MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD; WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH; RAMZI BINALSHIBH; ALI ABDUL AZIZ ALI; MUSTAFA AHMED ADAM AL HAWSAWI	**AE 768A (GOV)** **Government Response** To Mr. Mohammad's Motion to Compel Documents and Information Related to the Government's Storage, Transfer, and/or Sale of 9/11 Crime Scene Evidence 13 March 2020

1. **Timeliness**

The Prosecution timely files this Response pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.

2. **Relief Sought**

The Prosecution respectfully requests that this Commission deny the requested relief set forth within AE 768 (KSM), Mr. Mohammad's Motion to Compel Documents and Information Related to the Government's Storage, Transfer, and/or Sale of 9/11 Crime Scene Evidence, without oral argument.

3. **Burden of Proof**

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

4. **Facts**

On 3 April 2018, Mr. Mohammad served his Request for Discovery, DR-076-MOH, on the Prosecution, seeking "all records and relevant documents pertaining to the storing, transferring, and/or selling of any and all debris from any of the locations of the attacks of September 11, 2001."[1] This material was requested on the grounds that such "debris is part of a

[1] AE 768 (KSM), Attach. B.

crime scene which Mr. Mohammad may need to investigate in order to determine the integrity of the buildings' construction. This information may be used as part of Mr. Mohammad's pre-trial, trial, and/or mitigation case."[2]

On 5 April 2018, the Prosecution denied this request.[3] After noting that "[t]he Prosecution has the responsibility to determine what information it must disclose in discovery," the Prosecution explained that none of the estimated 1.4 million tons of debris generated by the attacks of September 11, 2001 is evidence in this case. Regarding "the integrity of the affected buildings' construction," the response referred Mr. Mohammad to "the nearly 12,000 pages of discovery provided to you on 28 January 2013 (the National Institute of Standards and Technology ("NIST") Report;" it also referred Mr. Mohammad to the photographs, film, and other related materials from that day.[4]

On 10 March 2020, nearly two years later, Mr. Mohammad filed the instant motion.[5]

5. <u>Law and Argument</u>

I. The Government's Discovery Obligations Are Defined by the Relevant Rules and Statutes

The Military Commissions Act of 2009 ("MCA") 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. Pursuant to the MCA, the Rules for Military Commissions ("R.M.C.") require that the government produce evidence that is material to the preparation of the defense. Specifically, R.M.C. 701(c)(1) requires the Prosecution to permit Defense counsel to examine,

> [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

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[2] *Id*.

[3] *Id*., Attach. C.

[4] *Id*.

[5] *Id*.

> 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). However, notwithstanding this requirement, no authority grants defendants an unqualified right to receive, or compels the government to produce, discovery merely because the defendant has requested it. Rather, the government's discovery obligations are defined by the relevant 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"); *United States v. Yunis*, 867 F.2d 617, 625 (D.C. Cir. 1989) ("In short, we hold that the District Court abused its discretion in ordering the disclosure of classified information to a defendant where the statements in question were no more than theoretically relevant and were not helpful to the presentation of the defense or essential to the fair resolution of the cause.").

A criminal defendant has a right to discover certain materials, but the scope of this right and the government's attendant discovery obligations are not without limit. For example, upon request, the government must permit the defendant to inspect and copy documents in the government's possession, but only if the documents meet the requirements of R.M.C. 701. Similarly, due process requires the government to disclose evidence favorable to the accused, but only when the evidence is "material" to guilt or punishment, *see Brady v. Maryland*, 373 U.S. 83, 87 (1963), or may be used to impeach the credibility of government witnesses, *see Giglio v. United States*, 405 U.S. 150, 154 (1972). 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 under R.M.C. 701, trial 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 *United States v. Caicedo-Llanos*, 295 U.S. App. D.C. 99, 960 F.2d 158, 164 n.4 (D.C. Cir. 1992 (quoting *United States v. Ross*, 511 F.2d 757, 763 (5th Cir. 1975), *cert denied*, 423 U.S. 836 (1975))).

