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

| UNITED STATES OF AMERICA<br><br>v.<br><br>ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI | **AE 348A**<br><br>**Government Response**<br>To Defense Motion To Abate Proceedings Pending The Restoration Of Commander Brian Mizer To The Defense Team<br><br>22 October 2015 |
|---|---|

## 1. Timeliness

The government timely files this response pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.d.(1).

## 2. Relief Sought

The government respectfully requests the Commission to deny the defense-requested relief because Commander Brian Mizer's personal decision to leave active duty does not warrant an abatement of these proceedings.

## 3. Overview

Commander Mizer chose to terminate his attorney-client relationship with the accused. He did not consent to remain on active duty and instead detached from the Office of Military Commissions on 16 October 2015, the terminal date of his military orders. AE 348, Attach. B at 2. Commander Mizer's choice to depart and sever his attorney-client relationship was consistent with case law, which states that "separation from active duty normally terminates representation." *United States v. Hutchins*, 69 M.J. 282, 290 (C.A.A.F. 2011). The defense instead requests this Commission to order an abatement of the proceedings unless CDR Mizer is re-assigned to represent the accused, despite CDR Mizer's explicit request to be excused and

against the Department of the Navy's decision to grant CDR Mizer's request. The defense erroneously relies on *United States v. Hohman*, 70 M.J. 98 (C.A.A.F. 2011), in support of its motion. The facts in *Hohman* are inapposite to the defense position and, in fact, suggest that abatement of these proceedings would be in error. In denying the defense motion, the prosecution recommends the Commission make appropriate findings of fact with respect to the relevant factors of CDR Mizer's departure which constitute good cause for his absence going forward. *See Hutchins*, 69 M.J. at 289.

**4. Burden of Proof**

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

**5. Facts**

The government charged Abd Al Rahim Hussayn Muhammad Al Nashiri ("the accused") with multiple offenses under the Military Commissions Act of 2009, 10 U.S.C. §§ 948a *et seq.*, relating to terrorist attacks against the United States and its allies. The accused is charged with the attempted attack on USS THE SULLIVANS (DDG 68) on 3 January 2000, and the attacks on USS COLE (DDG 67) on 12 October 2000 and the French supertanker MV *Limburg* on 6 October 2002. These attacks resulted in the deaths of 18 people, serious injury to dozens of others, and significant property damage.[1]

[1] The Commission dismissed the separate charges relating to the accused's alleged participation in the attack on MV *Limburg* (Charge IV, Specification 2, and Charges VII-IX). AE 168G; AE 241C. The government moved for reconsideration of the Commission's order dismissing those charges. AE 168H; AE 241D. The Commission granted reconsideration and, on reconsideration, denied the government's requested relief while modifying the initial Order to state dismissal of the charges was without prejudice. AE 168K; AE 241G. The Order does not affect the Conspiracy charge (Charge V), which includes overt acts comprising the attack on MV *Limburg*. On 29 September 2014, the government filed an interlocutory appeal with the United States Court of Military Commission Review ("U.S.C.M.C.R."), causing AE 168K/241G to be stayed automatically pending disposition by the U.S.C.M.C.R. On 12 November 2014, the United States Court of Appeals for the District of Columbia

The Convening Authority referred capital charges against the accused on 28 September 2011. Detailed defense counsel had previously requested Mr. Richard Kammen as learned counsel on 21 April 2011, and the Convening Authority had granted the defense request and appointed Mr. Kammen as the learned counsel on 27 April 2011. AE 077A, Attach. C. The Commission arraigned the accused on 9 November 2011 after granting the defense its first-requested continuance in this case. While Mr. Kammen has been continuously assigned to this case since before arraignment, seven detailed defense counsel have represented the accused at various times. Unofficial/Unauthenticated Transcript ("Tr.") at 6 (Nov. 9, 2011) (noting LCDR Stephen Reyes as detailed defense counsel and Maj Allison Danels and Mr. Michel Paradis as assistant detailed defense counsel); *Id.* at 1773 (Jun. 11, 2013) (noting Capt Daphne Jackson as assistant detailed defense counsel); *Id.* at 2524 (Feb. 17, 2014) (noting CDR Mizer as assistant detailed defense counsel); *Id.* at 2525 (Feb. 17, 2014) (noting MAJ Thomas Hurley as assistant detailed defense counsel); *Id.* at 5385 (Feb. 23, 2015) (noting LCDR Jennifer Pollio as assistant detailed defense counsel).

