

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

UNITED STATES OF AMERICA v. MAJID SHOUKAT KHAN	AE 047K ORDER Defense Motion for Appropriate Relief 13 July 2020
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1. Procedural History.

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 Reismeier's appointment as CA was revoked. *See* AE 047C.

b. On 23 April 2020, this Commission ordered the Parties to file briefs indicating their respective positions as to whether the designation of a new CA and revocation of Mr. Reismeier's appointment rendered AE 047 moot. AE 047D.² The Parties filed responsive briefs on 7 May 2020.³ AE 047E; AE 047F. The Government argued that this motion has been rendered moot, and the Defense argued that it has not.

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 047D, Order, dated 23 April 2020.

³ AE 047E, Defense Brief in Accordance with AE 047D, filed 7 May 2020; AE 047F, Government Brief in Accordance with AE 047D, filed 7 May 2020.

c. On 12 May 2020, the Defense moved for leave to file a supplement to AE 047E,⁴ which was granted by the Commission on 14 May 2020.⁵ Following several procedural turns, the Defense filed its supplement on 19 May 2020⁶ and the Government responded.⁷

2. Findings of Fact.

a. The Acting Secretary of Defense appointed Rear Admiral Christian L. Reismeier, USN (Ret.), (hereinafter, “Mr. Reismeier”) as Convening Authority (CA) for Military Commissions on 23 May 2019,⁸ with an effective date of 22 May 2019.

b. On 29 May 2019, Mr. Reismeier took action as CA in the Accused’s case to grant 175 out of 200 hours requested for approved expert witness, Mr. Steven Kleinman. AE 040, Att. I.

c. On 14 June 2019, Mr. Reismeier recused himself from the commission cases of *United States v. Abd al Rahim Hussayn Muhammad al Nashiri* and *United States v. Ali Hamza Ahmad Suliman Al Bahlul*. See AE 040, Att. D, E.⁹

d. On 21 June 2019, the Defense moved to continue the next scheduled session of the Commission in order to investigate and advise the Accused fully and adequately about a possible conflict of interest. See AE 035A.¹⁰ On 28 June 2019, the Military Judge granted the continuance. AE 035G.¹¹

⁴ AE 047H, Defense Motion for Leave to File a Supplement to AE 047E, filed 12 May 2020.

⁵ AE 047I, Expedited Briefing Order, dated 14 May 2020.

⁶ AE 047E (SUP), Defense Supplement to AE 047E, filed 19 May 2020.

⁷ AE 047J, Government Response to Defense Supplement to AE 047E, filed 26 May 2020.

⁸ See AE 047C, Government Notice Regarding Designation of New Convening Authority for Military Commissions, filed 21 April 2020, Att. B; AE 040, Defense Motion to Disqualify the Convening Authority, filed 26 September 2019, Att. C.

⁹ AE 040, Defense Motion to Disqualify the Convening Authority, filed 26 September 2019.

¹⁰ AE 035A, Defense Motion to Continue Hearing and for Other Related Relief, filed 21 June 2019.

¹¹ AE 035G, RULING, Defense Motion to Continue Hearing and for Other Related Relief, dated 28 June 2019.

e. On 17 July 2019, the Defense requested production of discoverable documents and information relating to the CA from the Government. *See* AE 037, Att. C.¹² In particular, the Defense requested information relating to Mr. Reismeier and the applicability of Article 13, UCMJ, credit, and whether three DoD offices involved in the military commission process or the Central Intelligence Agency had any involvement with Mr. Reismeier's consideration or application for the CA position. *Id.*

f. On 18 July 2019, the Defense received Mr. Reismeier's "Supplement to Memorandum for File," dated the same day, which sought to provide additional clarification and answers to questions raised in various commissions cases relating to Mr. Reismeier's impartiality as CA. *See* AE 040, Att. K.

g. On 25 July 2019, the Government responded to the Defense's discovery request and argued, contrary to the Defense's interpretation of the Military Judge's ruling in AE 035G,¹³ that the Defense was not entitled to such discovery and that any information provided by the Prosecution was done "voluntarily." *See* AE 037, Att. D. The Prosecution provided seven (7) attachments, all of which had either been previously disclosed or were already matters of the public record. *Id.* In response to the Defense's request relating to Mr. Reismeier's application for the CA position, which sought information from four different government offices, the Prosecution failed to answer and omitted three of the offices from its declaration. *Id.* at 4.

h. On 26 July 2019, the Defense requested clarification as to whether the statement, "the Government has no discoverable information to provide," meant that 1) the Government had

¹² AE 037, Defense Motion to Compel Production of Documents and Information Related to Possible Conflict of Interest Involving the Convening Authority, filed 29 July 2019.

