MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI**	**AE 535C** **Government Response** To Defense Motion to Compel Discovery and for Appropriate Relief for Violations of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) Regarding Ahmed Rabbani and Sanad al-Kazimi 12 January 2023

1. Timeliness

This Response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court ("R.C.") 3.7.(d)(1) and AE 535B Ruling.

2. Relief Sought

The Government requests that the Commission deny AE 535, Defense Motion to Compel Discovery and for Appropriate Relief for Violations of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972), Regarding Ahmed Rabbani and Sanad al-Kazimi (the "Motion").

3. Overview

Consistent with its continuing discovery obligations under to Rule for Military Commission ("R.M.C.") 701(a)(5), the Prosecution does not possess the information sought by the Motion and is unaware whether it exists. Specifically, the Prosecution has no information that during any debriefing sessions with members of the Prosecution or law enforcement, Mr. Rabbani or Mr. al-Kazimi recanted prior statements or claimed that their prior statements implicating the Accused were false or otherwise the result of torture. *See* Mot. at 3, ¶ 4.e.iii.; *id.* at 8, ¶ 6. Other than the information previously disclosed to the Defense, the Prosecution is unaware of and does not possess from the proffer sessions any allegations of torture and/or cruel,

inhuman, or degrading treatment of either detainee while in United States or foreign government custody (*see* Mot. at 4–5, ¶ 4.g.). However, the Prosecution will make reasonable efforts to discover and disclose such information if it exists. Concerning potential inducements or incentives for testimony in court regarding the Accused's conduct relative to the charged offenses, the Prosecution is only aware of a request by counsel for Mr. al-Kazimi that he desired to be repatriated to Yemen and no other country.[1] The Prosecution is unaware of and possesses no information regarding inducements or incentives requested or extended to Mr. Rabbani. No agreement exists with either detainee to provide testimony against the Accused. Regarding prior statements that the Prosecution intends to affirmatively use and the circumstances of the taking of those statements, the Prosecution has provided adequate notice consistent with R.M.C. 914 and 701(e) by providing the Defense the statements of each detainee. *See* Mot. at 2, ¶ 4.c. *Brady* or *Giglio* violations have not occurred, so no remedy is necessary. Consequently, the Commission should deny the relief requested by the Motion.

4. <u>Burden of Proof</u>

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). Contrary to the assertion in the Motion that the Defense generally bears no burden to ask for discovery, R.M.C. 914(a) applies and controls in this circumstance, and this rule requires a party to move for prior statements of a witness.

[1] The Prosecution possesses an e-mail exchange with Mr. al-Kazimi's counsel dated 30 November 2018 stating, "OCP understands and recognizes that Mr. Kazimi has a strong interest in repatriation/transfer. OCP in good faith intends to make reasonable efforts to secure the cooperation of appropriate USG agencies in negotiating repatriation/transfer terms for Mr. Kazimi. However, please understand that effectuating transfer will require the approval of multiple USG agencies and a foreign government, over whom OCP has no control. For your reference, OCP agreed in Darbi's PTA to positively endorse Darbi's transfer request if he met the conditions of his PTA; a similar assurance can be made in Mr. Kazimi's case."

4. Facts

For the purpose of resolving this motion, and except for the assertions that both detainees made statements during proffer sessions recanting prior statements implicating the Accused, the Prosecution does not contest the Defense statement of facts. *See* Mot. at 2–6, ¶ 4.

5. Law and Argument

I. The Prosecution Complied with Its Discovery Obligations[2]

R.M.C. 914(a) requires a party to disclose a witness's prior statements after testimony and only upon motion by the opposing party. Nevertheless, the Prosecution has already provided notice of the prior statements. *See* Mot. at 2, ¶ 4.c. Thus, the Prosecution has complied with R.M.C. 701(e) regarding potential exculpatory evidence.

Moreover, no agreement exists between the detainees and the Prosecution to provide testimony against the Accused. Except for the Prosecution's representation in response to the inquiry by Mr. al-Kazimi regarding repatriation to Yemen, and without conceding that the representation to Mr. al-Kazimi's counsel is in fact an inducement, the Prosecution has made no other promises, commitments, or representations to secure the detainee's testimony against the Accused. As noted by the Motion, should either detainee be available at the time of trial, the Prosecution intends to elicit their testimony. Should either detainee be unavailable, the Prosecution intends to offer their prior statements identifying the Accused.

