

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

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID
MUHAMMAD SALIH MUBARAK BIN
'ATTASH, RAMZI BIN AL SHIBH, ALI
ABDUL-AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

AE 530G (KSM)¹

MOTION FOR APPROPRIATE RELIEF
to Compel Compliance with Military
Commission Orders, and Abate All
Proceedings Until All Attorney-Client Legal
Materials Are Returned

October 27, 2017

1. Timeliness

This motion is timely filed.

2. Relief Sought

Mr. Mohammad requests that the Government and JTF-GTMO be ordered to immediately comply with the Military Commission's orders in AE 530A² as well as the provisions of AE 018U³, and that proceedings be abated unless and until such compliance is complete, and all legal materials and Mr Mohammad's computer and other electronics are returned unexamined.

3. Overview

For at least the third time in these proceedings the Government has intruded into the legal bins, legal materials and/or protected attorney/client communications of Mr.

¹ Defense counsel are using the assigned AE number and abbreviation in compliance with AE 470 Trial Conduct Order, but object to the use of Mr. Mohammad's initials which have been used extensively in a dehumanization campaign by the US government. Defense counsel for Mr. Mohammad have requested a different abbreviation.

² AE 530A ORDER regarding Government Notice of Evidence Relevant to October 2017 Laptop Seizure Dated 19 October 2017.

³ AE 018U ORDER Privileged Written Communications Order

Mohammad, and seized attorney-client privileged materials from Mr. Mohammad in violation of the Sixth, Eighth and Fourteenth Amendments of the United States Constitution, Common Article 3 of the Geneva Conventions, and in further violation of direct orders of the Military Commissions; and has done so in explicit disregard of the Commission's orders to the contrary. The government's pattern of conduct, and the Commission's failure to require compliance with orders purportedly designed to protect Mr. Mohammad's rights, substantially interferes with the attorney-client relationship and counsel's ability to render effective assistance; and consistently reinforces the sequela of the government's torture of Mr. Mohammad in CIA custody by, inter alia, conveying the message that the prosecution and other governmental agencies exercise effective control over the Commission's proceedings, and that Mr. Mohammad's lawyers are unable to protect him or his legal rights from governmental abuse.

4. Burden of Proof

As the moving party, the defense carries the burden of persuasion. However, the Government should bear the burden of explaining their non-compliance with clearly articulated orders of the Commission.

5. Facts

a. The complete factual basis for JTF-GTMO and Trial Counsel's actions is unclear as they have refused to comply with the Commission's orders to respond to requests for further information, and have not provided the notice to defense counsel pursuant to AE 018U.

b. On 14 June 2017, this Court issued a Supplemental Ruling in AE 018T (SUP)⁴ governing handling procedures for privileged written communications exchanged between defense counsel and the accused and setting out the required processes and procedures for handling of client legal materials by JTF-GTMO and the Government including specifically how to execute a seizure of attorney-client materials.

c. On 19 October 2017 counsel for the five named defendants were informed that certain materials including laptops had been seized from the prisoners' legal bins.⁵ After discussion in open session, the Commission issued the following order:

I am ordering that none of the materials that were seized today be reviewed; and secondly, that the people who did the seizing explain why they seized them and why the normal procedure was not being followed. And they are to explain that to any defense counsel whose client's materials were seized.⁶

d. Instead of complying with that Order, Trial Counsel took it upon themselves to decide how to proceed, and did not make available "the people who did the seizing...to any defense counsel whose client's materials were seized." When counsel for Mr. Mohammad reached out to the SJA to find out "why they seized them and why the normal procedure was not being followed" the SJA refused to respond.

e. Later on 19 October, 2017 the Government filed AE 530 *Government Notice Of Evidence Relevant to October 2017 Laptop Seizure*. The government noted: "The Prosecution further states that a JTF-GTMO official is prepared to testify regarding the underlying facts surrounding the seizure during the October 2017 session if the Commission deems that testimony regarding this matter is necessary." However, when

⁴ AE 018T SUPPLEMENTAL RULING Government and Defense Motions to Amend AE 018U Dated 14 June 2017.

