

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

UNITED STATES OF AMERICA

v.

ABD AL RAHIM HUSSAYN  
MUHAMMAD AL NASHIRI

AE 350E

RULING

**Defense Motion to Abate Proceedings**  
Until Critical Members of the Defense Team  
Receive Appropriate Security Clearances and  
SAP Read-Ons

**16 September 2016**

**1. Background.**

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. The Accused's defense team<sup>1</sup> is currently comprised of Mr. Richard Kammen (learned counsel), LCDR Jennifer Pollio, CDR Aimee Cooper, Ms. Mary Spears, and Ms. Rosa Eliades. However, Ms. Spears and Ms. Eliades have yet to be granted their security clearances and required Special Access Program (SAP) read-ons. On 8 July 2016, the Defense filed AE 350,<sup>2</sup> claiming that without Ms. Spears and Ms. Eliades being cleared, the Defense cannot provide the Accused with effective assistance of counsel. (AE 350 at 1-2). The Defense also argues Rule 4 of the Military Commissions Rules of Court, effective 1 September 2016, will compel the two non-cleared attorneys to act unethically in contravention of the Indiana Rules of Professional Responsibility by forcing them to make an appearance and without being able to meet with the Accused. *Id.*

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<sup>1</sup> This only includes the attorneys assigned, not the paralegals, consultants, and investigative assistants which also provide important support to the defense team.

<sup>2</sup> AE 350, Defense Motion to Abate Proceedings Until Critical Members of the Defense Team Receive Appropriate Security Clearances and SAP Read-Ons, filed 08 July 2016.

c. On 22 July 2016, the Government responded,<sup>3</sup> claiming “the operative fact for this Commission to continue hearings is that the accused already has adequate representation by counsel, consistent with R.M.C. 506(b),” and the “defense failed to allege any particularized prejudice to the accused.” (AE 350A at 1-2). In reply,<sup>4</sup> the Defense claimed “the Chief Defense Counsel [(CDC)], and the Convening Authority (CA) have found [Ms. Spears and Ms. Eliades] to be necessary for adequate representation of the accused” and their absence “constitutes good cause to continue the proceedings.” (AE 350B at 3).

d. The Commission heard oral argument on this motion on 7 September 2015.<sup>5</sup> The Commission denied this motion from the bench on 9 September 2016.<sup>6</sup>

## 2. Law.

a. An accused facing a military commission with capital charges has the right to one detailed military defense counsel and at least one additional counsel learned in applicable law relating to capital cases. 10 U.S.C. § 949a(b)(2)(C). “Whether a request for a continuance should be granted is a matter within the discretion of the military judge. Reasons for a continuance may include: insufficient opportunity to prepare for trial.” Discussion to R.M.C. 906(b)(1). “The propriety of granting a continuance is always fact-specific and must be decided in light of the peculiar circumstances surrounding each case and the reasons presented to the trial court.”

*United States v. Young*, 50 M.J. 717, 722 (A. C. C. A. 1999) (citing *Ungar v. Sarafite*, 376 U.S. 575 (1964)); see also *United States v. Burton*, 584 F.2d 485, 491-92 (D.C. Cir. 1978) (no abuse

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<sup>3</sup> AE 350A, Government Response to Defense Motion to Abate Proceedings Until Critical Members of the Defense Team Receive Appropriate Security Clearances and SAP Read-Ons, filed 22 July 2016.

<sup>4</sup> AE 350B, Defense Reply to Government Response to Defense Motion to Abate Proceedings Until Critical Members of the Defense Team Receive Appropriate Security Clearances and SAP Read-Ons, filed 29 July 2016.

<sup>5</sup> Unofficial /Unauthenticated Transcript of Abd Al Rahim Hussayn Muhammad al Nashiri Dated 7 September 2016 from 11:04 AM to 11:50 AM at pp. 6138-6162.

<sup>6</sup> Unofficial /Unauthenticated Transcript of Abd Al Rahim Hussayn Muhammad al Nashiri Dated 9 September 2016 from 9:00:04 AM to 10:05 AM at pp. 6532-6533.

of discretion in denying a 30 to 60 day continuance after counsel withdrew and Burton had failed to retain replacement counsel). “A defendant shoulders the burden, by a preponderance of the evidence, to show ‘reasonable cause’ for the continuance request.” *United States v. Parker*, 75 M.J. 603, 613 (N.M.C.M.R. 2016) (citing *United States v. Allen*, 31 M.J. 572, 620-623 (N.M.C.M.R. 1990)).

b. “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 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.

### 3. Analysis.

a. The Accused is currently represented by one detailed military defense counsel and an additional counsel “learned in applicable law related to capital cases”-squarely within the requirements of 10 U.S.C. § 949a(b)(2)(C) and R.M.C. 506. In addition to the statutorily required counsel, CDR Cooper has been detailed to represent the Accused. Though CDR Cooper has not yet established an attorney-client relationship with the Accused, she is fully cleared and is available to the defense team. Thus, the Accused is currently represented by three counsel who all possess the necessary security clearances. Also, the Commission presumes Ms. Spears and Ms. Eliades are able to assist the defense in those matters not requiring a security clearance, including reviewing unclassified documents, preparing unclassified motions, among a myriad of other potential things.

b. The Commission also observes that in making the claim of possible ineffective assistance of counsel, the Accused has cited no precedent affording an indigent defendant a right to more representation than the M.C.A. requires. In his Reply, the Accused cited “Rule for Trial by Military Commissions 9(1)(b)(1)” and *United States v. Graham*, 91 F.3d 213, 221 (D.C. Cir. 1996), claiming these authorities establish that two lawyers are insufficient to represent him. However, Regulation for Trial by Military Commission 9(1)(b)(1) simply does not stand for that proposition. As for *Graham*, Graham claimed he received ineffective assistance of trial, in part because the district court deprived Graham of his counsel of choice. 91 F.3d at 220. The *Graham* court criticized the district court for failing to fully inquire into Graham’s concerns with his detailed counsel, but held Graham, as an indigent, did not have a right to his choice of counsel. *Id.* at 221-22. The court further found Graham was not prejudiced by the district court judge’s failure to fully inquire into Graham’s desire for substitute counsel. *Id.* Other than noting that *Graham* states that an accused’s right to counsel “includes the right to effective representation by appointed counsel,”<sup>7</sup> the defense did not connect *Graham* to this case.

#### 4. Findings.

a. The fact Ms. Spears and Ms. Eliades 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. As noted earlier, both counsel are in no way inhibited from performing important functions for the Accused. This case is in the pretrial litigation stage, with trial not likely before 2017.

b. The availability of Mr. Kammen, LCDR Pollio, and CDR Cooper to defend the Accused in this pretrial stage greatly outweighs the Accused’s need for a continuance in this

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<sup>7</sup> AE 350B at 4.

case. The defense failed to show that the failure of the government to clear Ms. Spears and Ms. Eliades has prejudiced the Accused at this stage of the proceedings.

5. **Ruling.** Accordingly, the Defense Motion is **DENIED**.<sup>8</sup>

So **ORDERED** this 16th day of September, 2016.

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

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<sup>8</sup> The Commission has denied this motion, but may revisit it if problems persist in securing security clearances for these counsel after discovery concludes. As the Commission made clear throughout the proceedings held on 7-9 September 2016, and reiterates here, the continued failure of the government to move these matters forward could result in the Commission granting a similar motion in the future.