

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

| | |
|---|---|
| <p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL HADI AL-IRAQI</p> | <p>AE 062A</p> <p>Government Response</p> <p>To Defense Motion for Appropriate Relief: Accused Possession of a Microsoft Enabled Laptop Computer</p> <p>07 September 2016</p> |
|---|---|

1. Timeliness

The Government timely files this Response pursuant to Military Commissions Trial Judiciary Rule of Court (“RC”) 3.7.d.(1).

2. Relief Sought

The Government respectfully requests that the Commission deny AE 062, Defense Motion for Appropriate Relief: Accused Possession of a Microsoft Enabled Laptop Computer (“Defense motion”).

3. Overview

The Accused requests that the Military Commission order the Government to permit his counsel to provide him with a write-enabled laptop computer with document marking, word processing, database, and video editing software, asserting that “the use of a laptop computer is necessary to guarantee and effectuate the Accused’s present ability to communicate and cooperate with his counsel to the degree minimally necessary for him to factually and rationally understand the nature of the proceedings and to assist in the preparation and presentation of his own defense.” AE 062 at 2.¹ The Defense also asserts that “multiple detainees held at Guantanamo Bay, Cuba (GTMO) have previously been granted the use of laptop computers over the past several years.” *Id.* Specifically, the Defense points to the Military Commission of

¹ The Defense Motion does not contain any page numbers.

United States v. Mohammad et. al., (“*Mohammad case*”) where the five accused were granted possession and use of laptop computers, as further justification that the Accused should be granted one.

There are several problems with the Defense arguments. First and most importantly, the Accused is not entitled to a laptop computer. To the Government’s knowledge, no United States court has ever held that a prisoner or *pretrial detainee* has a right to possess and use a laptop computer and/or other similar electronic devices. To the contrary, federal case law makes clear that the Accused is not entitled to use or possess any particular technical means to assist in the preparation of his defense, and the Defense fails to cite any authority compelling a contrary conclusion.

Second, the Defense assertion that a laptop computer is necessary for the Accused to participate in his defense is a bare conclusory statement, with no supporting evidence. The Defense fails to meet its burden to present evidence in support of this request.

Third, this case is factually different and distinct from the *Mohammad case*. For instance, in the *Mohammad case*, the accused initially elected to proceed *pro se* and the military judge in that Commission appointed stand-by advisory counsel for each of the accused. The only reason the Government agreed to provide each accused with an individual laptop computer was that the accused had elected to proceed *pro se*.² In this case, the Accused is not proceeding *pro se*. Rather, he is being ably represented by four, fully cleared and competent counsel.

Lastly, the Defense provides no evidence or reasoning for the need of the requested software. The requested software is more applicable for attorneys than for an accused.

² The military judge in the *Mohammad case* granted three of the five accused the right to proceed *pro se*. See *Mohammad*, AE 182I at 2 n.1. The other two accused asked to be allowed to represent themselves, and the military judge’s decision was withheld pending a mental competency determination that the two accused were competent to voluntarily waive their right to counsel. *Id.* Although the Government initially declined to produce laptops to those two accused, the Defense attorney for one of the accused (Mr. Hawsawi) argued that doing so was creating an incentive for his client to proceed *pro se* (i.e. so he could get a laptop), so the Government agreed to provide laptops to all five accused as a result of that allegation. *Id.*

Simply put, the Defense has failed to carry its burden of establishing that the Accused requires a Microsoft enabled laptop in order to cooperate and communicate effectively with counsel in preparation and presentation of his defense. This lack of entitlement notwithstanding, the Government remains committed to continuing to facilitate efficient means of communication between the Accused and Defense Counsel. The Commission should deny the Defense motion.

4. Burden of Proof/Persuasion

As the moving party, the Defense has the burden to demonstrate by a preponderance of the evidence that the requested relief is warranted. Rule for Military Commissions (R.M.C.) 905(c).

5. Facts³

On 2 June 2014, charges against the Accused were referred to this non-capital Military Commission. The Accused is charged with one Specification of Denying Quarter (Charge I), one Specification of Attacking Protected Property (Charge II), three Specifications of Using Treachery or Perfidy (Charge III), one Specification of Attempted Use of Treachery or Perfidy (Charge IV), and one Specification of Conspiracy to Commit Offenses Triable by Military Commission (Charge V). *See* Referred Charge Sheet.

To effectively and meaningfully confront the charges against him, the Accused is currently represented by four, fully cleared, and competent counsel: his chosen *Pro Bono* Civilian (lead) Defense Counsel, Mr. Rushforth, and three detailed military counsel. Four additional *Pro Bono* Civilian Defense Counsel are also expected to join the existing Defense team in the future. At that time, the Accused will be represented by a total of eight attorneys.

