

UNCLASSIFIED//FOR PUBLIC RELEASE  
MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

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UNITED STATES OF AMERICA

v.

ABD AL-HADI AL-IRAQI

AE 054A

Defense Motion For A Continuance

19 January 2016

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1. **Timeliness:**

This motion is timely filed pursuant to Rule for Military Commission (R.M.C.) 906 and Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7. On Friday, 15 January 2016, at 1320, the Defense received an e-mail from Captain (Capt) [REDACTED] United States Marine Corps, a Staff Attorney for the Trial Judiciary, advising that its e-mail request for an 802 conference needed to be resubmitted as a motion in the AE 054 series, with a compressed briefing schedule deadline of 19 January 2016.

2. **The Motion:**

a. Witnesses: Should the Commission determine that witnesses are necessary to resolve this motion, the Defense requests that the Government produce the individuals named in Mr. Rushforth's affidavit for direct and cross examination by the parties on the ultimate issue: the government's complete and total, universal control over granting security and country clearances such as they relate to enabling the Accused to exercise BOTH his statutory and constitutional rights to counsel of his choice.

b. The Defense respectfully requests a delay of the January hearing, consistent with its Motion for a Continuance, AE 015K, to allow Mr. Rushforth to not only receive his security

clearance, but also to be granted access to and meet with his client and travel to Guantanamo Bay, Cuba. At present, without a security clearance, country clearance, or having met the client, Mr. Rushforth is not able to adequately represent the Accused at the hearing, and the Defense objects to going on the record when the Accused will not be represented by the entire defense team of record, which includes Mr. Rushforth, especially when the delays in getting Mr. Rushforth approved for his clearances is within the exclusive control of the Federal Government.

c. Based upon the below authority, the Defense requests that the hearing scheduled for 26-27 January 2016 be continued until such time that the Accused's entire team of currently qualified attorneys who have entered an appearance have received all clearances required for full, competent and zealous representation. In other words, until the Government performs its task—a job that only it can do—in a timely and appropriate manner. To the extent that the Government is not treated by the Commissions (or other federal Courts) as a monolith generally, in a case such as this, where everything touching this case—from the statutes to the trial to the procedures to the evidence to the witnesses—is excessively, tightly controlled exclusively by the single entity known as the Federal Government (consisting as it does of numerous subordinate agencies), it must of necessity (and propriety) be treated as it is—a monolith—that is alone responsible for the entire Commissions Trial system, from A to Z—including the Accused's access to adequate representation. And when the Federal Government assumes and reserves for itself alone the responsibility for the entire process, it and it alone must bear the burden—and consequences—of its actions, or its failures, especially when such interfere with, impact or affect an Accused's Constitutional rights.

3. **Authority:**

a. Per the Regulation For Trial by Military Commission (RTMC), Rule 9.5(a), citing to 10

U.S.C. § 949 and R.M.C., the Accused has a statutory right to civilian counsel of his own choosing and at no expense to the government. 502(d)(3). He is attempting to exercise that right currently. By necessity, the Accused is completely dependent upon the Government to process any qualified civilian counsel's security and country clearance before the full benefit of his right to counsel can be substantively realized.

b. Per the 6<sup>th</sup> Amendment to the U.S. Constitution, the Accused has a constitutional right to counsel of his choice, independent of and in addition to the above referenced statutory right.

c. In *US v. Gonzalez-Lopez*, 548 U.S. 140 (2006), the U.S. Supreme Court determined that although the right to counsel of one's choice "...is circumscribed in several important respects" (citations omitted), where the government has relied upon the decisions of other government/civilian agencies/branches to go forward to trial; when those other agencies and branches were themselves incorrect in their decisions as to the qualification of counsel to represent the Accused, the trial of that Accused without the presence of his counsel of choice is reversible error—even absent the presence or some quantifiable prejudice to the Accused.

Indeed, the Court noted that:

We have little trouble concluding that erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993). Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds," *Fulminante v. U.S.*, 499 U.S. 279, 310 (1991)--or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a

context would be a speculative inquiry into what might have occurred in an alternate universe.

d. Regarding the Government's expected argument that in order to exercise his statutory right to the Pro Bono civilian counsel of his choice, he must waive his speedy trial right, even when the exercise of the statutory right is contingent upon the Government doing something to approve and facilitate it, the Court in *Gonzalez-Lopez* also stated the following, which is particularly apropos to the instant case:

Stated as broadly as this, the Government's argument in effect reads the Sixth Amendment as a more detailed version of the Due Process Clause--and then proceeds to give no effect to the details. It is true enough that the purpose of the rights set forth in that Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair. What the Government urges upon us here is what was urged upon us (successfully, at one time, see *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980) with regard to the Sixth Amendment's right of confrontation--a line of reasoning that "abstracts from the right to its purposes, and then eliminates the right." *Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting).

and

So also with the Sixth Amendment right to counsel of choice. It commands, not that a trial be fair, but that a particular guarantee of fairness be provided--to wit, that the accused be defended by the counsel he believes to be best. "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause." *Strickland v. Washington*, 541 U.S. 36, 684-685. In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation "complete.

e. Finally, regarding the possibility of going forward with just the Detailed Military Counsel working no prejudice to the Accused, or that absent some prejudicial error such as Ineffective Assistance of Counsel, the Court noted that:

The right to select counsel of one's choice, by contrast, has never been derived from the Sixth Amendment's purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee. See *Wheat v. U.S.*, 486 U.S.153, 159 (1988); *Andersen v. Treat*, 172 U.S. 24 (1898). See generally W.

Beaney, *The Right to Counsel in American Courts* 18-24, 27-33 (1955). Cf. *Powell v. Alabama*, 287 U.S. 45, 53 (1932). Where the right to be assisted by counsel of one's choice is wrongly denied<sup>1</sup>, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice--which is the right to a particular lawyer regardless of comparative effectiveness--with the right to effective counsel--which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

f. The essential holding of the Supreme Court's in *Gonzalez-Lopez* is this: the statutory right to counsel under the facts of this case—being totally dependent upon the Government's good faith control of not only its subordinate agencies but also of its processes, such as the security clearance process, or country clearance process, if used to effectuate either by force or trick a waiver or the constitutional right to counsel, is itself an unconstitutional act that is a "structural defect." Such structurally defective errors cannot be waived or avoided by a "harmless error" analysis because they "...defy analysis by 'harmless-error' standards' because they 'affect the framework within which the trial proceeds,' and are not 'simply an error in the trial process itself.'" *Id.* at 149. On this point, the Court stated:

A choice-of-counsel violation occurs whenever the defendant's choice is wrongfully denied<sup>2</sup>. Moreover, if and when counsel's ineffectiveness "pervades" a trial, it does so (to the extent we can detect it) through identifiable mistakes. We can assess how those mistakes affected the outcome. To determine the effect of wrongful denial of choice of counsel, however, we would not be looking for

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<sup>1</sup> A wrongful denial occurs when the Government fails to manage itself, its subordinate agencies or its processes in such a way that the right to counsel of one's choice is effectively unavailable for reasons beyond the Accused's control. When the government fails as a result of its own actions and processes; and when such failures are exclusively its responsibility and within its exclusive control—the statutory right becomes an illusory ruse to force or trick the Accused into waiving his more valuable and important Constitutional rights—such as the right to a speedy trial, and probably even his confrontation right.

<sup>2</sup> Again, wrongful in the sense that there is simply no excusable reason for the government's failure to administer its own security clearance processes in a manner that allows the Accused to exercise BOTH his statutory and constitutional rights.

mistakes committed by the actual counsel, but for differences in the defense that would have been made by the rejected counsel--in matters ranging from questions asked on voir dire and cross-examination to such intangibles as argument style and relationship with the prosecutors. We would have to speculate upon what matters the rejected counsel would have handled differently--or indeed, would have handled the same but with the benefit of a more jury-pleasing courtroom style or a longstanding relationship of trust with the prosecutors. And then we would have to speculate upon what effect those different choices or different intangibles might have had. The difficulties of conducting the two assessments of prejudice are not remotely comparable.

g. The Supreme Court's guidance in this area, under the facts of the present case—where the only reason that the Accused cannot exercise both his statutory and constitutional rights to representation to counsel of his choice—clearly govern the instant proceedings and should be applied strictly so that the government can not only know what is expected of it, but that the Accused's substantive due process rights are both respected and preserved.