¹³ In AE 035G, the Commission provided the following guidance on discovery: "The Defense may follow generally accepted discovery practices in requesting the information from the Government and, if denied, file appropriate motions." This was not an order compelling the Government to produce any and all materials requested by the Defense. AE 035G, Ruling, Defense Motion to Continue Hearing and for Other Related Relief, dated 28 June 2019, at 2.

searched for responsive materials and determined that none existed; 2) the Government had not searched for materials; or 3) the Government had located information but chose to withhold such material as non-discoverable. *See* AE 037, Att. H. The Government provided no such clarification, and stated, “[w]e do not have additional comments to provide at this point.” *Id.*

i. The Defense filed a Motion to Compel Production on 29 July 2019. AE 037. In its response, the Government urged denial, based in large part on the waiver of discovery in the Pretrial Agreement. To a lesser extent, the Government urged denial based upon their own determination the requested information either did not exist or, if it did exist, was not relevant or material to the preparation of the defense.¹⁴ On 13 September 2019, the Commission granted the motion in part. AE 037C.¹⁵ In the Order, the Commission reminded the Government of their discovery obligations, the requirement to faithfully execute those obligations, and the dire consequences awaiting if they failed. *Id.* at 3.

j. On 26 September 2019, the Defense filed its Motion to Disqualify the Convening Authority. AE 040. At some point between on or about 28 June 2019 and on or about 17 September 2019, the Government became aware of discoverable documents through another commissions case, but failed to disclose them to the Defense. *See* Tr. at 774.¹⁶ “[I]t was not until the defense personally reached out to the prosecution requesting these documents on October 29th, 2019, that the prosecution even acknowledged their existence.” Tr. at 781.

¹⁴ AE 037A (CORRECTED COPY), Government Response to Defense Motion to Compel Production or Documents and Information Related to Possible Conflict of Interest Involving the Convening Authority, filed 12 August 2019, at 10, 12.

¹⁵ “The Commission does not accept the Government’s assertion that the waiver of discovery in the pretrial agreement contemplated the discovery requested in AE 037. The new Convening Authority’s decision to recuse himself in two other military commission cases and the issues those decisions generated are beyond the discovery usually contemplated in a criminal case.” AE 037C at 2.

¹⁶ Unofficial/Unauthenticated Transcript of Motions Hearing Dated 26 February 2020.

k. On 14 November 2019, in AE 037E,¹⁷ the Defense moved the Commission to Compel Production of Supplemental Discovery for the AE 037 Series, requesting three (3) items of relief and an alternative form of relief in the event the former were denied. The Government response, AE 037F,¹⁸ filed on 15 November 2019, requested the Commission deny production of any documents within the specified time frame. The Government provided the requested documents (Attachments B and C of AE 037F) to the Commission in a proposed *ex parte* filing for *in camera* review.

l. The Commission held a motions hearing session at Naval Station Guantanamo Bay, Cuba, (NSGB) 19–21 November 2019. While travelling to NSGB for the session, the Military Judge reviewed *in camera* the approximately 1,000 pages of discovery provided by the Government on the eve of the hearing. The Military Judge ordered production of the documents to the Defense, which occurred some 90 minutes prior to the session’s first hearing. *See* AE 037F, Att. B, C. The motion was discussed on the record on 19 November 2019.¹⁹

m. On 5 December 2019 in AE 037G, the Commission memorialized its previous ruling granting the motion to compel discovery and ruled on other issues raised in the AE 037 series.

n. On 27 December 2019, the Defense requested additional documents and material from the Government, specifically requesting complete e-mail chains. In a series of exchanges of memoranda between the Defense and the Government, the Defense identified what the Government should be seeking and where to look, while the Government asserted, without explanation, attorney-client work product and another unspecified privilege as reasons for not

¹⁷ AE 037E, Defense Motion to Compel Production of Supplemental Discovery for the AE 037 Series and for Expedited Briefing Schedule, filed 14 November 2019.

¹⁸ AE 037F, Government Response to Defense Motion to Compel Production of Supplemental Discovery for the AE 037 Series and for Expedited Briefing Schedule, filed 15 November 2019.