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Circuit ("D.C. Circuit") granted the defense request to stay the proceedings before the U.S.C.M.C.R. Order, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. Nov. 12, 2014). On 10 February 2015, the D.C. Circuit heard oral argument on the defense petition for a writ of mandamus and prohibition to the U.S.C.M.C.R. On 23 June 2015, the D.C. Circuit denied the petition and dissolved the stay. Order, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. June 23, 2015). On 26 June 2015, the U.S.C.M.C.R. granted the government's unopposed motion to stay the proceedings—suspending oral argument in the first interlocutory appeal and suspending the briefing schedule in the second interlocutory appeal—while the government explores options for re-nomination and re-confirmation of the military judges as U.S.C.M.C.R. judges. Order, *United States v. Al Nashiri*, No. 14-001 (U.S.C.M.C.R. June 26, 2015). The U.S.C.M.C.R. also ordered the government to keep the Court apprised of "efforts to change the appointment of the military judges" and to "file a motion every 30 days, providing the status of this action and whether the parties request continuation of the suspension of litigation." *Id.* On 16 October 2015, the government filed its fourth 30-day notice in accordance with the Court's 26 June 2015, 25 August 2015, and 23 September 2015 Orders and requested the Court maintain the stay to permit the re-nomination and re-confirmation process that is underway to continue. Appellant Motion to Continue the Stay of the Proceedings, *United States v. Al Nashiri*, No. 14-001 (U.S.C.M.C.R. Oct. 16, 2015).

Commander Mizer, as a drilling member of the Navy Selected Reserve, consented to involuntary mobilization for one year from July 2013 until July 2014. AE 348, Attach. B at 1. On 23 July 2013, then-Chief Defense Counsel, Colonel Karen Mayberry detailed CDR Mizer as assistant detailed defense counsel to the present case. AE 157A, Attach. B. During the week of 14 August 2013, CDR Mizer met with the accused for the first time. Tr. at 2556 (Feb. 19, 2014). Shortly thereafter, on 21 August 2013, the Commission set trial for 2 September 2014. AE 045H. On 23 August 2013, the defense notified the Commission of the addition of CDR Mizer to the defense team. AE 157A. All hearings were then cancelled for the remainder of 2013 because of defense personal conflicts and requested continuances.

On 17 February 2014, CDR Mizer placed his qualifications on the record and represented the accused for the first time before the Commission. Tr. at 2524 (Feb. 17, 2014). On 26 February 2014, the Commission issued AE 045V which was an order re-establishing litigation deadlines and milestones in this case and postponing trial until 4 December 2014. On 7 March 2014, the defense requested an additional 120-day delay of trial "to accommodate Commander Mizer's anticipated release from active duty to address the medical needs [redacted] AE 045W at 1.[2] The defense asserted that "Commander Mizer will not voluntarily extend his current involuntary mobilization as previously planned and intends to make limited use of Navy-authorized dwell time to address the medical needs [redacted] *Id.*

On 27 March 2014, twenty days after filing its request for a 120-day delay of trial, the defense submitted AE 045AA, a motion to extend the deadline for law motions until 1 August 2014 also due to CDR Mizer's departure. On 9 May 2014, the Commission ruled on both defense requests for a continuance, rejecting CDR Mizer's departure from active-duty as a

[2] The government has no independent basis for this factual assertion and relies entirely on the defense's assertion in its pleading. The government has no reason to doubt its veracity.