4. **Argument and Delay Attribution:** This argument section draws on and references the sum and substance of Mr. Rushforth's affidavit, attached hereto as Exhibit A.

a. For purposes of the continuance and speedy trial clock delay attribution, the Defense incorporates herein by reference the argument and precedent more fully briefed in their Motion for Continuance, AE 015K, filed on or about 4 January 2016.

b. None of the bureaucratic delays outlined in Mr. Rushforth's affidavit is any way the Accused's fault, or the fault of the Defense Team. Rather, it is wholly an internal federal government operation and problem. Accordingly, any delays wrought by this process should and must legally be borne by and attributed to the government—as a whole—the only entity prosecuting the Accused and the only entity capable of granting the necessary security clearances which will allow Mr. Rushforth to view the evidence classified by the Government itself. Indeed failing to grant the clearance not only violates the Accused's exercise of both his statutory and constitutional rights to counsel of his choice, but it will collaterally affect the Accused's right to

confront the evidence and witnesses against him by and through the counsel of his choice.

c. The Accused is absolutely powerless to affect this process and is wholly dependent upon the government, which not only unilaterally classified the evidence against him, but unilaterally decided that a security clearance is required to be able to see and use said evidence for purposes of defending against the charges. That same government then statutorily gave him the right to Pro Bono counsel. And now, that same government, based upon recent conversations between the Defense and Prosecution, asserts that if the Accused desires to avail himself of his statutory right to Pro Bono counsel, he must “buy” the so-called speedy trial clock delay by waiving his constitutional speedy trial right—despite the fact that the delay is the result not of the Accused’s choice of counsel, but because of what can best be described as a bureaucratic malaise. The argument that exercising a statutory right can cause the Accused to waive his constitutional rights is not completely unfounded provided that the process to exercise the right at issue is in fact controlled by the client, not when the Accused’s exercise of the right is dependent upon the Government performing one of its essential and inherently exclusive functions.

d. Rendering the Accused’s exercise of a statutory right that is completely dependent upon the government facilitating the exercise of that right—when the government has total control of how, when and under what circumstances the Accused may exercise that right (after a security clearance has been granted)—renders the right at issue merely illusory at best and downright fraudulent at worst. The statutory right literally vanquishes, as a substantive matter, the Constitutional right, since it is designed merely to look like a functional substantive right but is a mirage that either forces or tricks the accused into waiving one or more of his constitutional rights.

5. **Requested Relief/Conclusion:** The Defense requests a continuance, of all on the record

proceedings—or an outright abatement of the entire case—until such time that the Government does its job and stops interfering with the Accused exercise of his substantive due process rights (both statutory and constitutional) and issues the appropriate and necessary security (and country) clearances to Mr. Rushforth (who already has a lengthy, clear, reliable and trustworthy record of possessing same). The present situation is intolerable and the attempt by the Government to use its own inter-agency bungling as a foil to force the Accused to waive his Constitutional rights is both indefensible and inexcusable.

6. **Conference Statement:** The Defense submits that the conference requirement is fully satisfied due to the on-going nature of this discussion, the lack of any new issues being raised, coupled with the late date and the Friday-before-a-holiday-weekend e-mail directive from CPT [REDACTED] to file a motion in the AE054 series no later than close of business on 19 January 2016. Not only does the below record of constant and current e-mail communications between the parties reflect that the conferencing has occurred, but it evinces that there is and can be no surprise to the Government.

a. The Government and the Defense have been engaging in an on-going discussion of a continuance since well before Christmas 2015. Most recently, the Government and the Defense exchanged numerous e-mails discussing this issue, specifically: on Tuesday, 12 January 2016, and Wednesday, 13 January 2016. The final e-mail was exchanged on 14 January 2016, in response to Mr. Viti Felice's e-mail of 13 January 2016 at 1656. Mr. Viti stated "Let's just get this before the judge" and on 14 January, at 1223, the Defense submitted an e-mail to the appropriate Military Judiciary officials requesting an 802 conference, which resulted in the e-mail from CPT [REDACTED] referenced in paragraph 1, above.

b. Finally, the Defense wishes to clarify the conference statement contained in its previously

filed Motion for a Continuance, AE 015K. After filing the Motion, the Government advised that the Defense had misstated their position in subparagraph “5(a):” quoted below.

a. As a preliminary matter, the Government has no objection to an initial continuance during which time no substantive<sup>3</sup> matters will be addressed while Mr. Rushforth is brought into the case *and ready to fully, competently and diligently litigate this matter*. The Government limits its lack of objection to an initial continuance for the following purposes: 1) allow Mr. Rushforth to obtain his security clearance; and 2) for him to meet with the Accused to form an attorney client relationship.

c. Shortly after the Defense filed its AE 015K, the Government advised that the Defense (MAJ Kincaid) misstated its objection. It clarified that the Government DID object to the words in *italic* text, above. It objected to any delay to allow the Pro Bono civilian defense counsel to prepare for trial, but that it does NOT object to a delay to allow for him to obtain his security clearance. The Defense apologized for the misstatement and advised that it would correct the error at an 802 and again on the record, but would NOT file a motion seeking permission to amend the prior pleading. The Defense has thus now used this motion as an opportunity to correct the record by clarifying the Government’s position and its misstatement.