⁵ Unofficial/Unauthenticated Transcript of the KSM et al. (2) Motions Hearing Dated 10/18/2017 from 9:14 AM to 10:23 AM, pp 16774 -16780. at 16774.

⁶ Unofficial/Unauthenticated Transcript of the KSM et al. (2) Motions Hearing Dated 10/18/2017 from 9:14 AM to 10:23 AM, pp 16774 -16780. at 16775.

asked to produce the witness, the Government failed to do so and the Military Commission refused to take testimony during the October hearings.

f. Rather than require the prosecution to comply with its previously issued orders to enable defense counsel to investigate the matter, and in the face of the prosecution's unilaterally-declared method of proceeding, on 19 October 2017 the Commission entered its order in AE 530A. Adhering to the prosecution's procedure, the order did not require testimony from any witnesses, and is thereby necessarily incomplete and limited only to procedures for allegedly "securing" the laptops until the government may obtain *ex parte* orders explicitly authorizing the intrusion into privileged communications and confidential case materials. The Order does not provide any practical remedies for determining whether and to what extent the contents of the computers already have been reviewed and/or other legal materials seized.

g. Despite the government's intransigence and the Commission's unwillingness to enforce its own orders, Mr. Mohammad is aware of additional facts that, in the context of those publicly discussed in the Commission, demonstrate the government's ongoing failure to comply with the Commission's orders resulting in the likely violation of Mr. Mohammad's constitutional rights, including the following:

1. On Monday 16 October 2017 after proceedings in the Military Commission courtroom, Joint Task Force-Guantanamo searched and seized Mr. Mohammad's legal bin. No official from Joint Task Force-Guantanamo "immediately informed" defense counsel of the seizure as required by AE 018U (Sup) (Paragraph 11c: "If the materials are not properly marked, they will be retained by the attorney representative of the SJA and counsel for the

Accused shall be immediately notified.... The materials shall not be duplicated, photographed, or otherwise copied by any process prior to being shown to Defense Counsel.” (Emphasis added.))

2. On Wednesday 18 October 2017 as Mr. Mohammad prepared for transportation to the Expeditionary Legal Complex (ELC) Joint Task Force-Guantanamo opened his legal bin and seized his laptop computer.
3. After being informed of the seizure of the computers, in open court, the Commission ordered: “I am ordering that none of the materials that were seized today be reviewed; and secondly, that the people who did the seizing explain why they seized them and why the normal procedure was not being followed. And they are to explain that to any defense counsel whose client's materials were seized⁷.”
4. After comments from defense counsel, the Commission clarified: “Any of those materials that were seized, in whatever format or carrying device -- computer, paper, CD, there may be something I am not thinking of -- but whatever was seized from them as relates to legal materials is what I am talking about and that's covered by the order not to be reviewed until this issue has had an opportunity for defense counsel to weigh in on this thing⁸.”
5. After returning to Camp 7 following the commission proceedings that afternoon, Joint Task Force-Guantanamo informed Mr. Mohammad that he would not be able to return to his cell until it was searched and each of his

⁷ Unofficial/Unauthenticated Transcript of the KSM et al. (2) Motions Hearing Dated 10/18/2017 from 9:14 AM to 10:23 AM, at p. 16776.

⁸ Unofficial/Unauthenticated Transcript of the KSM et al. (2) Motions Hearing Dated 10/18/2017 from 9:14 AM to 10:23 AM, pp 16777.

legal bins was reviewed. Because of the number of cells and legal bins being searched, Joint Task Force-Guantanamo did not return Mr. Mohammad to his cell until the early morning hours of 19 October 2017. At that time, the Watch Commander⁹ and the tier supervisor searched each of Mr. Mohammad's legal bins in his presence. The search lasted for three hours. Contemporaneously with the search, Joint Task Force-Guantanamo informed Mr. Mohammad that a "new SOP" would restrict the number of legal he could have in his cell to 5, and that any additional legal bins would have to be stored outside his cell, and thus not under his immediate custody and control. Because Mr. Mohammad had approximately 26 legal bins, he immediately culled through the documents in the presence of the Joint Task Force-Guantanamo guard force to prepare the materials for return to his defense counsel¹⁰. The Watch Commander filled nine "burn bags"¹¹. After filling the bags, the Watch Commander sealed each of the bags with tape and Mr. Mohammad then placed a label as required to comply with AE 018U (specifically paragraph 6b) on the front and back of each bag, two labels on each of the nine sealed bags. He requested that these bags be returned to his legal team. He was not

⁹ Each reference to a Watch Commander is a reference to the same Watch Commander. His badge number is FOUO and therefore contained in Attachment B.