sufficient basis to grant a continuance. AE 045FF at 2 (ruling that "Commander Mizer's decision to at least temporarily not voluntarily extend his involuntary recall to active duty which forms the factual basis for the Defense request in AE 045W, while difficult, is Commander Mizer's personal decision and not the result of action by the United States Navy [and] [i]f Commander Mizer is not present during a hearing or session, the Accused will continue to enjoy the benefit of the advice, counsel and representation of three (3) detailed Judge Advocates and his Learned Defense Counsel."). The Commission did, however, postpone the start of trial until 9 February 2015, but on other grounds. *Id*. at 5. Before leaving active duty, CDR Mizer represented the accused before the Commission on two additional occasions during hearings in April and May 2014. Tr. at 3306 (Apr. 22, 2014); *Id.* at 4356 (May 28, 2014.)

In July 2014, at the termination of his one-year involuntary mobilization orders, CDR Mizer separated from active duty, resumed civilian work (representing another accused in capital appellate litigation), and effectively terminated representation of the accused. *See* Tr. at 4629 (Aug. 4, 2014) (learned defense counsel stating "[t]hat's correct, Your Honor. Commander Mizer is currently separated. He expects to return. He is not present."); *see also id.* at 4682 (Aug. 4, 2014) (learned defense counsel stating, "I mean, it's just very recent. I mean, to be fair, he has some personal issues, family issues that required him to take a hiatus from this. He hopes to be back in November. He has accepted employment with the Air Force, I think as a civilian appellate counsel. He has commenced those duties, and among his responsibilities is pursuing the further appeals on behalf of Airman Witt."). The accused was fully aware of CDR Mizer's departure from active duty. *Id.* at 4630 (Aug. 4, 2014) (learned defense counsel stating "[y]es, that was discussed with [the accused] the last time we were in court, and it has also been discussed with him over—since the last time we were in court as well."). Following this

separation, CDR Mizer again consented to one additional year of involuntary mobilization starting in October 2014 and extending until October 2015.

On 15 September 2014, this Commission suspended all future trial dates based on pending and outstanding litigation. AE 45KK. On 16 April 2015, the Commission cancelled all future sessions pending resolution of two government interlocutory appeals. AE 203N. During CDR Mizer's second one-year involuntary mobilization orders, this Commission convened two hearings, of which CDR Mizer was present for one hearing. Tr. at 5384 (Feb. 23, 2015).

On 26 June 2015, the United States Court of Military Commission Review ("U.S.C.M.C.R.") granted the government's unopposed motion to stay the proceedings for the government to pursue the re-nomination and re-confirmation of the military judges as U.S.C.M.C.R. judges. Order, *United States v. Al Nashiri*, No. 14-001 (U.S.C.M.C.R. June 26, 2015). As of the filing of the present motion, the stay remains in effect. Appellant Motion to Continue the Stay of the Proceedings, *United States v. Al Nashiri*, No. 14-001 (U.S.C.M.C.R. October 16, 2015).

On 11 August 2015, learned defense counsel, Mr. Kammen, met with the accused, without CDR Mizer, and the accused refused to consent to CDR Mizer's withdrawal as detailed defense counsel. Thereafter, on 14 August 2015, anticipating his upcoming demobilization, CDR Mizer applied to the Chief Defense Counsel, Brigadier General John Baker, pursuant to R.M.C. 505(e), for withdrawal as detailed defense counsel. AE 348, Attach. B. After providing his assessment that trial would not commence until 2017, at the earliest, CDR Mizer stated that "given the indefinite delay of Mr. Al-Nashiri's case, I respectfully do not consent to further extension of my active-duty orders, and I intend to return to my civilian employment with the Department of the Air Force's Appellate Defense Division." *Id.* at 2. Commander Mizer

justified his request by stating that "separation from active duty normally terminates representation" and therefore "constitutes good cause for the severance of my attorney-client relationship with Mr. Al-Nashiri for purposes of R.M.C. 505(d)(2)." *Id.* at 3 (internal quotation marks omitted).