7. **Attachment:**

- A. Affidavit of Brent Rushforth, Pro Bono Civilian Counsel
- B. Certificate of Service.

Respectfully Submitted,

//s//  
BRENT RUSHFORTH  
Pro Bono Counsel

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<sup>3</sup> An exchange of discovery material, being non-substantive, and other non-substantive matters, will be pursued by the parties during this continuance.

*//s//*

ROBERT T. KINCAID, III  
Major, USA  
Detailed Defense Counsel

*//s//*

WENDALL HALL,  
Major, USA  
Assistant Detailed Defense Counsel

*/s//*

KEITH B. LOFLAND,  
Lieutenant Commander, JAGC, U.S. Navy  
Assistant Detailed Defense Counsel

**ATTACHMENT A**

MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

<p><b>UNITED STATES OF AMERICA</b></p> <p><b>v.</b></p> <p><b>ABD AL-HADI AL-IRAQI</b></p>	<p><b>Exhibit A to AE 054A</b></p> <p><b>Defense Motion For A Continuance</b></p> <p><b>19 January 2016</b></p>
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**AFFIDAVIT OF MR. BRENT RUSHFORTH REGARDING THE SECURITY  
CLEARANCE PROCESS**

District of Columbia        )  
  ) SS:  
City of Washington         )

Before me, the undersigned notary public, this day, did personally appear Brent Rushforth, an individual known to me, who, being duly sworn according to law, deposes and states the following:

I, Brent Rushforth, have filed of record my Notice of Appearance as Pro Bono Civilian Counsel, following my due designation as such by, Brigadier General John G. Baker, United States Marine Corps, Chief Defense Counsel, Military Commissions Defense Organization (MCDO). Although I have filed my appearance with this Commission, I have been unable to either travel to Cuba or to meet with my client and remain unable to effectively represent the Accused. In support of that statement, I affirmatively state under oath the following:

1. That as of this date, the status of my security clearance application is as follows:
  - a. In late August or early September 2015, I received a call from the Department of Justice (DoJ) advising me that my previously granted habeas corpus proceedings-related security clearance was about to expire and asking whether I wanted to update it. I asked them to please process the update. Shortly thereafter Major (MAJ) Robert Kincaid contacted me in September

2015 inquiring into whether I was still interested in and available to assist in representing a GTMO detainee in a pro bono capacity, to which I responded affirmatively.

b. After discussing the pro bono representation issue with MAJ Kincaid, I spoke with Captain (CAPT) Brent Filbert, JAGC, USN, Deputy Chief Defense Counsel, MCDO about the position. I then contacted the DoJ Security Office officials with whom I had previously spoken to inquire into the status of my security clearance renewal.

c. Shortly thereafter, on or about 8 December, 2015, General John Baker, the Chief Defense Counsel, formally designated me a member of the Pool of qualified civilian attorneys. I then submitted all required security clearance documents, on or about 9 December 2015, via USPS, first class postage prepaid thereon, as directed by my Military Commissions Defense Organization point of contact, Lieutenant (LT) Tia Suplizio, JAGC, USN, to the Department of Defense (DoD), using the following Pentagon mailing address:

Mr. [REDACTED]  
Military Commissions Defense Organization  
1620 Defense Pentagon  
Washington, D.C., 2301-1620

d. On or about 11 December 2015, Mr. [REDACTED] who I believe introduced himself as being with Pentagon Security, called my office and stated that he had the received the packet at the Pentagon and had no idea to whom it should be delivered. He was not familiar with either the address or "Mr. [REDACTED]" and when told to send it to the Office of Military Commissions, he stated he didn't know how to get it to them.

e. I immediately engaged MAJ Kincaid, who called and e-mailed Mr. [REDACTED] and arranged for one of his Paralegals, SGT [REDACTED] who was already at the Pentagon that day, to retrieve the package. Upon receipt of the package, MAJ Kincaid notified me that SGT [REDACTED] had delivered it to Mr. [REDACTED] who forwarded it to the Mark Center for processing. The Mark Center is the building housing the Office of Military Commissions Headquarters and the Convening Authority.