¹⁰ This is a process that Mr. Mohammad completes on a regular basis. The standard operating procedure is that the Watch Commander places the items in an envelope and seals it and then Mr. Mohammad places a sticker with his ISN on it. The Watch Commander then gives it to the SJA who delivers it with other client mail either directly to a member of Mr. Mohammad's defense team or to the Defense Courier who resides on island and courier's mail to and from each defense team and the detainees.

¹¹ These were the standard issue "burn bag" – a sturdy paper bag with diagonal stripes that measures approximately 21.5" x 12" x 7".

able to wait until the bags were picked up by the SJA because he had a 9:00 am legal meeting scheduled at Echo II and would have been too late.

6. Routine Camp 7 procedures require Mr. Mohammad to rely on a similar procedure to deliver sealed, stickered legal materials from his legal bins at Camp 7 to his legal team: the delivery of legal papers is effected through Camp 7 personnel to the SJA in Mr. Mohammad's presence, and the SJA transfers the sealed material to the Defense Courier, who delivers it to Mr. Mohammad's legal team.
7. At the time Mr. Mohammad left for his scheduled legal meeting, the Watch Commander informed him that the sealed bags of legal materials would be delivered to the Defense Courier by 2:00 p.m. that day, Thursday, October 19, 2017.
8. Joint Task Force-Guantanamo failed to deliver the materials by the indicated hour.
9. On Friday, 20 October 2017 Mr. Mohammad's defense team asked the Defense Courier to contact the office of the SJA to inquire regarding the return of the nine bags filled with legal materials. The SJA did not respond to the inquiry.
10. On Saturday, 21 October 2017, Mr. Mohammad's Learned Counsel contacted the Defense Courier to inquire whether the SJA had delivered the legal materials or indicated when delivery could be expected. The SJA had not delivered the materials and the Defense Courier had no further information about the timing of the return of the bags.

11. Over the past week, Mr. Mohammad has asked the Watch Commander daily why the nine bags of legal materials had not been returned to his legal team. He was told by the Watch Commander that, contrary to the assurances given to Mr. Mohammad on October 19, 2017, “the Lt. Commander of the SJA” had instructed the Watch Commander to retain custody of the bags for retention by the SJA. Several times, when Mr. Mohammad inquired, this Watch Commander confirmed that Joint Task Force-Guantanamo was retaining custody of the nine sealed bags at the direction of the SJA. He informed Mr. Mohammad that the SJA had told him, the Watch Commander, that the bags would remain in the custody of Joint Task Force-Guantanamo until further orders from the SJA.
12. On Tuesday 24 October, 2017 Mr. Mohammad had a scheduled visit with his legal team at 9:00 am at Echo II. He asked the Watch Commander to have the bags loaded on the transport van so he could take the nine legal bags with him for delivery to his attorney. Mr. Mohammad routinely delivers material to his legal team members during meetings, with instructions for disposition. The Watch Commander said that he would “call Ops” to request this. The Watch Commander returned and told Mr. Mohammad that “Ops” had denied his request. He would not be permitted to take the bags in the van to his legal meeting, because “Ops” reported that “the Lieutenant Commander at the SJA said that the Watch Commander should keep it until we decide” what to do. Mr. Mohammad was not allowed to take the bags in the van to his legal meeting.

13. Later that morning of Tuesday 24 October 2018, members of Mr.

Mohammad's team who were still at NSGB were informed that they could pick up Mr. Mohammad's nine bags of legal materials at Echo II from the SJA at 1500. When the Military attorney Capt. Greg Vanison arrived, he was informed by the Assistant SJA that Mr. Mohammad said he wanted his legal materials returned to him rather than to counsel, "so now we have to work out the legal stuff to see what to do next¹²." The Assistant SJA instead turned over a single bag and a Memorandum noting that the bag contained materials found in other detainee cells, which were marked with Mr. Mohammad's ISN #. None of the materials from the nine bags of legal materials were returned to Mr. Mohammad's legal team at that time (or at any time since).

