

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID
MUHAMMAD SALIH MUBARAK BIN
‘ATTASH, RAMZI BIN AL SHIBH, AMAR
AL BALUCHI (“ALI ABDUL AZIZ ALI”),
MUSTAFA AHMED ADAM AL HAWSAWI

AE-013EEE(MAH)

**Motion to Make Conforming Amendments
to AE-013DDD, the Commission’s Second
Amended Protective Order #1**

Filed on: 6 January 2014

1. **Timeliness:** This motion is timely filed.
2. **Relief Sought:** Defense Counsel request that this Commission issue conforming amendments to AE-013DDD, Second Amended Protective Order #1, so that the language of this Order conforms with the rulings and reasoning in AE-013CCC and AE-200II.
3. **Overview:** The Defense for Mr. Hawsawi asks this Commission to extend the timeline for signing AE 013BB Amended Memorandum of Understanding (MOU), until the commission can consider making conforming changes to AE-013DDD Second Amended Protective Order #1, so that this Order may be consistent with the Commission’s findings and rulings.

In AE-200II, the Commission decided on Defense Motion to Dismiss due to Violations of the Convention Against Torture, which challenged aspects of AE-013AA Amended Protective Order #1 governing the handling of classified information in these proceedings. Denying the defense motion, the Commission found that a person is bound to protect classified information to the extent that person has privity with the U.S. Government through an Executive Order, statute, regulation or some agreement signed with the Government. As a result of this finding, the Commission issued AE-013DDD Second Amended Protective Order #1 to govern the handling of classified information in this proceeding. Ruling that “it has limited power to control the

actions of the Accused” with respect to their handling of classified information, the Commission modified its previous protective order by striking a paragraph that prohibited the Accused from disclosing their observations and experiences.

In the present Motion, the Defense seeks to ensure that Seconded Amended Protective Order #1 follows the Commission’s reasoning by removing remaining language in that order which would bind the Accused, persons who do not have privity with the U.S. Government, and that would impose an obligation on them which would effectively silence them – a silencing that prohibits them from pursuing remedies or investigation available under the Convention Against Torture.

The lingering language in the Seconded Amended Protective Order #1 that binds the Accused, when coupled with requirement for the Defense to sign the memorandum of understanding, imposes an affirmative obligation on Defense Counsel to police the accused and prevent them from exercising rights they have under international law to seek investigation and recourse as victims of torture. To remedy this interplay of the remaining language in the Second Amended Protective Order #1 and the MOU, the Commission should take out the language in the order that purports to bind the Accused -- specifically, paragraph 8(b), which continues to refer to the Accused.

4. Burden and Standard of Proof: The burdens of proof and persuasion on this motion rest with the defense. RMC 905(c).

5. Facts:

a. In AE-200II, the Commission decided the Defense Motion to Dismiss due to Violations of the Convention Against Torture. Denying that defense motion, which challenged aspects of Amended Protective Order #1, the Military Judge found the paragraphs of the Order that

described categories of information to be kept classified, did not themselves,

impose a duty or obligation on Counsel or the Accused. The duty and obligation to safeguard and protect classified information exists, to the extent an individual is in privy [sic] with the U.S. Government, by statute, Executive Order, administrative service regulation, and signed agreements between an individual (in this case, Defense Counsel) and the U.S. Government.

Order, AE-200II, at ¶ 9) (“Findings / Law / Discussion”)

The commission then found that any prohibition in the Amended Protective Order #1 on the disclosure of the Accused’s observations and experiences, “goes to “information” an Accused provides to persons, bound in privy [sic] to the U.S. Government due to the grant of a security clearance and access to protected information, who must protect this information from unauthorized disclosure.” *Id.* at ¶ 11 (“Findings / Law / Discussion”).

b. In light of the above ruling in AE-200II, the Commission amended the previously issued protective order that addressed the handling of classified information. *See* AE-013CCC (filed Dec. 16, 2013). Specifically, the Commission deleted the following language, from paragraph 2(g)(5):

In addition, the term “information” shall include, without limitation, observations and experiences of an accused with respect to the matters set forth in subparagraphs 2g(4)(a)-(e), above.

Second Supplemental Ruling, AE-013CCC, at ¶ 6(i) (“Discussion”).

In discussing the effect of this paragraph, the Commission reasoned: “the Commission recognizes it has limited power to control the actions of the Accused in this regard.” *Id.* The Commission elaborated that, “the restriction articulated in paragraph 2g(5) is no different than any other classified information that comes into the possession of counsel and is superfluous to restrictions set forth by the protective order.” *Id.*

c. Affirming the deletion of paragraph 2g(5), the Commission further ruled that, “the language at [sic] question will be removed from the order recognizing that doing so does not lessen in any sense the responsibilities of counsel to fulfill all the obligations inherent in possessing a security clearance.” *Id.* at ¶ 7(j) (“Ruling”).

d. As a result of its rulings, therefore, the Commission issued a Second Amended Protective Order #1. *See* AE-013DDD (filed Dec. 16, 2013). In that new Order, however, the Commission left language binding the Accused, inconsistent with the Commission’s reasoning and rulings in AE-200II and AE-013CCC. The Second Amended Protective Order #1 still provides that:

(b) No participant in any proceeding, including the Government, Defense, *Accused*, witnesses, and courtroom personnel, may disclose classified information, or any information that tends to reveal classified information, to any person not authorized to access such classified information in connection with this case.