f. On or about 8 December 2015, CAPT Brent Filbert, USN, sent a memorandum to the Assistant Director For Personnel Security, WHS, via the Convening Authority requesting that Mr. Rushforth, "as an approved pro bono civilian counsel for high value detainee, Mr. Hadi al-Iraqi," be granted an approved security clearance. CAPT Filbert specifically mentioned the "court-ordered deadline to obtain a security clearance." As a precaution, the same memo addressing Mr. Rushforth CAPT Filbert re-submitted the packet on or about 11 December 2015, this time to COL [REDACTED] USA, explaining that CAPT Filbert had been advised to send "...all security clearances like these..." to the "...CAs office before they go to the WHS..." and further stating that he didn't understand why.

g. On or around 4 January, 2016, I received a call from the DoD's Mr. [REDACTED] who advised that he was the individual responsible for moving my security clearance application to completion.

h. Mr. [REDACTED] further advised that he had no record of my application having been submitted or being processed by the DoD, to which I responded by stating that I was surprised given that I and several of my references had already been interviewed by numerous FBI agents who advised that they were working on my background clearance update.

i. I immediately called Mr. [REDACTED] whom I know from past experience to be in charge of DoJ Security. As stated above, due to my prior habeas corpus litigation experience, this is not my first high-level security clearance. Mr. [REDACTED] advised that the DoJ had in fact been working on my clearance since my call back in September. I asked him if he could transfer the entire packet to the DoD's Mr. [REDACTED] and he told me to have Mr. [REDACTED] call his office to work out the transfer. Mr. [REDACTED] stated that my DoJ point of contact was Ms. [REDACTED]

j. I then called DoD's [REDACTED] and told him that the DoJ would gladly transfer the paperwork and gave him both Mr. [REDACTED] and Ms. [REDACTED] DoJ contact information.

k. About one week later, approximately 11 January 2016, I called DoD's Mr. [REDACTED] about the status of my clearance and he stated that he called the DoJ point of contact several times and had left messages, but there was no return call. He stated that he would try again.

l. Approximately two days later, DoD's Mr. [REDACTED] called me and said that he had reached DoJ's Ms. [REDACTED] and asked her to send the paperwork that DoJ possessed to the DoD, where Mr. [REDACTED] would finish the investigation and get my TS and other clearances issued. Ms. [REDACTED] told the DoD's Mr. [REDACTED] that there were numerous bureaucratic reasons why that could not be done, despite her superior's (Mr. [REDACTED]) statements to the contrary.

m. At this writing, to the best of my knowledge, my security clearance is stuck in government limbo—probably still at the DoJ when it needs to be at the DoD and the DoD seems powerless to retrieve it, nor will it issue me the clearances I need to do my job as Pro Bono Counsel for the Accused in the case of U.S. v. Abd al-Hadi al-Iraqi.

2. I have in total placed between three or more calls to the DoJ (Mr. [REDACTED]) and another five or more calls to the DoD (Mr. [REDACTED]). As far as I know, the investigation continues at the DoJ and DoD has received nothing, despite my paperwork having been submitted directly to the designated DoD component on or around 9 December 2015.

3. I can literally do nothing else and I find it quite telling, if not disturbing, that the DoD representative, Mr. [REDACTED] asked me if I could inquire with the Office of Military Commissions to have that agency attempt to exert some influence on getting the DoJ and DoD—both federal government agencies—to both speak to and cooperate with each other because he [REDACTED] is powerless to make anything happen.

4. Perhaps the most disturbing aspect of this whole experience is that it appears that the paperwork I submitted to the DoD has disappeared after being first mis-delivered by the Pentagon mail and security office. Indeed, it appears that all the progress made thus far in obtaining my security clearance update is due entirely to my own efforts with, by and through the DoJ. Had I

not reached out to them in September to facilitate this process, I—and most importantly, my client—would still be waiting on the DoD to process paperwork that they have either lost, have failed to process, or have yet to receive despite it being sent to and delivered to them.

Further, you Affiant sayeth naught.

Dated 19 January, 2016, at 12<sup>00</sup> o'clock, p. .m.

*Brent D. Rushforth*

Brent Rushforth

Subscribed and sworn to before me this 19th day of January, 2016.

*Michael Newton* Notary Public



Commission Expires: 11-14-16

MICHAEL NEWTON  
NOTARY PUBLIC DISTRICT OF COLUMBIA  
My Commission Expires November 14, 2016

**ATTACHMENT B**

**CERTIFICATE OF SERVICE**

I certify that on 19 Jan 2016, I filed AE 45A with the Office of Military Commissions Trial  
Judiciary and I served a copy on counsel of record.

*//s//*  
ROBERT T. KINCAID, III  
Major, USA