14. On Tuesday 24 October 2017 Mr. Mohammad asked to speak to the Watch

Commander, who told him that "the Lt. Commander of the SJA" had said "we need to search" the nine bags, which had been removed from the Watch Commander's office at some point in his absence. Asked if the materials were taken out of the building to be searched, the Watch Commander said that he did not know, he did not see them removed from his office nor see them being searched.

15. On Tuesday 24 October 2017, while Mr. Mohammad was in the Main

Recreation area after legal visits, he was informed of the return of his legal bags. However, when Mr. Mohammad returned to his cell, he found only six bags, none of which were the original bags he had sealed and asked Joint Task

¹² See Declaration of Major Gregory Vanison, Attachment C.

Force-Guantanamo to return to his legal team the previous week. These bags had some materials that had not been in the nine bags, and were missing materials that had been in those nine bags. The six bags were of the same type as the nine bags used previously, but were not sealed in any way, and did not have the labels that Mr. Mohammad had placed on them when the Watch Commander took them on 19 October 2017.

16. On Wednesday 25 October 2017 Mr. Mohammad's counsel requested information from the SJA regarding the seizure of the nine bags of legal materials¹³. To date, the SJA has not responded to counsel's request.

17. On the morning of October 26, 2017, Mr. Mohammad spoke with the Watch Commander and verified all the details of the account given above with the Watch Commander.

18. Mr. Mohammad did not request that his materials be returned to him (rather than sent to his legal team) at any time at any time.

h. Despite explicit orders from the Commission to the contrary, the prosecution and Joint Task Force-Guantanamo continue to violate Mr. Mohammad's rights to secure and confidential attorney client communications and refuse to require "the people who did the seizing explain" the facts surrounding the seizure of Mr. Mohammad's legal materials to Mr. Mohammad's counsel.

i. While the Commission apparently took the "[t]he Government," at its word that it would "provide the information regarding this action to Counsel for the Accused directly, outside of the normal filing process,"¹⁴ it is clear that the government has no

¹³ See Attachment D.

¹⁴ AE 530A ORDER Government Notice of Evidence Relevant to October 2017 Laptop Seizure

intention of doing so. Rather, it is clear that the government intends, once again, to stonewall the defense while exploiting its back-channel lines of communication to interfere with Mr. Mohammad's ability to prepare a defense. *See* AE 425 series.¹⁵

6. Law and Argument

The Sixth Amendment right to counsel is empty unless an accused is able to have confidence that any and all correspondence with his attorney will be held in confidence and the privilege not impaired by government intrusion. "The right to the effective assistance of counsel at trial is a bedrock principle in our justice system." *Martinez v. Ryan*, 566 U.S. 1, 13 (2012). Particularly when the government seeks to kill the accused, the Fifth, Sixth and Eighth Amendments mandate that the defendant be afforded the assistance of counsel and a meaningful opportunity to consult, conduct a thorough-going investigation and prepare a defense. *Powell v. Alabama*, 287 U.S. 45, 57, 72, 453 S.Ct. 55 (1932). This right extends to the period before "the beginning of trial," when the accused is "as much entitled to such aid during that period as at the trial itself." *Id.* at 57. It is, of course, obvious, that "[n]ecessarily included in the Sixth Amendment right to counsel is the right of an accused to confer privately with his attorney." *United States v. Brooks*, 66 M.J. 221, 223. The conviction and execution of a prisoner who has not been afforded counsel in a meaningful and substantial sense "would be little short of judicial murder." *Powell*, 287 U.S. at 72.