Second Amended Protective Order #1, AE-013DDD, at ¶ 8(b)
(emphasis added).

e. The interplay between this protective order language which binds the Accused and the MOU that this Commission issued in AE-013BB (which Defense Counsel are expected to sign by January 24, 2013), creates an affirmative obligation on Defense Counsel to prohibit these accused from exercising their right to seek redress for their past treatment at the hands of the U.S. Government.

6. Law and Argument:

To Maintain Consistency with the Commission’s Reasoning and Rulings, Protective Order #1 Should Not Bind the Accused

In the Second Amended Protective Order #1, the Commission articulated that

The purpose of this Protective Order is to ensure those authorized to receive classified information in connection with this case will never divulge that information to anyone not authorized to receive it, without prior written authorization from the OCA and in

conformity with this Order.

See AE-013DDD, at ¶9(a).

The present Motion aims to ensure that the Order is directed at “those authorized to receive classified information,” and not at the Accused. *Id.* The Second Amended Protective Order #1, however, continues to bind the Accused by imposing a duty on them to protect classified information. *Id.*, at ¶ 8(b).

When it deleted paragraph 2(g)(5) of the last Protective Order #1, which addressed the “observations and experiences of the accused,” the Commission recognized that “it has limited power to control the actions of the Accused in this regard.” Second Supplemental Ruling, AE-013CCC, at ¶ 6(i) (“Discussion”). So that the Second Amended Protective Order #1 is internally consistent and conforms with this aspect of the Commission’s reasoning and with its rulings, the language referring to obligations of the Accused with respect to classified information, in Paragraph 8(b), should be removed. Any classified information of which the accused are in possession arises from their individual observations and experiences – it is contained in their memories. Removing Paragraph 8(b) would make the Second Amended Protective Order #1 copacetic with its other provisions, consistent with the Commission’s reasoning in removing Paragraph 2(g)(5), and thereby would firmly withdraw the Commission from seeking to control the Accused’s communication of their observations and experiences – a matter which the Commission itself has acknowledged it “has limited power to control.” *Id.*, at ¶ 6(i) (“Discussion”).

The language that lingers in the Second Amended Protective Order #1 under Paragraph 8(b), read in conjunction with the duties that the MOU imposes on Defense Counsel, poses additional obstacles: these two documents operate to obligate Defense Counsel against their own

client. The MOU pits lawyer against client by placing an affirmative obligation on Defense Counsel to prevent the release of classified information. This oppositional role arises because the MOU requires counsel to promise, “to take all reasonable precautions to prevent any unauthorized use or disclosure of any classified documents or information in my possession or control.” *See* AE-013BB, *Amended Memorandum of Understanding Regarding the Receipt of Classified Information*, at 2.

Accordingly, just as before Amended Protective Order #1 was changed, the Second Amended Protective Order #1 and MOU still operate to require Defense Counsel to silence Mr. Hawsawi – which inherently requires counsel to prevent the Accused from exercising their rights to seek investigation and redress under the Convention Against Torture. *See* AE-200(MAH) (filed Aug. 12, 2013), at 6-7. For the reasons articulated in the Defense’s earlier pleadings, placing on the Accused some duty with respect to their knowledge of classified information through observations or experiences, and then binding Defense Counsel to enforce this purported duty, is untenable ethically, constitutionally, and under international law. *See* AE-200, Defense Motion to Dismiss due to Violations of the Convention Against Torture (filed Aug. 12, 2013); AE-200I, Defense Reply (filed Oct. 10, 2013).

The Defense asks that this Commission extend the timeline for signing the MOU until the Commission considers this Motion requesting conforming amendments. At the very least, the Accused should not be obligated, under this Commission’s own orders, with respect to the information they have from their own observations and experiences.¹ Any such obligation would

¹ The Defense requests this amendment to the Second Amended Protective Order #1 without conceding the legal validity of the Commission’s decisions in AE-013CCC and AE-200II, with respect to the claims raised in AE-200.

make the Commission complicit in silencing the Accused, and would have the effect of pitting counsel against client.

8. Request for Oral Argument: The Defense requests oral argument on this motion.

9. Conference with Opposing Counsel: The Defense informed the Prosecution of the substance of this Motion on January 6, 2014. The Prosecution responded that it opposes this Motion.

10. Attachments:

A. Certificate of Service

 //s//
WALTER B. RUIZ
Learned Defense Counsel

 //s//
SEAN M GLEASON
Lt.Col., JAGC, USMC
Detailed Defense Counsel

CERTIFICATE OF SERVICE

I certify that on the 6th day of January, 2014, I electronically filed **AE-013EEE (MAH), Motion to Make Conforming Amendments to AE-013DDD, the Commission's Second Amended Protective Order #1**, with the Clerk of the Court and served the foregoing on all counsel of record by e-mail.

 //s//
WALTER B. RUIZ
Learned Defense Counsel

 //s//
SEAN M GLEASON
Lt.Col., JAGC, USMC
Detailed Defense Counsel