The Trial Counsel has the responsibility to determine what information must be disclosed in discovery. R.M.C. 701(b)–(c); *United States v. Briggs*, 48 M.J. 143, 144 (C.A.A.F. 1998); *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987). "Unless defense counsel becomes aware that

[2] The Prosecution acknowledges that its "*Brady* obligations are separate and distinct from its obligations under Rule 16 of the Federal Rules of Criminal Procedure . . . which mandates the disclosure of any evidence that is material to the preparation of a defense." *United States v. Flynn*, 411 F. Supp. 3d 15, 28 (D.D.C. 2019).

other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final." *Ritchie*, 480 U.S. at 59. It is incumbent upon prosecutors to execute this duty faithfully because the consequences are dire if they fail to do so. *See* United *States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015) (finding no abuse of discretion in the military judge's dismissal with prejudice of charges due to a prosecution discovery violation); *United States v. Bowser*, 73 M.J. 889 (A.F. Ct. Crim. App. 2014), *summarily aff'd*, 74 M.J. 326 (C.A.A.F. 2015). The Prosecution continues to be responsive to discovery requests submitted by the Defense. The Prosecution will produce relevant and material information that becomes known.

Here, however, the Prosecution is unaware of and therefore does not possess the information the Defense seeks. The Prosecution has found no information that during the proffer sessions either detainee recanted prior statements or that they made additional allegations their prior statements implicating the Accused were the product of or result of torture. The Motion suggests that members of the Defense may have obtained information from the detainee's counsel, but the Prosecution has received no information from the detainee's counsel regarding recantation as described in the Motion. Both detainees and their counsel are physically available should they choose to provide information or testify to verify the Motion's allegations.

Additionally, the Federal Bureau of Investigation ("FBI") special agent who attended the interviews of the detainees is available to testify about the facts and circumstances of the engagements. While the FBI special agent's notes of the meeting have not been found, the Prosecution will continue to endeavor to locate her notes (if made), or seek a recreation or summary of the notes. *See United States v. Grunewald*, 987 F.2d 531, 535 (8th Cir. 1993) (finding no Jencks Act or *Brady* violations where the government produced summaries of handwritten notes instead of the actual notes); *United States v. Van Brandy*, 726 F.2d 548, 551

(9th Cir. 1984) (holding that the government fulfilled its *Brady* obligations by producing summaries of the FBI's file because *Brady* "does not extend to an unfettered access to the files").

II. The Prosecution Has Found No *Brady* or *Giglio*[3] Information To Disclose

The statutory and regulatory discovery obligations of the Prosecution are established in 10 U.S.C. § 949j as well as R.M.C. 701 and 703.[4] R.M.C. 701(c)(1) mandates that "after service of charges, upon the request of the defense," the Government shall allow Defense counsel to examine the following:

> [a]ny books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

R.M.C. 701(c)(1).[5]

Notwithstanding this requirement, however, no authority grants defendants an unqualified right to receive, or compels the Prosecution to produce, discovery merely because

[3] The Prosecution is unaware of case law that has found a pre-trial *Brady*/*Giglio* violation when the evidence has not been lost and, if produced, can still be used at trial. The cases the Defense cites are post-conviction cases where no adequate alternative exists at that time to remedy the *Brady/Giglio* violation. Mot. at 8–10. Here, because the Defense can still inquire and, if accurate, use the alleged recantations, no *Brady* or *Giglio* violation that prejudices the Accused has occurred. *See United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002) ("Though discovered during trial, O'Hara had sufficient time to make use of the material disclosed. Delayed disclosure of evidence does not in and of itself constitute a *Brady* violation." (collecting cases)). Therefore, the procedural posture here is different from the cases the Defense cites making them inapposite.

[4] The Military Commissions Act of 2009 ("2009 M.C.A.") affords the Defense a reasonable opportunity to obtain evidence through a process comparable to other United States criminal courts. *See* 10 U.S.C. § 949j; FED. R. CRIM. P. 16. This Commission has observed that "the MCA's requirement that an accused's discovery rights mirror those of a federal criminal defendant . . . ." AE 399F at 4. Given this, where the R.M.C. 701 and FED. R. CRIM. P. 16 have provisions with "functionally identical language," the Commission has further observed that "federal-court interpretations are generally more persuasive than military case law interpreting Article 46, U.C.M.J., and its implementing regulations" *Id*.

[5] R.M.C. 701(c) and Rule for Courts-Martial 701(a)(2) are substantially similar to one another and both are similar to FED. R. CRIM. P. 16(a).

the defendant has requested it. Rather, the Prosecution's discovery obligations are defined by applicable rules and statutes. *See generally United States v. Agurs*, 427 U.S. 97, 106 (1976) (noting that "there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor").

