

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

UNITED STATES OF AMERICA

v.

ABD AL RAHIM HUSSAYN
MUHAMMAD AL NASHIRI

AE 348L

RULING

Defense Motion

To Abate Proceedings Pending The
Restoration of Commander Brian Mizer to
the Defense Team

23 September 2016

1. Procedural History.

a. The Accused is charged with multiple offenses in violation of the Military Commissions Act (M.C.A.) of 2009, 10 U.S.C. §§ 948 *et seq.*, Pub. L. 111-84, 123 Stat. 2574 (Oct. 28, 2009). He was arraigned on 9 November 2011.

b. On 8 October 2015, the Defense filed AE 348,¹ requesting the Commission abate the proceedings pending the restoration of Commander (CDR) Brian Mizer to the defense team, claiming his withdrawal constituted an improper severance of the attorney-client relationship without good cause. (AE 348 at 1). The Government filed its response² asserting CDR Mizer voluntarily departed the defense team, and the severance of the attorney-client relationship with the Accused was consistent with relevant case law. (AE 348A at 1). The Defense replied,³ and requested⁴ the Commission compel the production of Brigadier General (BGen) John Baker and

¹ AE 348, Defense Motion to Abate Proceedings Pending Restoration of Commander Brian Mizer to the Defense Team, filed 8 October 2015.

² AE 348A, Government Response to Defense Motion to Abate Proceedings Pending Restoration of Commander Brian Mizer to the Defense Team, filed 22 October 2015.

³ AE 348B, Defense Reply to Government Response to Defense Motion to Abate Proceedings Pending Restoration of Commander Brian Mizer to the Defense Team, filed 28 October 2015.

⁴ The parties also filed AE 348C, Defense Motion to Compel Production of Witnesses in Support of AE 348, Defense Motion to Abate Proceedings Pending Restoration of Commander Brian Mizer to the Defense Team, filed 3 August 2016; AE 348D, Government Response to Defense Motion to Compel Production of Witnesses in Support of AE 348, filed 17 August 2016; and AE 348E, Defense Reply to Government Response to Defense Motion to Compel Production of Witnesses in Support of AE 348: Defense Motion to Abate Proceedings Pending Restoration of Commander Brian Mizer to the Defense Team, filed 12 August 2016 .

Dr. Sondra Crosby to testify in support of the motion. (AE 348C at 1). The Commission denied the motion to compel production of witnesses on 1 September 2016.⁵

c. The Commission heard argument on 7-8 September 2016.⁶

2. Findings of Fact.

a. CDR Mizer was initially detailed to represent the Accused on 23 July 2013. (AE 348, Attachment D).

b. On 30 March 2015, the Defense requested the Commission abate all Commission proceedings in the Accused's case while the government pursued two interlocutory appeals of Commission rulings.⁷ The request was made while CDR Mizer was still representing the accused; he was as an involuntarily mobilized officer in the Navy reserves. The Commission granted the Defense motion.⁸

c. On 20 July 2015, CDR Mizer received demobilization orders from the Department of the Navy. (AE 348, Attachment B).

d. On 14 August 2015, CDR Mizer submitted an Application for Withdrawal as Detailed Counsel to the Chief Defense Counsel of the Military Commissions Defense Organization, BGen Baker, stating, "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.* The Accused opposed CDR Mizer's withdrawal. (AE 348 at 5).

⁵ AE 348F, Ruling, Defense Motion to Compel Production of Witnesses in Support of AE 348: Defense Motion to Abate Proceedings Pending the Restoration of Commander Brian Mizer to the Defense Team dated 1 September 2016.

⁶ Unofficial /Unauthenticated Transcript of Abd Al Rahim Hussayn Muhammad al Nashiri dated 7 September 2016 from 11:04 A.M. to 11:50 A.M. at pp. 6138-6162.

⁷ AE 340A, Defense Motion To Continue The Hearing Scheduled For [7]-11 April 2015 And All Subsequent Hearings Related To AE 207, And Abate Proceedings Pending The Resolution Of Government's Appeal Of AE 248[S], filed 30 March 2015.

⁸ AE 340J, Order, Abate all Proceedings, dated 10 April 2015.

e. BGen Baker denied CDR Mizer's application to withdraw and submitted a request, dated 11 September 2015, to the Department of the Navy to extend CDR Mizer on active duty and cancel his demobilization orders. (AE 348, Attachment D).

f. On 5 October 2015, the Department of the Navy denied BGen Baker's request to cancel CDR Mizer's orders. (AE 348, Attachment E).

g. On 16 October 2015, CDR Mizer demobilized. (AE 348D at 3).

h. On 29 July 2016, nine months after CDR Mizer's demobilization, this Commission granted the Government's request to lift the stay of proceedings because the interlocutory appeals had been decided.⁹

i. The Accused's defense team¹⁰ is currently comprised of Mr. Richard Kammen (learned counsel), LCDR Jennifer Pollio, CDR Aimee Cooper, Ms. Mary Spears, and Ms. Rosa Eliades.

