MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI	**AE 079A** **Government Response** to Defense Motion to Compel Discovery of Sixteenth Supplemental Request for Discovery Dated 25 January 2017 14 April 2017

1. Timeliness

This Response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.d.(1).

2. Relief Sought

The Government respectfully requests that the Commission deny AE 079, Defense Motion to Compel Discovery of Sixteenth Supplemental Request for Discovery Dated 25 January 2017 (”Defense Motion”).

3. Overview

In its Motion, the Defense requests that the Commission issue an order to “compel discovery contained within the Defense Sixteenth Supplemental Request for discovery dated 25 January 2017.” AE 079 at 1. The Defense submitted its “Sixteenth Supplemental Request for Discovery ICO *United Stated v. Abd Al Hadi Al-Iraqi*” (“Sixteenth Supplemental Request”) on 25 January 2017. AE 079, Attachment B. In it, the Defense requests that the Government respond to 50 overly broad categories of information. *See id.* The Government has to date produced over 51,000 pages of discovery to the Defense. Based upon the Government’s interpretation of what the Defense is requesting in its overly broad requests, the Government

believes that any discoverable information the Defense requests has already been produced as part of the over 51,000 pages.

The Government understands its discovery obligations and will continue to comply with the specific and substantial discovery requirements set forth in the Military Commissions Act ("M.C.A"), 10 U.S.C. §§ 948a *et seq*., and other rules. *See* 10 U.S.C. § 949j; Rules for Military Commissions ("R.M.C.") 701 & 703. Any relevant and responsive information in the possession, custody, or control of the Government has been, or will be, produced in accordance with the applicable discovery rules. If the Defense believes that it has not yet received a particular piece of discovery that it feels entitled to, the Defense should submit a supplemental discovery request that clarifies, with specificity, exactly what information it is seeking. The Defense's Motion should be denied because the Defense fails to argue for the materiality of specifically identified information, and based on the Defense's broad requests, the Government believes that it has already produced any discoverable information, either directly to the Defense or through the Military Commission Rule of Evidence ("M.C.R.E.") 505 process.

4. Burden of proof

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

5. Facts

On 11 June 2014, the Defense submitted a 19-page general request for discovery to the Government. The Government responded categorically and substantially to that request on 14 July 2014. Government Response to 11 June 2014 Request for Discovery ICO *United States v. Abd Al Hadi Al-Iraqi* (14 July 2014). To date, the Government has produced approximately

51,000 pages of discovery, and it expects to produce additional discovery pursuant to M.C.R.E. 505.

On 30 March 2017, the Defense conferenced the Defense's Motion, stating the motion would request "that the Commission compel the Government *to respond* to the Defense's Sixteenth Supplemental Discovery Request." AE 079, Attachment C (emphasis added). The Defense filed its Motion on 31 March 2017. *Id.*, Attachement A. In it, the Defense requests that the Commission issue an order to "compel discovery contained within the Defense Sixteenth Supplemental Request for discovery dated 25 January 2017."[1] *Id.* at 1.

6. Law and Argument

I. The Government's Discovery Obligations Generally

It is the responsibility of Government trial counsel in all criminal prosecutions to review and determine what information is discoverable to the Defense. *See* R.M.C. 701(b)-(c); *United States v. Briggs*, 48 M.J. 143 (C.A.A.F. 1998); *United States v. Brooks*, 966 F.2d 1500 (D.C. Cir. 1992); *United States v. Simmons*, 38 M.J. 376 (C.M.A. 1993). The Government must produce information that is "material to the preparation of the defense" when the information is "within the possession, custody, or control of the Government" and "the existence of which is known or by the exercise of due diligence may become known to trial counsel." R.M.C. 701(c). Further,

[1] In the Relief Sought section of the Defense's Motion, the Defense requests that the Commission "compel production of [the] Defense Sixteenth Supplemental Discovery Request dated 25 January 2017." AE 079 at 1. The first sentence of the Overview section, the very next line of the Defense's Motion, however, states that "[the Accused] files this motion to compel discovery contained within the Defense Sixteenth Supplemental Request for discovery dated 25 January 2017. *Id.* Although the Defense's conferencing email and Relief Sought section of its Motion create potential confusion with regards to what relief the Defense is actually seeking, the Government, relying on context and the Defense's request in the Overview section of its Motion, understands that the Defense is seeking an order compelling the Government to produce the *information requested in* the Sixteenth Supplemental Request, not merely a response to its discovery request or the request itself. *See* AE 079 at 3-16.

the Government must produce all exculpatory evidence that reasonably tends to (a) negate the guilt of the accused, (b) reduce the degree of guilt of the accused, or (c) reduce the punishment. R.M.C. 701(e)(1); *see Brady v. Maryland*, 373 U.S. 83, 88 (1963).