Military courts have adopted a standard by which "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *United States v. Graner*, 69 M.J. 104, 107–08 (C.A.A.F. 2010). In instances where the Defense did not present an adequate theory of relevance to justify the compelled production of evidence, C.A.A.F. has applied the relevance standard in upholding denials of compelled production. *See Graner*, 69 M.J. at 107–09. A defense theory that is too speculative, and too insubstantial, does not meet the threshold of relevance and necessity for the admission of evidence. *See United States v. Sanders*, 2008 WL 2852962 (A.F. Ct. Crim. App. 2008) (citing *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 argument as to its materiality, is insufficient. *See Briggs*, 46 M.J. at 702 (citing *United States v. Branoff*, 34 M.J. 612, 620 (A.F.C.M.R. 1992) (remanded on other grounds), citing *United States v. Cadet*, 727 F.2d 1453, 1468 (9th Cir. 1984)).

II. The Defense Has Not Articulated a Sufficient Rationale For Information Additional to What the Prosecution Has Already Provided.

The Prosecution is well aware of its discovery obligations and applies the law and standards described above objectively, in good faith, with an eye towards producing information, even in many cases where it does not actually meet the relevant and material standards.[6] The Prosecution is also well aware that such determinations are its responsibility alone to make. *See* AE 599H, Ruling, at 5 ("In a military commission, as is true in all criminal cases, the Government has the responsibility to determine what information it must disclose in discovery.") (citing R.M.C. 701(b)–(c); *United States v. Briggs*, 48 M.J. 143 (C.A.A.F. 1998); *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987)).

[6] *See* Memorandum from David W. Ogden, Deputy Attorney Gen., Dep. Of Justice, to Dep. Prosecutors, subj: "Guidance for Prosecutors Regarding Criminal Discovery" (Jan. 4, 2010) (encouraging prosecutors to provide discovery "broader and more comprehensive than the discovery obligations" to, *inter alia*, promote truth-seeking and to provide "for a margin of error in case the prosecutor's good faith determination of the scope of appropriate discovery is in error").

In this case, notwithstanding the overbreadth of its request,[7] Mr. Mohammad has failed to articulate a reason for additional disclosures sufficient to meet the thresholds laid out in the authorities he cites. While "[t]his materiality standard normally is not a heavy burden,'"[8] it is still a burden that must be met, requiring "a strong indication that it will 'play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.'"[9] Here the Defense has not met this burden. Rather than provide such a "strong indication," the Defense merely raises the possibility that further disclosures may be helpful to Mr. Mohammad's case in some way. The only specific aspect of its case the Defense gives any reason, however hypothetical, to believe may be helped by the requested discovery concerns the "integrity of the buildings' construction"[10] presumably to "challenge the prosecution's theory that Mr. Mohammad's actions were the sole or principal cause of the property damage and resulting fatalities and personal injuries for which Mr. Mohammad is charged."[11]

On this question, the Prosecution has already provided the Defense with extensive discovery, as indicated in the Prosecutions response of 5 April 2018. The Defense provides no reason to suppose that the additional discovery requested here will provide any benefit beyond the materials already provided, which might aid the Defense in pursuit of its apparent theory that the North and South Towers of the World Trade Center may have collapsed on September 11, 2001 due to lack of integrity in the buildings' construction rather than the foreseeable effects of hijacked airliners being piloted into them as missiles.

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[7] *See* AE 635C, Ruling, at 5 n.26 ("The Commission encourages the Defense to provide specific and narrowly focused, rather than broad ('any and all') sweeping discovery requests and motions to compel discovery.").

[8] *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1998) (quoting *United States v. George*, 786 F.Supp. 56, 58 (D.D.C. 1992), concerning obligations under Federal Rule of Criminal Procedure 16 (a)(1)(C)).

[9] *Id*. (quoting *United States v. Felt*, 491 F.Supp. 179, 186 (D.D.C. 1979)).

[10] AE 768 (KSM), Attach. B.

[11] AE 768 (KSM) at 4.

The Defense points out that the Military Rules of Evidence establish a "low threshold of relevance."[12] It does not follow that there is no threshold at all. The authorities the Defense cites highlight the difference between relevant, material discovery and the speculative request the Defense makes here. In *United States v. Roberts*, the prosecution failed to disclose the fact that a prosecution witness had previously made a false official statement.[13] In *United States v. Reece*, the prosecution failed to disclose that one minor witness had a history of inpatient treatment for alcohol, drug, and behavioral problems, and another had been placed in a foster home for behavior described by her family as "uncontrollable."[14] Unlike these cases, in which the defense could clearly articulate the relevance and materiality of the requested discovery and provide a "strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal,"[15] here the Defense can only assert that further discovery *might* assist Mr. Mohammad's case at some stage.