3. Law.

a. An accused facing a military commission with capital charges has the right to one detailed military defense counsel and one additional counsel learned in the applicable law relating to capital cases. 10 U.S.C. §§ 949a(b)(2)(C). "One of the express limitations upon the right to choose one's own attorney is that the criminal defendant be 'financially able to retain counsel of his choice.'" *United States v. Friedman*, 270 U.S. App. D.C. 359, 849 F.2d 1488, 1490 (D.C. Cir. 1988); *see also United States v. Bostick*, 791 F.3d 127, 156 (D.C. Cir. 2015) (the indigent criminal defendant who seeks court-appointed counsel does not have a constitutional right to choose his attorney).

⁹ AE 340L, Order, Government Motion for the Commission to Lift the Abatement of All Proceedings it Ordered in AE 340J, dated 29 July 2016.

¹⁰ This only includes the attorneys assigned, not the paralegals, consultants, and investigative assistance which also provide important support to the defense team.

b. Regulation for Trial by Military Commission (R.T.M.C.) 9-1.a places the responsibility of detailing defense counsel on the Chief Defense Counsel.¹¹ Rule for Military Commission (R.M.C.) 505(d)(2)(B) states “[a]fter an attorney-client relationship has been formed between the accused and detailed defense counsel . . . an authority competent to detail such counsel may excuse or change such counsel only: (i) Upon request of the accused or application for withdrawal by such counsel; or (ii) For other good cause shown on the record.” “[G]ood cause” includes “physical disability, military exigency, and other extraordinary circumstances which render . . . counsel . . . unable to proceed with the military commission within a reasonable time.” *Id.* at Discussion.

c. “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). Though separation from active duty normally terminates the relationship, “highly contextual circumstances may warrant an exception from this general guidance in a particular case.” *United States v. Hutchins*, 69 M.J. 282, 290-291 (C.A.A.F. 2011).¹²

d. “As long as at least one qualified counsel for each party is present, other counsel for each party may be absent from a military commission session with the permission of the military

¹¹ The Convening Authority also plays a role in the detail of learned defense counsel. *See* R.T.M.C. 9-1.a.6.

¹² The Navy Marine Court of Criminal Appeals (N.M.C.C.A.) was reversed when it found that military counsel’s separation from active duty “standing alone, cannot be used as a basis to sever an existing attorney-client relationship . . . after nearly a year of preparatory work and mere weeks before commencement of a general court-martial for murder.” *United States v. Hutchins*, 68 M.J. 623, 629 (N-M.C.C.A. 2010), reversed by *United States v. Hutchins*, 69 M.J. 282, 291 (C.A.A.F. 2011) (finding representation adequate based on the continued assistance of civilian counsel; provision of replacement military counsel; and the military judge’s allowing counsel more time to prepare the case).

judge.” R.M.C. 805(c). “The military judge may, however proceed in the absence of one or more defense counsel, without the consent of the accused, if the military judge finds that, under the circumstances, a continuance is not warranted and that the accused’s right to be adequately represented would not be impaired. *Id.* at Discussion.

4. Analysis.

a. The Defense alleges CDR Mizer’s demobilization from active duty on 15 October 2015 constitutes an improper severance of the attorney-client relationship without good cause, thus requiring abatement until the restoration of CDR Mizer to the Accused’s defense team. The Government contends that separation from active duty, by itself, is good cause for severance of an attorney-client relationship, and that nothing more is required. The Court of Appeals for the Armed Forces (C.A.A.F.) does not go as far as the government argues. “Our case law does not establish separation from active duty as necessarily establishing good cause in every case, nor does our case law establish a specific methodology for considering the relative interests of the government, counsel, and the client.” 69 M.J. at 290. The Commission has, as *Hutchins* directs, delved into the reasons for the severance of the attorney-client relationship. 69 M.J. at 290-291.

b. In this case, CDR Mizer: (1) is a Naval Reservist who was involuntarily mobilized for the purpose of being detailed to represent the Accused in July 2013; (2) was again involuntarily mobilized in October of 2014 for the same purpose; (3) received demobilization orders from the Department of Navy in July of 2015; (4) subsequently communicated to learned counsel and the Accused his intent to demobilize; (5) submitted a request to withdraw from representing the Accused to the CDC; (6) as of 16 October 2015, was statutorily¹³ prohibited from any involuntary extension of his orders; and (7) demobilized on 15 October 2015.

¹³ See 10 U.S. Code § 12302 limiting mobilization of the “Ready Reserve under the jurisdiction of that Secretary to active duty for not more than 24 consecutive months.”

c. It is clear to the Commission that CDR Mizer's withdrawal from representing the Accused was a matter of routine separation from active duty. However, separation from active duty does not always end the inquiry as the C.A.A.F. explained in *Hutchins*:

[H]ighly 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 personnel 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.