6. Law and Argument

I. The Accused Has No Right to Access and Use a Laptop Computer

To justify its request that the Government provide the Accused with his own laptop

³ The Defense's continued practice of inserting arguments in the "Facts" section is improper. *See* RC 3.10a, Form 3-1 ¶ 5. For instance, Fact sections k, l, m, o and p of the Defense motion, all contain argument.

computer, the Defense asserts that providing the Accused with a write-enabled computer is required to vindicate his rights to the basic tools necessary to prepare and present a defense, to the effective assistance of counsel, to adjudicatory competence, and to a fair and reliable determination of guilt and penalty, as guaranteed by the Fifth, Sixth, and Eighth Amendments to the United States Constitution. AE 062 at 6-7.

Even assuming *arguendo* that the Accused could invoke the Fifth, Sixth, or Eighth Amendments as a source of rights, none of those constitutional guarantees would warrant the requested relief. First, the notion that the Accused has an entitlement to a laptop computer can be quickly dismissed. Numerous federal courts have addressed this very issue and to the Government's knowledge no court has ever found that civilly committed persons, *pretrial detainees*, or prisoners have a constitutional right to have computers, or items that are similar to computers. See *Endsley v. Luna*, 2008 U.S. Dist. LEXIS 78327, at *9 (C.D. Cal. May 23, 2008) (citing *Sands v. Lewis*, 886 F.2d 1166, 1172 (9th Cir. 1989) (holding that prisoners do not have a constitutional right to have memory typewriters in cells)), *overruled on other grounds by Lewis v. Casey*, 518 U.S. 343, 350-55 (1996) ; *see also Fogle v. Blake*, 227 F. App'x 542, 542 (8th Cir. 2007) (finding civil committee failed to state a constitutional claim regarding denial of a computer or typewriter); *Taylor v. Coughlin*, 29 F.3d 39, 40 (2d Cir. 1994) ("If prison inmates do not enjoy a constitutional right to typewriters as implements of access to the courts, it would be illogical for us to rule that there is a constitutional right to typewriters of a specific memory capacity."); *Allen v. King*, 2016 U.S. LEXIS 108748, at *20, 21 (E.D. Cal. August 16, 2016) ("To this Court's knowledge, no court has ever held that a civil detainee such as a SVP (sexually violent predator) has a constitutionally protected right to possess and use personal laptops and other similar electronic devices."); *Telucci v. Withrow*, 2016 U.S. Dist. LEXIS 66334, at *14, 15 (E.D. Cal. May 19, 2016) ("No court has found that prisoners have a constitutional right to possess personal computers, or items that are similar to personal computers, in their cells."); *White v. Monahan*, 2009 U.S. Dist. LEXIS 14167, at *2 (C.D. Ill. Feb 24, 2009) (acknowledging that while civil detainees enjoy more liberties than convicted prisoners, "[t]he inability to possess

a computer does not implicate a property interest that might be protected by procedural due process protections or an interest that might be classified as a substantive due process interest”); *Spicer v. Richards*, 2008 U.S. Dist. LEXIS 61970, at *7 (W.D. Wash. Aug. 11, 2008) (unpub.) (finding no authority to show that SVP had a Fourteenth Amendment right to possess a “cell phone, pager, computer, [or] color ink cartridge printer”); *Carmony v. County of Sacramento*, 2008 U.S. Dist. LEXIS 11137, at *18 (E.D. Cal. Feb. 14, 2008) (finding civil detainee had no “free-standing First Amendment right to access computers and/or the internet”); *State ex rel. Anstey v. Davis*, 203 W.Va. 538, 545, 509 S.E.2d 579 (1999) (“We are persuaded by the uniformity of opinion on this issue and therefore hold that prison inmates have no constitutional right to possess personal computers in their cells.”).

The Defense cites to a number of cases in its motion, none of which are remotely applicable to the issue at hand. For instance, the Defense cites *Ake v. Oklahoma*, 470 U.S. 68 (1965), apparently to illustrate that the Accused is entitled to access and use a laptop computer in order to develop available evidence reasonably required to prepare a defense. This reliance is misplaced. In *Ake*, the Supreme Court answered the question of “whether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question.” *Id.* at 70. Access to a psychiatrist in order to develop an insanity defense is not comparable with access to a laptop to organize discovery materials. Even without Microsoft enabled laptop computers, the Accused in this case has been provided with far more than the “basic tools” necessary to prepare his defense (including four detailed attorneys, with potentially four additional attorneys, numerous paralegals, and investigators) contemplated in *Ake*.