¹⁹ *See* Unofficial/Unauthenticated Transcript of Motions Hearing Dated 19 November 2019 at 436–454.

producing the requested materials. *See* AE 040D, Att. H–K.²⁰ On 21 January 2020, the Government responded to the Defense request in an incomplete manner, including referring to the waiver of discovery in the Pretrial Agreement, apparently ignoring the Commission’s analysis in AE 037C. On 18 February 2020, the Government provided additional responsive discovery to the Defense in an attempt to correct the incomplete 21 January 2020 response. *Tr.* at 784.

o. On 24 January 2020, the Defense filed AE 040D, a Supplement to the Motion to Disqualify the CA, following the late disclosure of AE 037F.

p. At another motions hearing session at NSGB from 25–27 February 2020, the Commission heard Mr. Reismeier’s testimony as well as oral argument on the motion.²¹ Mr. Reismeier testified he had previously indicated his possible belief that the Accused’s pending pretrial punishment claim could violate the Pretrial Agreement; he also testified he had no knowledge of the Accused or the case prior to becoming CA. *Tr.* at 576–771.²² Mr. Reismeier also testified that during the summer of 2019 he conducted a search for materials related to the military commission in his personal Gmail e-mail account with no assistance or guidance from the Government. *See Tr.* at 584–87. Mr. Reismeier further testified that, after turning over the materials he found in his Gmail account, the Government did not follow up with him regarding the existence of other potentially responsive materials, including his Navy e-mail account. *See Tr.* at 590–91. There is no evidence before the Commission that Mr. Reismeier’s Navy e-mail account was ever searched for responsive materials. *See Tr.* at 803.

²⁰ AE 040D (Corrected Copy), Supplemental Pleading in Support of Defense Motion to Disqualify the Convening Authority, filed 24 January 2020.

²¹ *See* Unofficial/Unauthenticated Transcript of Motions Hearing Dated 25–26 February 2020 at 566–814.

q. During the February session, Assistant Trial Counsel was unable to satisfactorily answer the Military Judge's questions regarding these ongoing discovery issues. Tr. at 803–07.

r. On 26 March 2020, the Defense filed the instant Motion for Appropriate Relief to Regulate Discovery. AE 047.

s. On 17 April 2020, Mr. Reismeier's appointment as CA was revoked. AE 047C.

t. On 7 May 2020, the Prosecution produced to the Defense the Position Description for Mr. Reismeier's position as the Director of the Office of the Convening Authority for Military Commissions. See AE 047E (SUP), Att. C. Although the Position Description was signed by the Acting Deputy Secretary of Defense on 23 February 2019 and processed and signed by the responsible Human Resources Specialist on 25 March 2019, the Prosecution did not produce it until specifically requested by the Defense over a year later, on 7 May 2020.²³ Previously, on 17 July 2019, the Defense requested production of "[a]ll documents and information concerning communications, whether direct or indirect, between Mr. Reismeier and . . . the Office of the Deputy Secretary of Defense . . . concerning Mr. Reismeier's application, consideration, nomination, and/or selection as Convening Authority." AE 037, Att. C. The Prosecution responded that "the Government has no discoverable information to provide," *id.*, Att. D at 4, and further informed both the Defense and the Commission that "the Government does not have any evidence that meets the criteria identified by the Defense." AE 047H at 3.

3. Law.

a. "[T]he token trait of a good prosecutor is the ability to be adversarial without being hostile." *United States v. Voorhees*, 79 M.J. 5, 14, reconsideration denied, 79 M.J. 218 (C.A.A.F. 2019), and cert. denied, No. 19-795, 2020 WL 1496632 (U.S. Mar. 30, 2020). "The prosecutor's

²³ See AE 047E (Supplement), Att. C., Defense Brief Regarding Mootness, filed 11 May 2020.

obligation under Article 46 is to remove obstacles to defense access to information and to provide such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence.” *United States v. Williams*, 50 M.J. 436, 442 (C.A.A.F. 1999).