Information that is favorable to the Defense includes evidence that "would tend to exculpate [the defendant]," but the Government's obligations are not unbounded. *Brady*, 373 U.S. at 88; *see also United States v. Sampson*, 820 F. Supp. 2d 202, 232 (D. Mass. 2011) (finding no *Brady* violation where statements "were disclosed in substance" even though unabridged statements were more "graphic" and "embellished"); *United States v. Bland*, 432 F.2d 96, 97 (5th Cir. 1970) (per curiam) (holding that *Brady* does not require disclosure of information consisting only of "a refinement of facts already possessed by" the defendant), *cert. denied*, 401 U.S. 912 (1971). Additionally, the sought after information must have a logical relationship to the issues (relevance) *and* have a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different" (materiality). *United States v. Bagley*, 473 U.S. 667, 682 (1985). With respect to materiality, it is not determined in a vacuum, but rather depends on "the logical relationship between the information and the issues in the case, but also the importance of the information in light of the evidence as a whole." *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 125 (2d Cir. 2008) (citation omitted).

Brady's "purpose is not to displace the adversary system . . . [rather, the prosecution must] disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *Bagley*, 473 U.S. at 675. To this end, the Government is not obligated to open its files to the Defense—but instead a "prosecutor's decision on disclosure is final" unless the Defense requests a specific item "directly from the court, and argue[s] in favor of its

materiality." *Pennsylvania v. Ritchie*, 480 U.S. 39, 59-60 (1987). Moreover, the Supreme Court has also noted that although "the eye of an advocate may be helpful to a defendant in ferreting out information," "[u]nless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the [Government]'s files to argue relevance." *Id.* at 59.

II. Procedures that Guide the Classified Discovery Process in Military Commissions

The M.C.A. codifies procedures similar to those of the Classified Information Procedures Act ("CIPA") (18 U.S.C. Appendix §§ 1-16) that apply to the discovery of classified material.[2] Specifically, the M.C.A. states, "Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security." 10 U.S.C. § 949p-1(a); M.C.R.E. 505(a). "Under no circumstances may a military judge order the release of classified information to any person not authorized to receive such information." 10 U.S.C. § 949p-1(a); M.C.R.E. 505(a). Moreover, the Commission may not authorize the discovery of classified information unless it determines that such information would be noncumulative, relevant, and helpful to (i) a legally cognizable defense, (ii) rebuttal of the prosecution's case, or (iii) sentencing.[3] 10 U.S.C. § 949p-4(a)(2); M.C.R.E. 505(f)(1)(B).

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[2] The judicial construction of CIPA is authoritative in the interpretation of 10 U.S.C. § 949p, unless explicitly contradicted. *See* 10 U.S.C. § 949p-1(d). Any attempted "broadside challenge to the *in camera* and *ex parte* proceedings [pursuant to CIPA] is a battle already lost in the federal courts." *United States v. Sedaghaty*, 728 F.3d 885, 908 (9th Cir. 2013).

[3] The determination whether to classify information, and the proper classification thereof, is a matter committed solely to the Executive Branch. *See* M.C.R.E. 505(f), Discussion (stating the military judge should not conduct *de novo* review of the classification; rather, the military judge should determine "that the material in question has been classified by the proper authorities in accordance with appropriate regulations."). Courts consistently have recognized the principle

While *Brady* still governs the Government's discovery obligations with respect to classified information, the M.C.A. and Manual for Military Commissions affords the Government flexibility to ensure that it can protect classified information from unnecessary disclosure while providing discovery to the Defense that is actually relevant and helpful to the defense. 10 U.S.C. § 949p-4(a)(2); M.C.R.E. 505(f)(1)(B); *see also United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) ("[C]lassified information is not discoverable on a mere showing of theoretical relevance . . . ."); *United States v. Mejia*, 448 F.3d 436 (D.C. Cir. 2006) (applying *Yunis*); R.M.C. 701(c), Discussion (citing *Yunis* to define what information is material to the preparation of the defense); *Roviaro v. United States*, 353 U.S. 53, 63-64 (1957). Where the Commission authorizes the discovery of classified information, the M.C.A. allows the Government to produce substitutions, summaries, or statements admitting relevant facts, instead of disclosing specific items of classified information, so long as the Accused would have substantially the same ability to make his defense as if he were provided discovery of the underlying classified information. 10 U.S.C. § 949p-4; M.C.R.E. 505(f). The Government is not required to produce entire classified documents, in un-redacted form, even to cleared Defense counsel and can provide "desiccated statements of material fact" lacking the "evidentiary richness and narrative integrity" of the originals. *United States v. Rezaq* 134 F.3d 1121, 1142 (D.C. Cir 1998) (citing *Old Chief v. United States*, 519 U.S. 172, 183 (1997)); *see also* 10 U.S.C. § 949p-1; *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d at 124-25. Additionally, the Government is not required to produce "cumulative information already

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that neither an accused nor the courts can challenge the classification of information. *United States v. Smith*, 750 F.2d 1215, 1217 (4th Cir. 1984).

provided to [the Accused] in the course of discovery . . . ." *United States v. Abu-Jihaad*, 630 F.3d 102, 142 (2d Cir. 2010).