On 2 September 2015, BGen Baker denied CDR Mizer's request for withdrawal. AE 339A, Attach. B. (stating that, in his opinion, "good cause does not exist to otherwise excuse you under R.M.C. 505(d)(2)(B)(ii)"). On 11 September 2015, BGen Baker sent a letter to the Secretary of Defense asking that CDR Mizer's "demobilization orders be cancelled and that he continue to be involuntarily recalled to active duty until the later of one year or until the completion of his representation of Mr. al-Nashiri." AE 348, Attach. D at 1.

On 5 October 2015, the Deputy Assistant Secretary of the Navy, after a careful and detailed review of BGen Baker's request, disapproved the request to cancel CDR Mizer's demobilization orders and involuntarily extend him on active duty. AE 348, Attach. E at 1.

On 5 October 2015, CDR Mizer sent the government an e-mail conference on two motions that the defense intended to file with the Commission that same week. Attachment B. This conference request stated the following: "The second motion is a motion to excuse CDR Mizer. CDR Mizer is demobilizing on 16 October 2015. Mr. Al-Nashiri does not consent to CDR Mizer's withdrawal. The Chief Defense Counsel has denied CDR Mizer's request to withdraw as detailed counsel. Mr. Al-Nashiri's denial of CDR Mizer's request to withdraw will be attached to the pleading along with General Baker's denial." *Id.* The defense, absent CDR Mizer, then adjusted this conference to the present motion.

**6. Law and Argument**

The defense asks this Commission for the extraordinary relief of abatement of all proceedings "pending the restoration of Commander Mizer to the defense team."[3] AE 348 at 1. The Commission should reject the defense requested relief as it is both unfounded and unnecessary. First, the defense's reliance on *Hohman* for the proposition that abatement of these proceedings is an appropriate remedy is wholly misguided. Not only did two appellate courts reverse the military judge's abatement order, but the appellate courts held that there was no basis to grant an exception to the *Spriggs/Hutchins* rule that "separation from active duty normally terminates representation." *Hohman*, 70 M.J. at 99-100 (quoting *Hutchins*, 69 M.J. at 290-91). Second, the facts of this case are distinguishable from *Hohman*. In *Hohman*, the detailed defense counsel sought an extension to his active duty orders from the Marine Corps, but his request was denied. *Id.* at 99. On appeal, neither appellate court found that such circumstances warranted an exception to the *Spriggs/Hutchins* rule. *Id.* at 99-100. Here, the reverse is true. Commander Mizer has made his intentions plain—to be excused from further representation of the accused and return to his civilian employment. AE 348, Attach. B at 2. If it was not error in *Hohman* for defense counsel to be excused despite his request to remain on active duty, it certainly cannot be error, let alone serve as grounds for an abatement, if CDR Mizer does not wish to remain on active duty to continue representing the accused. Third, the accused continues to be represented by competent counsel, as was also the case in *Hohman*. The defense team is currently comprised of Mr. Kammen, learned defense counsel with significant capital litigation experience, and detailed military counsel. In addition, upon information and belief, the Military Commissions

[3] It should be noted that 24 hours prior to conferencing the present motion, the defense conferenced and was preparing to file a motion petitioning the Commission to excuse CDR Mizer. *See* Attachment B.

Defense Organization has newly assigned attorneys available to detail to the accused's defense team.

As set forth in Military Commissions Trial Judiciary Rules of Court 4.4(b), and as suggested in both *Hohman* and *Hutchins*, the Commission should articulate the relevant factors of CDR Mizer's excusal and make the appropriate findings of fact and law, as guided by relevant case law, that reflect the absence of counsel and the reasons for it. *See Hutchins*, 69 M.J. at 289. Ultimately, the fact that this severance comes as the result of CDR Mizer's personal choice cannot be over-emphasized given the defense's attempt to diminish this significant fact. *See generally* AE 348.