To be sure, following the September 11, 2001 attacks, the United States was left responsible for the recovery efforts not only associated with the tremendous loss of life on that day and the years that followed,[16] but also the property damage and destruction resulting from the Accused's actions. As noted by the Defense, "[t]he attack and crash sites . . . represented the

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[12] AE 768 (KSM) at 8 (quoting *United States v. Reece*, 25 MJ 93, 95 (C.M.A. 1987)).

[13] *United States v. Roberts*, 59 M.J. 323, 324 (C.A.A.F. 2004).

[14] *United States v. Reece*, 25 M.J. 93, 94 (C.M.A. 1987).

[15] *Lloyd*, 992 F.2d at 351.

[16] The attacks of September 11, 2001 constitute the deadliest attacks on U.S. soil in the history of the United States. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 311 (2004). The 343 deaths of emergency response personnel that occurred during the New York City Fire Department's response to the attacks on the World Trade Center constitute the largest loss of life of any emergency response agency in the history of the United States. *Id.* The 37 and 23 deaths of Port Authority Police Department and New York City Police Department personnel that occurred during those agencies' responses to the attacks on the World Trade Center constitute the largest loss of life and second-largest loss of life for any police force in the history of the United States. *Id.*

largest crime scenes in FBI history."[17] While the United States was left with this burden, Mr. Mohammad continued to escape justice until he was captured in March 2003. Now, in a plain attempt to further escape justice, the Defense attempts to argue that every piece of melted steel, and every piece of concrete that fell during the collapse of the World Trade Center towers is relevant and material to the defense.[18] In doing so, Defense counsel for Mr. Mohammad imply that the United States was required to maintain a hole in the ground and a toxic debris pile that caused cancer and the deaths of thousands of first responders over the past 20 years in perpetuity until they were allowed to inspect it and come to their own conclusion on how those same towers fell. The Commission must reject such an idea and should deny the Defense request on its face.

The North and South Towers of the World Trade Center stood in lower Manhattan from 1973 until minutes after two hijacked airliners were flown into them 28 years later. In reality, the Prosecution's discovery obligation in this regard was satisfied by simply turning over the videos of the planes striking the towers and the towers collapsing shortly thereafter. However, the Prosecution also provided the Defense a 12,000 page report by the National Institute of Standards and Technology documenting how and why the towers fell following the strikes.

In short, the information the Defense seeks is neither exculpatory, nor will it lead the Defense to other evidence. Thus, the Defense is entitled to no more discovery on this issue and the motion should be denied, without oral argument

6. <u>Conclusion</u>

The Prosecution respectfully requests that this Commission deny the requested relief set forth within AE 768 (KSM), Mr. Mohammad's Motion to Compel Documents and Information Related to the Government's Storage, Transfer, and/or Sale of 9/11 Crime Scene Evidence, without oral argument.

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[17] AE 768 (KSM) at 3 n.4 (quoting "9/11 Investigation," available at: https://www.fbi.gov/history/famous-cases/911-investigation, last accessed 8 March 2020).

[18] *See id.* at 14 ("Mr. Mohammad has the constitutional right to file a motion to dismiss where the government has failed to preserve potentially useful evidence").

7. Oral Argument

The Prosecution does not request oral argument, and posits that this Military Commission should dispense with oral argument as the facts and legal contentions are adequately presented in the material now before the Commission and argument would not add to the decisional process. However, if the Commission decides to grant oral argument to the Defense, the Prosecution requests an opportunity to respond.

8. Witnesses and Evidence

The Prosecution will not rely on any witnesses or additional evidence in support of this pleading.

9. Additional Information

The Prosecution has no additional information.

10. Attachments

A. Certificate of Service, dated 13 March 2020

Respectfully submitted,

____________//s//__________________________
Clay Trivett
Managing Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 13th day of March 2020, I filed AE 768A (GOV), Government Response To Mr. Mohammad's Motion to Compel Documents and Information Related to the Government's Storage, Transfer, and/or Sale of 9/11 Crime Scene Evidence, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//
Christopher M. Dykstra
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