III. The Commission Should Deny the Motion to Compel Because the Government Has Conducted an Extensive Search and the Defense Has Failed to Argue for the Materiality of Any Specific Documents

The Government has conducted a thorough search for potentially discoverable material using methods reasonably calculated to produce discoverable documents. *See generally Garcia v. U.S. Dep't of Justice Office of Info. & Privacy*, 181 F. Supp. 2d 356, 366 (S.D.N.Y. 2002). Such searches are presumed to have been performed in good faith, and the Government has taken voluntary steps to ensure the thoroughness of agency searches. AE 057D; *see also Boehm v. F.B.I.*, 948 F. Supp. 2d 9, 24 (D.D.C. 2013). This assertion is unambiguous, unrebutted, and entitled to great deference. *See generally Ritchie*, 480 U.S. at 59 (stating "unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final").

Some of the information responsive to the Sixteenth Supplemental Request is classified, requiring the Government to take all steps necessary to ensure any disclosure adequately protects the national security—as explicitly mandated by 10 U.S.C. § 949p-1(a)—including utilizing the procedures of 10 U.S.C. § 949p-4(b) and M.C.R.E. 505. In fulfilling its ongoing discovery obligations, the Government has filed motions for summaries, substitutions, or other relief pursuant to M.C.R.E. 505(f)(2). If the Commission determines that the Government's proposed summaries or substitutes are adequate, the Government will produce the discoverable information to the Defense in addition to the already-provided classified and unclassified information that the Government believes falls within the Defense's 50 overly broad requests.

The Defense relies, in part, on *United States v. Lloyd* for the proposition that information is material for discovery purposes "as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." AE 079 at 5 (citing *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993). Unlike the Defense in this case, the defense in *Lloyd* made specific discovery requests for several years' worth of tax returns.[4] *Lloyd*, 992 F.2d at 350. After the district court denied a defense motion to require production of the tax returns, the defense orally renewed the motion the day before trial and elaborated on the information's materiality.[5] *Id.* at 350. Here, on the other hand, the Defense simply states that "[a]ll documents and information requested by the Defense are material to the preparation of a defense and are favorable to the Defense in both findings and sentencing." AE 079 at 9. Merely stating that the requested items are favorable and material does not make them favorable or material, and it does not mandate a deviation from a court's usual acceptance of "the government's representation as to what documents in its possession are material." *Lloyd*, 992 F.2d at 352 (quotation omitted) (citations omitted).

The Defense has not requested any specific documents in its Sixteenth Supplemental Request. Instead, the Defense has requested that the Government categorize the discovery that has already been produced and then go on a fishing expedition to find any other information that

[4] For example, the defense in *Lloyd* requested "copies of tax returns for each taxpayer named in the indictment for the three years preceding the . . . tax years included in the indictement." *Lloyd*, 992 F.2d at 349.

[5] In arguing materiality, the defense maintained that the tax returns could prove lack of requisite fraudulent intent and could also be used to impeach witnesses. *Lloyd*, 992 F.2d at 350.

might fit into one of the 50 overly broad requests.[6] *See* Sixteenth Supplemental Request at ¶ 11. The Government is not required to do either, nor can it search for such broad and ill-defined material. The Defense has the technological and personnel resources to organize the discovery that has been produced into the categories at its own choosing, and then identify any specific item that the Defense believes should be produced. The Government believes that it has already produced all discoverable information responsive to the 50 overly broad Defense discovery requests in its Sixteenth Supplemental Request, either directly to the Defense or to the Military Judge via the M.C.R.E. 505 process. If the Defense believes that it has not yet received a particular piece of discovery that it feels entitled to, the Defense should submit a supplemental discovery request that clarifies, with specificity, exactly what information it is seeking. For the foregoing reasons, the Defense fails to meet its burden and the Defense's Motion should be denied in full.

7. Oral Argument

The Government does not believe that oral argument is necessary to resolve this issue.

8. Witnesses and Evidence

No witnesses or other evidence are anticipated at this time.

[6] Both military and federal courts have ruled against the defense using the discovery process as a fishing expedition. *See United States v. Briggs*, 48 M.J. 143, 144 (C.A.A.F. 1998) (The military judge denied production of the records, stating that unless the defense could articulate a rationale to show the "materiality" of the victim's entire medical record, it only appeared as if defense counsel were on a "fishing expedition."); *United States v. Badonie*, 2005 U.S. Dist. LEXIS 21928, *4 (D.N.M. Aug. 29, 2005) (Criminal defendants may not, however, embark on a "broad or blind fishing expedition among documents possessed by the Government . . . .") (citing *Jencks v. United States*, 353 U.S. 657, 667 (1957)).

9. Attachments

A. Certificate of Service, dated 14 April 2017.

Respectfully submitted,

_____//s//_____
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ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 14th day of April, 2017, I filed **AE 079A, Government Response to Defense Motion to Compel Discovery of Sixteenth Supplemental Request for Discovery Dated 25 January 2017,** with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//
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