## I. A Request for this Commission to Abate All Proceedings Is Unsupported by Law

The defense erroneously posits *Hohman* as authority for the proposition that the Commission should abate all proceedings. AE 348 at 3. As discussed, the defense reliance on *Hohman* is misplaced. In *Hohman*, the United States Court of Appeals for the Armed Forces ("C.A.A.F.") reviewed a decision by the Navy-Marine Corps Court of Criminal Appeals to set aside an abatement order issued by the military judge. *Hohman*, 70 M.J. at 99. The military judge, following a detailed defense counsel's departure from active duty, "concluded that the Marine Corps erroneously had severed the attorney-client relationship without good cause, and that the appropriate remedy required abatement of the proceedings pending restoration of [the attorney] as detailed defense counsel." *Id.* The defense mistakenly argues that *Hohman* "discussed a similar situation to the instant case" and that this Commission should follow the military judge's remedy. AE 348 at 3. Not only did both of the appellate courts reverse the abatement order, the facts in *Hohman* are inapposite to the defense position.

In *Hohman,* the Marine Corps denied a defense counsel request to extend his orders in order for him to continue representing his client. 70 M.J. at 99. Here the reverse is true. Commander Mizer's orders have previously been extended upon his request, but now CDR Mizer is specifically requesting his orders not be extended. AE 348, Attach. B. Commander Mizer provided the Chief Defense Counsel with three pages of facts and reasons for why his separation from active duty on 16 October 2015 constitutes good cause for the severance of his attorney-client relationship with the accused. *Id*. Accordingly, the government has not improperly severed CDR Mizer's relationship with the accused; rather, CDR Mizer is requesting and choosing to demobilize and sever his relationship with the accused. Despite this significant fact, the defense attempts to place responsibility for this severance on the government. AE 348 at 1. The defense is attempting to deny what it cannot admit, but it is plainly evident that CDR Mizer is choosing to leave. *Id.* at 2.

The defense also argues that if the facts of *Hohman* were different, a court of review would have agreed that the military judge's abatement order was proper. Not only is this argument speculative and hardly persuasive, it is difficult to reconcile it with the defense counsel assertion that the facts of *Hohman* are similarly situated to the case here. *Id.* at 3. The main factual differences between *Hohman* and this case weigh heavily against ordering abatement.

Further, the accused continues to be represented by Mr. Kammen, learned defense counsel with significant capital litigation experience, and detailed military counsel. In *Hohman*, C.A.A.F. specifically noted that the departure of detailed defense counsel was not in error because a second defense counsel was appointed to represent the accused. *Hohman*, 70 M.J. at 100. The Chief Defense Counsel has newly assigned attorneys available to detail to the accused's existing defense team, even apart from CDR Mizer's incoming replacement. AE 348,

Attach. E at 2 (Department of the Navy stating that they are "committed to supporting the Office of Military Commission's mission. In this regard, a qualified detailed defense counsel will be provided to replace CDR Mizer in a timely manner."). Ultimately, neither *Hohman* nor the facts of this case provide any basis for this Commission to order an abatement. As the defense has no legal authority for the relief requested, the Commission should, therefore, reject the defense request.

## II. This Commission Should Ensure that the Record Sets Forth the Relevant Facts Surrounding the Departure of CDR Mizer

The *Hohman* court does, however, highlight for this Commission the general principle and importance of placing specific findings on the record. *See Hohman*, 70 M.J. at 99 ("The military judge failed to place any of the approved reasons for severing the attorney-client relationship on the record prior to the departure of Capt Muth from active duty. We test such an error for prejudice."). Accordingly, the Commission should consider the relevant factors of CDR Mizer's departure, compare these facts to the law regarding severance of an attorney-client relationship, and delineate this analysis in its order. In the seminal case on this issue, C.A.A.F. provided the following guidance:

> Absent government misconduct, the routine separation of a judge advocate from active duty normally terminates any attorney-client relationship established on the basis of the attorney's military status, except when: (1) the attorney agrees to represent the client in his or her civilian capacity; or (2) the attorney enters the reserves and is ordered to represent the client to the extent permitted by applicable law based upon a determination by the appropriate official of reasonable availability.

*United States v. Spriggs*, 52 M.J. 235, 246 (C.A.A.F. 2000). There are no facts or allegations of government misconduct here. Commander Mizer is simply following protocol and his predicted demobilization orders, which amounts to a routine separation as a judge advocate from active duty.