The Defense also cites to *Deck v. Missouri*, 544 U.S. 622, 631 (2005) (shackling a defendant risks the ability to communicate with counsel), *Riggins v. Nevada*, 504 U.S. 127, 137 (1992) (involuntary administration of psychotropic medication risked interference with ability to communicate with counsel), and *Geders v. United States*, 425 U.S. 80, 91 (1976) (precluding

consultation between defendant in [sic] counsel during overnight recess in trial constituted impermissible “barrier to communication between a defendant and his lawyer”), presumably to illustrate Government interference with a defendant’s ability to communicate and consult with counsel. AE 061 at 8 n.16-17. The Government concedes that interference certainly occurred in those three cited cases. However, the inability to access and use a laptop computer as we have in this case hardly rises to the examples of Government interference as discussed in those three cases by the Supreme Court.

The second reason why the Defense argument fails is because it is an unsupported conclusory statement. Simply making a statement does not make that statement true or supported without some kind of evidence. Specifically, the Defense fails to provide any factual support that the Accused’s access to a laptop computer vindicates his rights to the basic tools necessary to prepare and present a defense, to the effective assistance of counsel, to adjudicatory competence, and to a fair and reliable determination of guilt and penalty; that the use of a laptop computer is necessary to guarantee the Accused’s ability to communicate and cooperate with his Defense counsel. The Defense provides no evidence that the Accused’s ability to cooperate and communicate with his counsel is negatively affected by not having a laptop computer; that having a computer will assist him to factually and rationally understand the nature of the proceedings; or that a laptop computer will assist him in the preparation and presentation of his own defense. A party making an argument needs to present some evidence and have some basis in law to support it. *See, e.g., Machulas v. Dep’t of the Air Force*, 407 F. App’x 465, 467 (Fed. Cir. 2011) (holding that several irrelevant, conclusory allegations were not enough to establish the petitioner’s case by a preponderance of the evidence); *Scaife v. Cook County*, 446 F.3d 735, 740 (7th Cir. 2006) (stating that the non-moving party “needed to do better than to make such broad-brushed, conclusory allegations”); *In re Morris Paint & Varnish Co.*, 773 F.2d 130, 136 (7th Cir. 1985) (stating “conclusory assertions are insufficient to raise a genuine issue of material fact”).

The Defense has failed to demonstrate any harm of not having a laptop computer with the Accused's ability to cooperate and communicate with counsel. The Accused in this case has been, and will continue to be, afforded meaningful opportunities to review unclassified discovery and to consult with his Defense team. To ensure the Accused's ability to meaningful participate in his defense, the Government has, and will continue to, facilitate the ability to attend all sessions of the Military Commission to observe the proceedings and discuss them with his counsel, and the opportunity to meet with Defense counsel at the detention facility where the Accused can assist in the preparation of his defense strategy.

Nor is a laptop computer required before the Accused can factually and rationally understand the nature of the proceedings and assist in his defense versus seeing the same information in print or relayed by his attorneys. The Accused is an intelligent, well-educated, multi-lingual individual (including English and Arabic), alleged to be one of the highest ranking al Qaeda members ever taken into U.S. custody. The Accused allegedly: (1) Commanded an al Qaeda training camp; (2) commanded al Qaeda guesthouse operations; (3) commanded al Qaeda's operations at or near Kabul, Afghanistan; (4) served on al Qaeda's senior advisory counsel; (5) directed, funded, supplied and oversaw al Qaeda's operations against U.S. Forces, coalition forces, and civilians in Afghanistan and Pakistan; and (6) acted as an al Qaeda liaison to al Qaeda in Iraq. It is clear that based on his intelligence, education, lingual skills and experience, the Accused is well-equipped, possibly more so than most other detainees in U.S. custody, to factually and rationally understand the nature of the proceedings against him without the use of a laptop computer.

II. Even if the Accused Has a Right to Possess and Use a Laptop Computer, He Has Failed to Show That His Inability to Do So Has Prejudiced Him

Assuming *arguendo*, that the Accused has a Constitutional right to possess and use a laptop computer, which the Government disputes as discussed above, the Defense must still present some evidence of prejudice: "it is well settled that some showing of prejudice is a necessary element of a Sixth Amendment claim based on an invasion of the attorney-client

relationship.” *United States v. Chavez*, 902 F.2d 259, 266 (4th Cir. 1990) (citing *Weatherford v. Bursey*, 429 U.S. 545, 552-59 (1977) (concluding the prosecution did not violate the Sixth Amendment by knowingly permitting an undercover agent to attend two meetings between plaintiff and counsel because plaintiff failed to show any evidence of prejudice); *United States v. Kelly*, 790 F.2d 130, 136 (D.C. Cir. 1986)); *see also Lewis v. Casey*, 518 U.S. 343, 349 (1996) (requiring party alleging a Sixth Amendment violation to demonstrate actual harm and rejecting the argument that the mere claim of a systemic defect, without showing of actual harm, sufficed). Mere allegation—for example, that an accused is unable to assist his attorneys in preparing for his criminal case—does not sufficiently allege an actual injury. *Bell v. Franis*, No. 1:09cv00650, 2009 WL 2877079, at *2 (E.D. Va. Sep. 3, 2009) (concluding a plaintiff who merely alleges an inability to help his lawyer prepare for his criminal case did not sufficiently allege an actual injury), *aff’d* 357 F. App’x 522 (4th Cir. 2009).