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935).

b. The right of an accused to obtain favorable evidence is established in Article 46, UCMJ, 10 U.S.C. § 846 (2000). “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 Rule for Military Commissions (R.M.C.) 701 which details liberal discovery as practiced in courts-martial. *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004). The military justice system has been a leader with respect to open discovery and disclosure. *Williams*, 50 M.J. at 439; see Moyer, *Procedural Rights of the Military Accused: Advantages Over A Civilian Defendant*, 51 MIL. L. REV. 1, 11–14 (1971). R.M.C. 701 sets forth the rights and corresponding obligations of the parties. These discovery and disclosure procedures are designed to be broader than those corresponding to civilian life in order to provide an accused, at a minimum, with such rights available in federal civilian proceedings. *Williams*, 50 M.J. at 440; see, e.g., *United States v. Walbert*, 14 C.M.A. 34, 33 C.M.R. 246 (1963) (applying the “Jencks Act,” 18 USC § 3500, to military justice discovery practices). Discovery practice under 10 U.S.C. § 949j and R.M.C. 701 promotes full discovery, eliminates gamesmanship from the discovery process, and is quite liberal, providing broad discovery which reduces motions practice, surprise, and delay. Manual for Courts-Martial, Rule for Courts-Martial 701(a),

Discussion (2019). The military rules pertaining to discovery focus on equal access to evidence to aid the preparation of the defense and enhance the orderly administration of military justice. *Roberts*, 59 M.J. at 325.

c. The Rules for Military Commissions provide for the regulation of discovery by the military judge. R.M.C. 701(a)(3), 701(l). See *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999). “[M]ilitary courts possess the . . . authority to impose sanctions for noncompliance with discovery requirements” *United States v. Stellato*, 74 M.J. 473, 488 (C.A.A.F. 2015) (quoting *United States v. Pomarleau*, 57 M.J. 351, 360 (C.A.A.F. 2002)). In the military justice system, Rule 701 governs the sanctioning of discovery violations and “provides the military judge with a number of options to remedy such violations.” *Id.*; *United States v. Murphy*, 33 M.J. 323, 328 (C.M.A.1991). These sanctions include: (a) order the party to permit discovery; (b) grant a continuance; (c) prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and (d) enter such other order as is just under the circumstances. R.M.C. 701(l)(3)(A)–(D). “Where a remedy must be fashioned for a violation of a discovery mandate, the facts of each case must be individually evaluated.” *Stellato*, 74 M.J. at 488 (quoting *United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993)).

d. Where the Government fails to disclose information pursuant to a specific defense request, the evidence is considered material unless the failure to disclose it can be demonstrated to “be harmless beyond a reasonable doubt.” *United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990). “Failing to disclose requested material favorable to the defense is not harmless beyond a reasonable doubt if the undisclosed evidence might have affected the outcome of the trial.” *United States v. Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013). When determining the appropriate sanction, a military judge considers “the nature, magnitude, and consistency of the discovery

violations.” *Stellato*, 74 M.J. at 489. One factor indicating prejudice is whether “the discovery violations delayed the Government’s production—and thus delayed the accused’s receipt—of exculpatory evidence in the form of e-mails” *Id.*

e. Discovery practice is not focused solely upon evidence known to be admissible at trial. *See United States v. Stone*, 40 M.J. 420, 422 (C.M.A. 1994) (citing *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993)). Of particular importance are the Government’s duties concerning disclosure of information requested by the defense which is “material to the preparation of the defense” R.M.C. 701(c)(1). *See United States v. Simmons*, 38 M.J. 376 (C.M.A. 1993). The defense need for such files is likely to vary significantly from case to case, and the defense is likely to be in the best position to know what matters outside the investigative files may be of significance. *Williams*, 50 M.J. at 443. Beyond those materials, “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case.” *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

f. In cases dealing with records of another military agency involved in the investigation of the accused, the prosecution “must exercise due diligence” in reviewing the files of other government entities to determine whether such files contain discoverable information. *Simmons*, 38 M.J. at 381; *cf. United States v. Claxton*, 76 M.J. 356, 359 (C.A.A.F. 2017) (where trial counsel did not make any attempt to inquire as to the status of government witnesses as required by the defense discovery request). To the extent 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. *Williams*, 50 M.J. at 441.²⁴ The scope of the due-diligence requirement with respect to governmental files beyond the prosecutor’s own files

²⁴ See Standard 11–2.1(a), Commentary, American Bar Association, Criminal Justice Discovery Standards 14 n. 9 (3d ed.1995).