The *Spriggs* Court stated that there are only two exceptions to the rule that demobilization terminates the attorney-client relationship. The first exception is that "the attorney agrees to represent the client in his or her civilian capacity." *Id.* Commander Mizer very clearly has *not* agreed to represent the accused in his civilian capacity and is in fact choosing to terminate his relationship with the accused by not consenting to any additional involuntary mobilization. AE 339A, Attach. B at Encl (3).

The second exception to the rule occurs when "the attorney enters the reserves and is ordered to represent the client to the extent permitted by applicable law based upon a determination by the appropriate official of reasonable availability." *Spriggs*, 52 M.J. at 246. The appropriate official possessing control over CDR Mizer's mobilization as a reservist is the Department of the Navy. AE 348, Attach. E at 1. Here, the Department of the Navy carefully considered the request by the Chief Defense Counsel to compel CDR Mizer to continue on active duty, but denied the request. Not only has the Department of the Navy not ordered CDR Mizer to continue to represent the accused, the "applicable law" does not permit CDR Mizer to continue to represent the accused. In denying the Chief Defense Counsel's request, the Department of the Navy stated that 10 U.S.C. § 12302 "prohibits involuntary extensions beyond 24 months" and that there is "no indication that Mr. al-Nashiri's trial will conclude within the 24-month statutory period." *Id.* Accordingly, under *Spriggs*, there is no exception that would permit CDR Mizer to continue representing the accused. CDR Mizer's routine separation from active duty, effective 16 October 2015, lawfully terminates his attorney-client relationship with the accused.

The defense reliance on *United States v. Hutchins* is similarly unavailing. *Hutchins* simply restated the bright-line rule that, while there may be exceptions, separation from active duty normally terminates representation. 69 M.J. at 290-91.

> Use of the word "normally" in *Spriggs* reflects articulation of general guidance, not a restrictive rule. Although separation from active duty normally terminates representation, highly contextual circumstances may warrant an exception from this general guidance in a particular case. In any given case, separation from active duty may amount to a routine personal action or may implicate significant government interests. Likewise, cancellation or postponement of a separation date, or recall to service in a reserve status may involve routine action or significant interests. Similarly considerations pertinent to the role of a particular member of the defense team in a specific case may range from routine matters to complex considerations.

*Id*. (internal citations omitted). The *Hutchins* Court provided factors that a trial court should consider when examining the severance of an attorney-client relationship. One of the factors included an analysis of 10 U.S.C. § 12302 because the separation could implicate varying interests. *Id*. This provision is the same statute cited by the Department of the Navy in denying the Chief Defense Counsel's request. AE 348, Attach. E at 1. The statute "prohibits involuntary extensions beyond 24 months." *Id.* The Chief Defense Counsel requested that CDR Mizer be extended until the later of one year or the completion of trial, which is not anticipated until 2017. *Id*. However, the defense request violates 10 U.S.C. § 12302 because the extension would exceed the two-year statutory limit, which the Department of the Navy understood. *Id.* Accordingly, an analysis of the statutory factor weighs in favor of following *Spriggs* and *Hutchins* that termination of active duty severs an attorney-client relationship.

The Department of the Navy also concisely summarized a variety of additional factors that also weigh in favor of following the *Spriggs/Hutchins* rule. First, the Department of Defense Instruction, 1235.12, requires a dwell time ration of 1:5 (one year away for every five years home), and that CDR Mizer's dwell time was 1: .25 (1 year away for every .25 years

home), which was far below the required standard. *Id.* Second, CDR Mizer would not be the sole defense counsel assigned to the case, and that the accused has learned defense counsel assigned to him with extensive capital experience. *Id.* Third, there was no indication that trial would conclude within the 24-month statutory period for involuntary mobilizations, as required by 10 U.S.C. § 12302, or by October 2016, which was the maximum time CDR Mizer could be involuntarily extended. *Id.* Fourth, CDR Mizer did not consent to further extension of his active-duty orders. *Id.* Fifth, CDR Mizer wanted to return to his civilian employment with the Air Force Appellate Defense Division. *Id.* Sixth, CDR Mizer, having established an attorney-client relationship with six Airmen, expected to argue several cases, one of which was a capital case pending before the United States Court of Appeals for the Armed Forces with argument scheduled for January 2016. *Id.* Finally, qualified detailed defense counsel would be provided by the Chief Defense Counsel in a timely manner and well in advance of trial. *Id.* at 2.