As the Military Commission noted just a few months ago:

the Commission is responsible to ensure appropriate legal protections for the Accused and will intervene when it is established the daily

19 October 2017.

¹⁵ AE 425 (Mohammad) Mr. Mohammad's Motion to Recuse Military Judge and the Current Prosecution Team and for Further Appropriate Relief, 31 May 2016.

operations of the detention facility adversely impact the Commission's ability to proceed or the Accused's rights.¹⁶

This is one of the situations when the operations of the detention facility – and the failure of the Government to comply with this Court's clearly announced Orders -- not only has adversely impacted the Accused's rights, but also now adversely impact the Commissions' ability to proceed.

Trial Counsel's impunity in completely ignoring a clear and precise Order of the Commission should not go unchallenged nor be allowed to be normalized.

At this point, Mr. Mohammad requests that the Commission enforce its Order and require "the people who did the seizing" to "explain why they seized [the legal materials] and why the normal procedure was not being followed" directly to counsel for Mr. Mohammad. Only when that record is established can Mr. Mohammad – and the Commission – make decisions about what should happen next.

7. Conference

On October 27, 2017, counsel for Mr. Mohammad requested the position of the government on this motion. The government opposes the motion.

8. Oral Argument:

Mr. Mohammad requests oral argument unless the Military Commission decides to grant the present motion without oral argument. .

9. Witness and Evidence:

Mr. Mohammad requests that "the people who did the seizing" be produced for an interview by Counsel for Mr. Mohammad.

¹⁶ AE 018T/AE 032PP/AE 049B/AE 144W, RULING Privileged Written Communications, dated 6 November 2013 at 2-3 (hereinafter AE 018T).

10. Additional Information:

None.

11. List of attachments:

- A. Certificate of Service
- B. Information regarding Watch Commander's Badge Number FOUO
- C. Declaration of Maj. Gregory Vanison
- D. Email from David Z. Nevin to SJA dated October 25, 2017

Respectfully submitted,

//s//
DAVID Z. NEVIN
Learned Counsel

//s//
GARY D. SOWARDS
Defense Counsel

//s//
DEREK A. POTEET
LtCol, USMC
Defense Counsel

Counsel for Mr. Mohammad

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 27th day of October 2017, I electronically filed AE 530G (KSM), Mr. Mohammad's Motion for Appropriate Relief to Compel Compliance with Military Commission Orders, and Abate All Proceedings Until All Attorney-Client Legal Materials Are Returned with the Clerk of Court and served the foregoing on all counsel of record by electronic mail.

//s//

DAVID Z. NEVIN
Learned Counsel

ATTACHMENT B

Watch Commander Badge Number



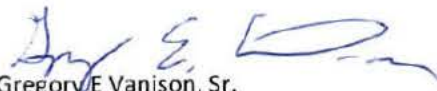
ATTACHMENT C

24 October 2017 at 1352hrs.

Declaration of MAJ Gregory E. Vanison, SR.

Memorandum for Record

I, Gregory E. Vanison, Declare that on today, 24 October 2017 at 1517hrs., I met with Assistant SJA [REDACTED] in the parking lot of Echo II. He pulled in the parking spot next to mine and informed me that "he knew we were expecting shred materials, but "Mr. Mohammad said he wanted his shred bags back." I said "really?" [REDACTED] said "yeah he wanted them back, so now we have to work out the legal stuff to see what to do next." He then handed me a bag and a Memorandum (attached) and informed me that the bag contained materials found in other detainee cells, which belonged to Mr. Mohammad. I accepted the bag, along with key to said bag, and asked what he wanted me to do with the bag after I removed the materials. [REDACTED] asked me if I could give the bag to [REDACTED] I asked what classification the bag was and [REDACTED] replied presumptive TS. I brought the bag to the ELC and waited for a witness prior to opening the courier bag.


Gregory E Vanison, Sr.
MAJ/USA
Assistant Defense Counsel



DEPARTMENT OF DEFENSE
HEADQUARTERS, JOINT TASK FORCE GUANTANAMO
OFFICE OF THE STAFF JUDGE ADVOCATE
APO AE 09522-9998

24 October 2017

JTF-GTMO-SJA

MEMORANDUM FOR Office of the Chief Defense Counsel, 1620 Defense Pentagon,
Washington, DC 20301-1620, C/O ISN 10024's defense team

SUBJECT: Disposal of possible legal material belonging to ISN 10024

On 20 October 2017, during a search of another detainee's cell, the guard force found documents stamped with legal markings and belonging to ISN 10024. Due to the fact that they might be legal in nature, they are being returned to you.