generally is limited to: (1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity “closely aligned with the” prosecution; and (3) other files, as designated in a defense discovery request, that involved a specified type of information within a specified entity. *Williams*, 50 M.J. at 441 (internal citations omitted); *see, e.g., United States v. Veksler*, 62 F.3d 544, 550 (3d Cir. 1995). The parameters of outside review “will depend in any particular case on the relationship of the other governmental entity to the prosecution and the nature of the defense discovery request.” *Id.*

4. Analysis.

a. The Defense sought—and the Commission provided for—the production of additional discovery from the Government regarding the Defense motion to disqualify the CA, AE 040. The Defense sought such information necessary for its argument in support of disqualification. Because the Defense sought the prospective disqualification of Mr. Reismeier as CA, and he no longer serves in that capacity, the Commission considered and ruled the AE 040 motion was rendered moot by the revocation of Mr. Reismeier’s appointment as the CA by the Secretary of Defense on 17 April 2020. *See* AE 040T.²⁵ However, AE 040 being rendered moot is not dispositive of the instant motion. “An issue is moot if resolving it would not result in a material alteration of the situation for the accused or for the Government.” *United States v. Napoleon*, 46 M.J. 279, 281 (C.A.A.F. 1997) (quoting *United States v. Clay*, 10 M.J. 269 (C.M.A. 1981)). As discussed below, the issue raised by AE 047 is not moot.

b. The Commission reminds the Government of its prior admonition that “[t]he prosecution [discovery] lens is very often too narrow to meet [R.M.C.] 701 obligations, and it

²⁵ AE 040T (Corrected Copy), RULING, Defense Motion to Disqualify the Convening Authority, dated 13 July 2020.

sounds like your lens is too narrow. Your interpretation of what the defense needs is very often too limited in scope to meet the spirit of 701.” Tr. at 807. “For instance, when they say the subject of the e-mail was Article 13, and you did not think that was responsive to their request, that's kind of stunning.” Tr. at 805.

c. The Government’s sovereign obligation in maintaining this prosecution is to ensure not a particular outcome, but rather that justice shall be done. Gamesmanship, second-guessing, and replacing the statutory language with the Government’s unique interpretation of the discovery rules is unacceptable and will not be tolerated by this Commission.

d. The Commission finds the Government has put forth incomplete discovery responses, failed to assist and provide guidance to Mr. Reismeier in his search for potentially discoverable materials, failed to follow up with Mr. Reismeier about an official Navy email account that existed during a relevant time period, failed to prospectively provide responsive material, failed to search for and disclose specifically requested material with obvious relevance to the ongoing litigation, and denied the existence of responsive material as to certain requests, as the Government did not seek it out due to their application of a faulty and unreasonably restrictive lens.²⁶ As a result, not only has the Government not acted within the spirit or letter of Article 46, 10 U.S.C. §949j, R.M.C. 701, or accepted standard practice in the military, it has created needless litigation and potentially delayed the resolution of this Commission. Most certainly, the Government’s discovery practice with regard to the CA issue significantly hampered the Defense’s ability to seek and secure an amendment to the Pretrial Agreement, extending sentencing for a period of time to allow for further cooperation by the Accused. The Commission finds the Government’s discovery practice worthy of sanction.

²⁶ See Unofficial/Unauthenticated Transcript of Motions Hearing Dated 26 February 2020 at 803–07.

e. The Commission concludes the resolution of this motion, AE 047, could result in a material alteration of the situation if the Commission provides relief in the form of the sentence credit relief requested by the Defense. Such relief is appropriate under the circumstances of this case in that it mitigates the prejudice done to the Accused and sanctions the Government for its discovery failures.

5. Orders.

a. The Defense Motion for Appropriate Relief, AE 047, is **GRANTED in part**.

b. It is **HEREBY ORDERED** that the Accused shall receive administrative credit of one year against the approved sentence to confinement as a sanction for the Government's discovery violations.

c. The Commission **DENIES** the Defense request for additional discovery on the disqualification of Mr. Reismeier as the CA as that issue is moot. *See* AE 040T.

d. The Commission **DENIES** the Defense request to require Trial Counsel to individually provide declarations setting forth their efforts to comply with their discovery obligations, given the relief granted herein and the moot nature of that discovery. *See* AE 040T.

e. The Commission **DENIES** the Defense request to disqualify Mr. Reismeier as CA, as that issue is moot. *See* AE 040T.

So **ORDERED** this 13th day of July, 2020.

//s//
DOUGLAS K. WATKINS
COL, JA, USA
Military Judge