In a military commission, as is true in all criminal cases, the Prosecution has the responsibility to determine what information it must disclose in discovery. *Briggs*, 48 M.J. at 144; *Ritchie*, 480 U.S. at 59. The Court of Appeals for the Armed Forces ("C.A.A.F.") has stated that "[t]o the extent that relevant files are known to be under the control of another governmental entity, the prosecution must make that fact known to the Defense and engage in 'good faith efforts' to obtain the material." *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999).

A criminal defendant has a right to discover certain materials, but the scope of this right and the prosecution's attendant discovery obligations are not without limit. For example, upon request, the defense may inspect and copy documents in the prosecution's possession, but only if the documents meet the requirements of R.M.C. 701(c). Similarly, R.M.C. 701(e) requires the prosecution to disclose exculpatory evidence favorable to an accused, but only when the evidence is "material" to guilt or punishment, *see also Brady*, 373 U.S. at 87, or may be used to impeach the credibility of government witnesses, *see Giglio*, 405 U.S. at 154.[6] Information that is favorable to the defense includes evidence which "would tend to exculpate [the defendant] or reduce the penalty." *Brady*, 373 U.S. at 88. Although the materiality standard is not a heavy burden for the defense to meet, the U.S. Court of Appeals for the District of Columbia Circuit has clarified that it is nonetheless a meaningful burden with a measurable standard, and trial

[6] The R.M.C. codified the holdings in *Brady* and *Giglio*. *See* R.M.C. 701(e). The Prosecution cites to *Brady* and *Giglio* case law to explain materiality and how other courts have decided similar issues. By using *Brady* and *Giglio* case law the Prosecution does not concede that the Due Process Clause of the Fifth Amendment applies to military commission proceedings.

counsel must disclose information "'only if it enables the [accused] to *significantly* . . . alter the quantum of proof in his favor." *United States v. Graham,* 83 F.3d 1466, 1474 (D.C. Cir. 1993) (quoting *Caicedo-Llanos*, 960 F.2d at 164 n.4) (D.C. Cir. 1992) (emphasis added). Under *Brady*, however, "the Government has no duty to disclose evidence that is neutral, speculative, or inculpatory, or evidence that is available to the defense from other sources." *United States v. Pendleton*, 832 F.3d 934, 940 (8th Cir. 2016).

In this case, the Motion speculates that both detainees have made statements during the proffer sessions recanting prior statements that implicated the Accused. The Motion provides no particular information regarding what or how the Accused is no longer implicated by the prospective testimony of these two detainees. Other than a global denial, the Motion offers no relevant evidence having a tendency to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence. *See United States v. Graner*, 69 M.J. 104, 107–08 (C.A.A.F. 2010).

Where the Defense has not presented an adequate theory of relevance to justify the compelled production of evidence, the C.A.A.F. has applied the relevance standard to uphold denials of compelled production. *See id*. at 107–09. A theory that is too speculative, or too insubstantial, does not meet the threshold of relevance and necessity for discovery. *See United States v. Briggs*, 46 M.J. 699, 702 (A.F. Ct. Crim. App. 1996). A general description of the material sought, or a conclusory statement as to its materiality, is insufficient. *Id*. (citing *United States v. Branoff*, 34 M.J. 612, 620 (A.F.C.M.R. 1992)) (remanded on other grounds). A "showing of materiality is not satisfied by a mere conclusory allegation that the requested information is material to the preparation of the defense." *United States v. Jean*, 891 F.3d 712, 715 (8th Cir. 2018) (quoting *United States v. Krauth*, 769 F.2d 473, 476 (8th Cir. 1985)) (internal quotation marks omitted). Likewise, a "vague asserted need for potentially exculpatory evidence that might be contained" in the materials sought by Defense "does not pass muster." *United*

States v. Apodaca, 287 F. Supp. 3d 21, 40 (D.D.C. 2017) (citing *United States v. Williams–Davis*, 90 F.3d 490, 514 (D.C. Cir. 1996)); *see also United States v. Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990) (observing that "[n]either a general description of the information sought nor conclusory allegations of materiality suffice; a defendant must present facts that would tend to show that the Government is in possession of information helpful to the defense").