69 M.J. 290-91 (internal citations omitted).

d. In addition to *Hutchins* and the other relevant cases, the Commission considered the proffers of testimony from BGen Baker and Dr. Crosby (which were supported by other evidence in the record in attachments to the brief or prior evidence submitted to the Commission), the testimony of CDR Mizer, argument from counsel, and the parties' briefs. The Commission has not found the circumstances warrant an exception from the general guidance that separation from active duty normally terminates the attorney-client relationship. CDR Mizer asked not to be extended on active duty, and there is no evidence of government misconduct. The case has been in abeyance for an extended period, at the request of the Accused, and the five counsel who currently represent the Accused have had ample time to become knowledgeable in those areas for which CDR Mizer was responsible before his scheduled de-mobilization. "None of the issues under the initial responsibility of [CDR Mizer] involved matters of fact or law in which he had unique knowledge or expertise beyond that which could be gained through routine preparation by the attorneys who remain" on the defense team. *Hutchins*, 69 M.J. at 292.

e. The Defense urges the Commission to consider the C.A.A.F.'s analysis in *United States v. Hohman*, 70 M.J. 98 (C.A.A.F. 2011) (per curiam). The Commission has done so. However, *Hohman* is not particularly helpful to the Accused's argument. In *Hohman*, the detailed defense counsel submitted administrative requests for extension of active duty in order to continue his representation of the accused during his court-martial. 70 M.J. at 99. The military judge abated the proceedings, finding the Marine Corps' denial of detailed counsel's request "had severed the attorney-client relationship without good cause, and that the appropriate remedy required abatement of the proceedings pending restoration" of the detailed defense counsel." *Id.* at 99. The Government appealed to the service court, which reversed the trial judge's abatement order. The C.A.A.F. affirmed the service court, finding that *Hohman* had not demonstrated any circumstances that would warrant an exception from the general guidance that separation from active duty normally terminates representation. *Id.* at 100.

f. This Commission disagrees with the Chief Defense Counsel's assessment that there was no good cause for CDR Mizer's withdrawal. However, regardless of whether there was good cause or not, the Commission finds that, at this pretrial stage of the proceedings the Accused was not prejudiced by the severance of the attorney-client relationship. In *Hohman*, the C.A.A.F. considered the length of time between the withdrawal of the detailed counsel and the detailing of new counsel to represent the accused, which was within two days of detailed counsel's departure from active duty. 70 M.J. at 99. The court also considered the fact trial did not begin until nine months after the detail of new defense counsel to the case. *Id.*, see also *United States v. Burton*, 584 F.2d 485, 491-92 (D.C. Cir. 1978) (no abuse of discretion in denying a 30 to 60 day continuance after counsel withdrew and Burton had failed to retain replacement counsel, even in a complex case).

g. Here, the Accused is represented by five lawyers: one learned counsel, two detailed military defense counsel, and two detailed civilian defense counsel.¹⁴ This case is in the pretrial litigation stage. It is unlikely the case will be tried within the next 9 months. The availability of learned counsel and four additional counsel to defend the Accused in this pretrial stage of these proceedings ensures that the Accused is not prejudiced by the severance of CDR Mizer, whether it was improper or not. *Hohman*, 70 M.J. at 100 (*Hohman* failed to establish that the assignment of new detailed military defense counsel nine months prior to trial was insufficient to remedy the improper severance of the detailed military defense counsel).

h. The Commission finds there is no government misconduct in this routine separation of CDR Mizer from what amounts to two years of involuntary active duty service.¹⁵ See *Spriggs*, 52 M.J. at 246. The Defense failed to establish that CDR Mizer is irreplaceable at this stage of the proceedings; that is to say, “[n]one of the issues under the initial responsibility of [CDR Mizer] involved matters of fact or law in which he had unique knowledge or expertise beyond that which could be gained through routine preparation by the attorneys who remain” on the defense team.¹⁶ See *Hutchins*, 69 M.J. at 292. Therefore, any procedural deficiencies concerning the termination and replacement of CDR Mizer did not result in prejudice to the Accused under applicable statutory standards of law. *Id.* at 284.

¹⁴ The fact that the two civilian defense counsel have been detailed to the Accused’s defense team, but have not yet been fully cleared, does not deny the Accused adequate representation at this stage of the proceedings.

¹⁵ Though the Commission has denied this motion, the Commission notes that CDR Mizer, during direct examination at the September session, expressed a willingness to be a part of the Accused’s defense team in his capacity as a drilling Navy reservist. Learned counsel also expressed a willingness to accept such an arrangement as a remedy. However, the Commission has seen no evidence indicating that CDR Mizer has made such a request, or that the Department of the Navy has denied any such request. Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing dated 7 September 2016 from 1:00 P.M. to 1:38 P.M. at p. 6179.

¹⁶ In fact, contrary to this assertion, the defense suggested they would readily accept CDR Mizer to the team “part time” as a “drilling reservist” to the extent his “Naval Reserve duties allow.” Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing dated 8 September 2016 from 11:04 A.M. to 11:50 A.M. at pp. 6412-13. This assertion undercuts the defense argument in their motion.

5. **Ruling.** Accordingly, the Defense Motion is **DENIED**.

So **ORDERED** this 23rd day of September, 2016.

//s//

VANCE H. SPATH, Colonel, USAF
Military Judge
Military Commissions Trial Judiciary