Here, the Accused may review unclassified Government discovery and communicate defense strategy with his counsel in person and by mail. Such access to Defense counsel is not only adequate and effective, but also meaningful—permitting the Accused to fully present his arguments to the Commission. *See Harris v. Harrison*, No. 5:11-CT-3021-D, 2011 WL 8332979, at *4 (E.D.N.C. July 26, 2011) (rejecting inmate’s complaints about “his inability to telephone an attorney” because inmates have “no constitutional right to telephone an attorney” and because multiple filings evidence that this inmate can contact his attorney using other means). *See also Valdez v. Rosenbaum*, 302 F.3d 1039, 1044-46 (9th Cir. 2002) (rejecting plaintiff’s argument that unlawful restrictions were placed on his telephone access during his pretrial detention because the plaintiff did not have a state-created liberty interest in using a telephone and because the restriction did not constitute punishment).

It is apparent from the Defense filing of numerous motions, requesting various forms of relief, that the Accused’s ability to communicate with his counsel has not been negatively affected by the lack of access to a laptop computer. More importantly, the Defense has failed to show actual prejudice or harm.

III. The *Mohammad* Military Commission is Separate and Distinct From This Case

No doubt recognizing the complete lack of authority supporting its position, the Defense argues that since the *Mohammad* accused all have laptop computers, the Accused in this case should get one too. With respect to the *Mohammad* case, there are several major differences between these two cases. First and foremost, it must be remembered that the only reason the accused in the *Mohammad* case initially received personal laptop computers was because they elected to proceed *pro se*.⁴ Here, the Accused is not acting *pro se*, but is instead represented by his own *pro bono* Civilian Defense Counsel and three detailed military defense counsel. Four additional *pro bono* attorneys are expected to join the Defense team once their security investigations are completed. These attorneys have more than adequate access to this Commission, and other courts, as well as the ability to research and make legal claims on behalf of the Accused.

Second, the amount of discovery in this case pales in comparison to the discovery in the *Mohammad* case. The *Mohammad* case involves five different accused. Total discovery expected to be turned over to the Defense in the *Mohammad* case already exceeds 300 thousand documents. In contrast, this case involves one accused, and is expected to have a manageable amount of discovery produced to the Defense. In any event, the Defense, with regard to both hardware and software, fails to demonstrate that the Accused requires similar accommodations to the accused in the *Mohammad* case. Rather, the Defense must demonstrate with evidence that this Accused requires particular hardware and software, and they have failed to do so.

⁴ On 21 January 2010, the Convening Authority in the *Mohammad* Military Commission withdrew and dismissed the referred charges without prejudice. *See Mohammad*, AE 182I at 2. Shortly thereafter, the Government took custody of the accuseds' laptops and accompanying media. *Id.* On 31 May 2011 and 25 January 2012 charges were again sworn against the five accused, and on 4 April 2012 the charges were referred to a capital military commission. *Id.* On 5 May 2012, Learned and Detailed Military Defense Counsel were appointed to represent the five accused. *Id.* On 23 February 2016, in AE 182K, the military judge ordered that, not later than 8 March 2016, the laptops be returned to the accused with the same functionality they had when seized in 2010. *See Mohammad*, AE 182L at 2.

7. Conclusion

For the above-stated reasons, the Government opposes the Defense motion. The Defense has failed to demonstrate by a preponderance of evidence that the Accused has a right to possess and use a laptop computer.

8. Oral Argument

Oral argument on this issue is not requested. However, should the Commission allow oral argument from the Defense, the Government would therefore likewise request oral argument.

9. Witnesses and Evidence

None.

10. Additional Information

The Government has no additional information.

11. Attachments

A. Certificate of Service, dated 07 September 2016.

Respectfully submitted,

//s//

CDR Douglas J. Short, JAGC, USN
Trial Counsel
CDR Kevin L. Flynn, JAGC, USN
Deputy Trial Counsel

LCDR B. Vaughn Spencer, JAGC, USN
LCDR David G. Lincoln, JAGC, USN
Assistant Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT A

Filed with TJ
7 September 2016

Appellate Exhibit 062A (al Hadi)
Page 11 of 12