Furthermore, CDR Mizer concluded his letter to not seek an extension of his orders by applying the *Spriggs/Hutchins* rule. AE 348, Attach. B. "'Separation from active duty normally terminates representation[.]' *United States v. Hutchins*, 69 M.J. 282, 290 (C.A.A.F. 2011). I respectfully submit my separation from active duty constitutes good cause for the severance of my attorney-client relationship with Mr. Al-Nashiri for purposes of R.M.C. 505(d)(2)." AE 348, Attach. B at 3. Yet, the defense refuses to recognize this basic principle and insists that CDR Mizer must be returned to active duty and re-assigned to the accused's defense team, despite his routine separation from active duty.

Importantly, this Commission should remain cognizant that this severance is the direct result of the decision of CDR Mizer to leave active-duty in accordance with the termination of his orders. *Id.* at 2. (stating that "given the indefinite delay of Mr. Al-Nashiri's case, I

respectfully do not consent to further extension of my active-duty orders, and I intend to return to my civilian employment with the Department of the Air Force's Appellate Defense Division"); *see also* Attachment B. The government has not acted in bad faith, but rather has approved CDR Mizer's personal decision to leave active duty.

Notably, this is not the first time such a situation has arisen regarding CDR Mizer. On 26 March 2014, the defense filed a similar pleading with this Commission requesting, instead of an abatement, a 120-day delay because CDR Mizer had chosen to leave active-duty to take care of his family. AE 045Y. In this pleading, the defense stated that "Commander Mizer will not voluntarily extend his current involuntary mobilization as previously planned and intends to make limited use of Navy-authorized dwell time to address the medical needs [redacted] *Id.* at 1. The defense also provided the following:

> The Under Secretary of Defense for Personnel and Readiness (USD P&R) has directed that reserve component members should be held "on involuntary active duty only as long as necessary, but not more than the originally directed 12 months, except as dictated by operational requirements, and approved by the Secretary of Defense." Memorandum from the USD P&R, Revised Mobilization/Demobilization Personnel and Pay Policy for Reserve Component Members Ordered to Active Duty in Response to the World Trade Center and Pentagon Attacks – Section 1 (15 March 2007). The Memorandum also establishes a five-year dwell-time for one-year involuntary mobilizations.

*Id.* at 3.

On 27 March 2014, twenty days after filing its request for a 120-day delay of trial, the defense submitted AE 045AA, a motion to extend the deadline for law motions until 1 August 2014 also due to CDR Mizer's departure. On 9 May 2014, the Commission ruled on both defense requests for a continuance, rejecting CDR Mizer's departure from active-duty as a sufficient basis to grant a continuance. AE 045FF at 2 (ruling that "Commander Mizer's decision to at least temporarily not voluntarily extend his involuntary recall to active duty which

forms the factual basis for the Defense request in AE 045W, while difficult, is Commander Mizer's personal decision and not the result of action by the United States Navy [and] [i]f Commander Mizer is not present during a hearing or session, the Accused will continue to enjoy the benefit of the advice, counsel and representation of three (3) detailed Judge Advocates and his Learned Defense Counsel.").

Here, CDR Mizer is similarly choosing to leave active duty. But instead of requesting a 120-day delay, as it did previously in AE 045Y, the defense is now moving for an abatement. The defense is simply re-requesting the Commission to address the same question, but hoping for a different, and more drastic, relief—abatement. The facts of this case do not warrant a different response from this Commission nor an order granting the extraordinary relief of abatement.