There is no generalized right of discovery in a criminal case, *Weatherford v. Bursey*, 429 U.S. 545, 549 (1977), *United States v. Shorts*, 76 M.J. 523 532 (A. Ct. Crim. App. 2017), and as the Supreme Court has repeatedly held, *Brady* did not create a constitutional one. *Ritchie*, 480 U.S. at 59; *see also United States v. Caro*, 597 F.3d 608, 620 (4th Cir. 2010). "In short, *Brady* is not a rule of discovery—it is a remedial rule" whose "focus is fairness." *United States v. Meregildo*, 920 F. Supp. 2d 434, 439 (S.D.N.Y. 2013). As stated above, other than mere speculation, the Defense has not produced any evidence to show that the Prosecution has in its possession statements from the proffer sessions that Mr. Rabbani or Mr. al-Kazimi recanted prior statements or claimed that their prior statements implicating the Accused were false or otherwise the result of torture.

III. Because the Commission Is Still in Pretrial Proceedings, the Accused Has Suffered No Prejudice and Removal of Capital Punishment Is Unwarranted

Even under a case in which a potential witness recanted his prior statements implicating the Accused, the Defense is appraised of that information and the testimony has not yet been elicited at trial. The Defense thus has ample time to discover the specifics of the recanted statements and to prepare to use the information in court. *See, e.g.*, *United States v. Wilson*, 160 F.3d 732, 742 (D.C. Cir. 1998) (discovery of a witness's recanted statement concerning details of a shooting does not warrant a new trial based on a *Brady* claim where the information is discovered in time to make use of it.); *see also United States v. Eshalomi*, 23 M.J. 12, 27 (C.M.A. 1986) (a *Brady* violation only occurs "where the evidence is material either to guilt or to punishment," such that recantation could have "impair[ed] [the victim's] credibility.");

United States v. Riederer, 2019 CCA LEXIS 323 (A.C.C.A. 2019) (concluding that nondisclosure of victim's memorandum that she did "not wish to participate" in the court-martial immaterial because "Appellant faced multiple allegations supported by overwhelming evidence"), *Hernandez v. Terrones*, 397 F.3d App. 954, 957 (5th Cir. 2010) (holding that "evidence is not 'suppressed' [for *Brady* purposes] if the defendant 'knows or should know of the essential facts that would enable him to take advantage of [the information]." Where an Accused knows that the witness has recanted and can use that at trial, then no *Brady* violation occurs. *See Strickler v. Greene*, 527 U.S. 263, 281–82 (1999) ("[T]here is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.").

The Defense has cited no legal authority to support their argument that the adequate remedy for a pretrial discovery violation is removal of the potential for capital punishment. Nor could the Prosecution find any. The closest analogous situation is dismissal of charges when the discovery violations are particularly egregious. Generally, for dismissal of charges, bad faith must be shown. *See United States v. Kohring*, 637 F.3d 895, 912–13 (9th Cir. 2011) (noting that when assessing whether a judge exercise his or her supervisory authority and dismiss charges, a court must find that the prosecution's conduct was flagrant, willful, and in bad faith). Accidental behavior will not support a finding of "flagrant" behavior. *See United States v. Chapman*, 524 F.3d 1073, 1085 (9th Cir. 2008). Even where prosecutorial misconduct has occurred that prejudiced the defendant, "dismissal is appropriate only as a last resort, where no other remedy would cure prejudice against a defendant." *United States v. Pasha*, 797 F.3d 1122, 1139 (D.C. Cir. 2015). Here, where the Prosecution has found no information the Defense seeks, and other remedies are available at this stage of the proceedings, bad faith cannot be presumed. As no bad faith or prejudice to the Accused has been shown, the Defense arguments fail.

6. Conclusion

For the foregoing reasons, the Prosecution respectfully requests that the Commission deny the remedies requested by the Motion.

7. Oral Argument

None requested.

8. Witnesses and Evidence

FBI Supervisory Special Agent Mary Boese.

9. Additional Information

None.

10. Attachments

A. Certificate of Service, dated 12 January 2023.

Respectfully submitted,

//s//

Michael J. O'Sullivan
Trial Counsel

John B. Wells
Managing Assistant Trial Counsel

Cherie E. Jolly, LCDR, JAGC, USN
Keven P. Schreiber, LCDR, JAGC, USN
Michael D. Ross, MAJ, JA, USA
Stephen J. Romeo, MAJ, JA, USA
James Garrett, MAJ, JA, USA
Tess V. Schwartz, LT, JAGC, USN
Jonathan Danielczyk, Capt, JA, USAF
Assistant Trial Counsel

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 12th day of January 2023, I filed AE 535C, the **Government Response** To AE 535 Defense Motion to Compel Discovery and for Appropriate Relief for Violations of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) Regarding Ahmed Rabbani and Sanad al-Kazimi, with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

//s//
Michael J. O'Sullivan
Trial Counsel