflicts of interest involving Mr. Reismeier as the Convening Authority (CA). Subsequently on 17 April 2020, Mr. Reismeier’s appointment as the CA was revoked. *See* AE 047C.² In AE 047E³ and AE 047F,⁴ the Parties argued whether the original motion, AE 047, had been rendered moot by that revocation. Additional procedural background and factual findings outlined in the Commission’s ruling in AE 047K are hereby incorporated by reference.⁵

b. The Commission held a motions hearing session at Naval Station Guantanamo Bay, Cuba, (NSGB) 19–21 November 2019; the motion was discussed on the record on 19 November

¹ AE 047, Defense Motion for Appropriate Relief to Regulate Government Discovery, filed 26 March 2020. *See also* AE 047A, Government Response to Defense Motion for Appropriate Relief to Regulate Government Discovery, filed 9 April 2020; AE 047B, Defense Reply to Motion for Appropriate Relief to Regulate Government Discovery, filed 16 April 2020.

² AE 047C, Government Notice Regarding Designation of New Convening Authority for Military Commissions, filed 21 April 2020.

³ AE 047E, Defense Brief Regarding Whether AE 047 Is Moot, filed 7 May 2020.

⁴ AE 047F, Government Brief in Response to AE 047D, filed 7 May 2020.

⁵ AE 047K, Order, Defense Motion for Appropriate Relief, dated 13 July 2020, at 1-7.

2019.⁶ At another NSGB session from 25–27 February 2020, the Commission heard Mr. Reismeier’s testimony as well as oral argument on the motion.⁷

c. On 23 December 2020, the Government moved⁸ for the Military Judge to partially reconsider the ruling in AE 047K.⁹ The Government requests that the Commission reconsider that part of its ruling relating to imposition of sanctions against the Government for discovery violations. Specifically, the Government requests that the Commission reconsider (1) its findings that the Government failed to satisfy its discovery obligations; and (2) its order awarding one year of confinement credit against the Accused’s sentence. AE 047L at 1. The Defense opposes the motion.¹⁰

2. STANDARD OF REVIEW:

A military judge may reconsider a decision at any time prior to authentication of the record of trial. Rule for Military Commissions (R.M.C.) 905(f). As the moving party, the Government bears the burden of establishing that it is entitled to the relief it seeks. R.M.C. 905(c)(1)–(2). A motion for reconsideration “is discretionary and need not be granted unless the [trial] court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” *Foster v. Sedgwick Claims Mgmt. Servs., Inc.*, 842 F.3d 721, 735 (D.C. Cir. 2016); *United States v. Booker*, 613 F.Supp.2d 32, 34 (D.D.C. 2009) (citing *United States v. Ferguson*, 574 F.Supp.2d 111, 113 (D.D.C. 2008); *United States v. Libby*, 429 F.Supp.2d 46, 47 (D.D.C. 2006)). A trial “court

⁶ See Unofficial/Unauthenticated Transcript of the *US v Khan* Motions Hearing Dated 19 November 2019 from 1:00 P.M. to 3:33 P.M. at pp. 436–54; AE 047K at 5.

⁷ See Transcript dated 25 February 2020 from 9:02 A.M. to 3:28 P.M.; 26 February 2020 from 10:02 A.M. to 11:47 A.M.; pp. 566–814.

⁸ AE 047L, Government Motion for Partial Reconsideration of AE 047K, Order, filed 23 December 2020.

⁹ AE 047K, ORDER, Defense Motion for Appropriate Relief, dated 13 July 2020.

¹⁰ AE 047M, Defense Response to Government Motion for Partial Reconsideration of AE 047K, Ruling, filed 6 January 2021. The Government replied (AE 047N, Government Reply to Defense Response to Government Motion For Partial Reconsideration of AE 0347K, filed 13 January 2021).

should not grant a motion for reconsideration unless the moving party shows new facts or clear errors of law which compel the court to change its prior position.” *Nat’l Ctr. for Mfg. Scis. v. Dep’t of Def.*, 199 F.3d 507, 511 (D.C. Cir. 2000). “When a party first argues an unavailing theory ... and then attempts to argue an alternative or contrary position in a motion for reconsideration, this constitutes neither new evidence nor a clear error of law sufficient to support a motion for reconsideration.” *Foster*, 842 F.3d at 735.

3. ANALYSIS:

a. “Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence provided in regulations prescribed by the Secretary of Defense.” 10 U.S.C. § 949j. This statute is implemented in R.M.C. 701, which provides for the regulation of discovery—including the sanctioning of violations—by the military judge. R.M.C. 701(a)(3), 701(l). “Where a remedy must be fashioned for a violation of a discovery mandate, the facts of each case must be individually evaluated,” including the nature, magnitude, and consistency of the discovery violations, as well as resulting delay. *United States v. Stellato*, 74 M.J. 473, 488-89 (C.A.A.F. 2015) (quoting *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993)).

b. The Commission appropriately cited applicable law, considered the specific facts and circumstances at issue, and made a reasoned determination that sanctions were warranted.

c. The Government has not met the burden to establish it is entitled to the relief sought. The Government has not shown either an intervening change of controlling law, new evidence, or the need to correct a clear error or prevent manifest injustice.

4. RULING:

a. The motion to reconsider as set forth in AE 047L is **DENIED**.

b. The Commission's Order as set forth in AE 047K, para. 5(b), is **HEREBY**

CORRECTED as follows:

It is **HEREBY ORDERED** that the Accused will be credited with one year of confinement against the sentence to confinement as a sanction for the Government's discovery violations.¹¹

So **ORDERED** this 18th day of February, 2021.

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DOUGLAS K. WATKINS
COL, JA, USA
Military Judge

¹¹ In reviewing the ruling at AE 047K as part of the Prosecution's reconsideration motion, the Commission realized its original order on the sentence credit was either unclear or incorrect. The Convening Authority is not able to change or grant sentence credit against an approved sentence. It is the Commission's intention that the Convening Authority determine the appropriate sentence based on the terms of the pretrial agreement and appendix without respect to the discovery sanction. Once that determination is made, then the Convening Authority will apply the one-year sentence credit ordered in AE 047K and this ruling in approving the sentence.