Staff Judge Advocate

ATTACHMENT D

UNCLASSIFIED//FOR PUBLIC RELEASE

From: David Nevin
To: SOUTHCOM NS Guantanamo Bay TTE GTMO SJA Mailbox LSS
Cc: David Nevin; TSgt DoD OMC; Chapman, Anne (anne@mitchellsteincarey.com); SFC
OSD OMC Defense; LT USN (US); Mai OSD OMC Defense; CPO OSD OMC
Defense; LeBoeuf, Denise (dleboeuf@aclu.org); CIV OSD OMC (US); David Nevin; Poteet, Derek A LtCol OSD
Jr CTR OMC Defense; Poteet, Derek A LtCol OSD; OMC Defense; Poteet, Derek (poteetusmc@yahoo.com); Radostitz, Rita J
CIV OSD OMC - Defense; Radostitz, Rita (rjradostitz@gmail.com); SSgt USAF (US); Sowards, Gary
(GSowards@hcr.ca.gov); Sowards, Gary (gsowards@mcbreenseior.com); MAJ OSD OMC Defense; DR OSD OMC Defense
Subject: [Non-DoD Source] Retention and search of legal materials
Date: Wednesday, October 25, 2017 6:25:46 PM

This email was sent from a non-Department of Defense email account, and contained active links. All links are disabled, and require you to copy and paste the address to a Web browser. Please verify the identity of the sender, and confirm authenticity of all links contained within the message.

Dear SJA:

I am Learned Counsel for Mr. Khalid Shaikh Mohammad, ISN 10024. On Thursday, October 19, 2017, the guard force accepted custody of nine sealed bags of privileged legal materials from Mr. Mohammad's legal bins with the express understanding they were to be delivered to Mr. Mohammad's attorneys. The materials were properly marked in accordance with paragraph 11(a) of AE 018U, AMENDED ORDER, Privileged Written Communications, 14 June 2017; and were fully protected from disclosure to other persons by the attorney-client privilege, the attorney work product doctrine, Rule 1.6 of the Rules of Professional Conduct, AE 018U, paragraph 11(a), and by other provisions of law. The Watch Commander assured Mr. Mohammad that the materials would be delivered by the SJA to the defense courier by 1400 hours that day for delivery to counsel.

Thereafter, the materials were nonetheless retained by the guard force, the SJA and/or others working under the direction of or in concert with Joint Task Force-Guantanamo, despite the continuous availability of the defense courier and the presence of at least two of Mr. Mohammad's attorneys on island. Some five days later, on Tuesday, October 24, 2017, Mr. Mohammad requested that he be allowed to take the nine bags of legal materials to his scheduled legal visit and to deliver them directly to counsel. His request was refused. That same day, counsel were advised that the materials would be delivered to them by an assistant SJA at 1500 at Echo II. The materials were not delivered at that time. Finally, that evening, materials from the original nine sealed bags were returned to Mr. Mohammad, in six different unsealed bags, after having been searched.

I am writing to request that you provide a detailed description of the custody and handling of these legal materials from the time the guard force took them from Mr. Mohammad's possession until the present, including but not limited to:

- a. where and in whose possession the materials were located at all times after the guard force took custody;
- b. identifying information of all persons and locations involved in the search, review, or other observation of the materials at any time;
- c. When, why, and by whom each such search, review or observation occurred; and what person or entity, if any, authorized the search, review or observation;

UNCLASSIFIED//FOR PUBLIC RELEASE

d. a precise description of any of the materials and their contents that were seized, copied, summarized or otherwise retained by the government.

I appreciate your prompt attention to this request, so that litigation regarding this issue may be avoided or simplified. Please contact me if I may provide additional information, or the assistance of our team's attorneys who will remain on island until Friday, October 27, 2017.

David Nevin

David Nevin
Nevin Benjamin McKay & Bartlett, LLP
P.O. Box 2772
Boise, ID 83701
208-343-1000
Caution-www.nbmlaw.com<Caution-www nbmlaw.com>