**7. <u>Conclusion</u>**

Commander Mizer has made a choice to not continue to represent the accused as assistant detailed defense counsel at the termination of his active-duty orders. The defense, absent any legal authority, is requesting this Commission order an abatement based on CDR Mizer's personal decision. The Commission should decline this invitation and deny the defense request. The Commission can, however, examine the relevant factors of CDR Mizer's departure and make the appropriate findings of fact and law that reflect the absence of counsel and the reasons for it in accordance with established case law regarding severance of an attorney-client relationship.

**8. <u>Oral Argument</u>**

The defense does not request oral argument. The government concurs that the Commission can decide this matter without oral argument. *See* Military Commissions Trial Judiciary Rule of Court 3.9(a).

**9. Witnesses and Evidence**

The government does not intend to rely on witnesses or evidence in support of this response.

**10. Additional Information**

The government has no additional information.

**11. Attachments**

A. Certificate of Service, dated 22 October 2015.

B. Conference E-mail between Defense and Trial Counsel, dated 5 October 2015.

Respectfully submitted,

_____//s//_____

BG Mark S. Martins, USA
Chief Prosecutor

COL Robert C. Moscati, JA, USAR
Deputy Chief Prosecutor
Trial Counsel

Mark M. Miller
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LtCol Winston G. McMillan, USMC
Managing Assistant Trial Counsel

LT Paul B. Morris, JAGC, USN
LT Jonathan P. Cantil, JAGC, USN
Assistant Trial Counsel

# ATTACHMENT A

## CERTIFICATE OF SERVICE

I certify that on the 22nd day of October 2015, I filed **AE 348A, Government Response** to AE 348, Defense Motion to Abate Proceedings Pending the Restoration of Commander Brian Mizer to the Defense Team, with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

//s//
COL Robert C. Moscati, JA, USAR
Deputy Chief Prosecutor
Trial Counsel

# ATTACHMENT B

**From:** Mizer, Brian L CIV (US) <[redacted]>
**Sent:** Monday, October 05, 2015 5:11 PM
**To:** WINSTONM; 'Rick Kammen'
**Cc:** Kammen, Richard CIV (US); Pollio, Jennifer L LCDR USN OSD OMC (US); Mizer, Brian L CIV (US); Kammen, Richard CIV (US); Mizer, Brian L CIV (US); Paradis, Michel D CIV DLSA (US); Pollio, Jennifer L LCDR USN OSD OMC (US); [redacted] MAJ OSD OMC Defense; Spears, Mary E CIV OSD OMC (US); Moscati, Robert C COL USARMY (US); ROBERCM4; 'Miller, Mark A. (USALAE)'; DEANNAS; Strommen, Deanna L SFC USARMY (US); Jolly, Cherie E LT USN OSD OMC OCP (US); Morris, Paul B LT USN (US); Cantil, Jonathan P LT USN OSD OMC OCP (US); PAULBM; [redacted]
**Subject:** Motions to Withdraw
**Signed By:** [redacted]

Prosecution,

The defense intends to file two motions to excuse defense counsel this week. The first is a motion to excuse Majors Danels, Jackson, and Hurley. All three majors executed PCS orders this summer. Mr. Al-Nashiri consents to their withdrawal, which will be attached to the motion. The Chief Defense Counsel, then Colonel Mayberry, orally consented to their withdrawal, and this is memorialized in a 5 October 2015, Memorandum from the Chief Defense Counsel, General Baker, which will also be attached to the pleading.

The second motion is a motion to excuse CDR Mizer. CDR Mizer is demobilizing on 16 October 2015. Mr. Al-Nashiri does not consent to CDR Mizer's withdrawal. The Chief Defense Counsel has denied CDR Mizer's request to withdraw as detailed counsel. Mr. Al-Nashiri's denial of CDR Mizer's request to withdraw will be attached to the pleading along with General Baker's denial.

Can you provide us with the government's position so that we may file these two pleadings?

Very Respectfully,

Brian L. Mizer
CDR, JAGC, USN
Office of Military Commissions
Office of the Chief Defense Counsel
[redacted]