

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

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID
MUHAMMAD SALIH MUBARAK BIN
'ATTASH, RAMZI BIN AL SHIBH, ALI
ABDUL-AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

AE 616B (KSM)

Mr. Mohammad's Notice
Regarding Non-Filing of
Response to AE 350SSS/AE 616¹

16 January 2019

1. Timeliness.

The present notice is filed within the time provided in AE 350SSS/AE 616 for filing Mr. Mohammad's objections to taking the testimony of the interpreter in closed session.

2. Notice.

On 9 January 2019, Mr. bin Attash filed AE 615,² containing facts that give rise to a presumptive conflict of interest – most directly as to counsel for Mr. bin Attash, but also as to all the defense teams in this case. As a result, on 11 January 2019 counsel for Mr. Mohammad filed AE 615A,³ moving the Military Judge to suspend all briefing schedules pending resolution of AE 615. Later on 11 January 2019 the Military Judge issued AE 615B,⁴ setting an expedited briefing schedule on AE 615, but ruling without explanation that there was “no immediate need”

¹ AE 350SSS/AE 616, ORDER, Expedited Briefing Schedule, 10 January 2019.

² AE 615(WBA), Defense Motion to Conduct Thorough Inquiry into Actual and/or Potential Attorney Conflict of Interest Pursuant to R.M.C. 901 and Holloway v. Arkansas, 435 U.S. 475 (1978) and to Cancel Proceedings Pending Inquiry, 9 January 2019.

³ AE 615A (KSM), Mr. Mohammad's Motion to Suspend Briefing Deadlines Pending Resolution of AE 615, 11 January 2019.

⁴ AE 615B, ORDER, Expedited Briefing Schedule and Deferral of Ruling on Motion to Suspend Briefing Deadlines, 11 January 2019.

to suspend other briefing schedules, nor has he explained when or how he will conduct a hearing as required under *Holloway v. Arkansas*, 435 US 475 (1978). *Id.*, at 2. At the time of the present filing the Military Judge has not otherwise ruled on AE 615.

Counsel for Mr. Mohammad are mindful of their obligation to provide effective assistance of counsel to Mr. Mohammad and to protect his legal interests when possible. However, as described in AE 615A and AE 530S,⁵ the present issue does not arise in a vacuum. Indeed, when counsel have continued to do their “professional utmost”⁶ on behalf of Mr. Mohammad despite laboring under similar conflicts of interest, this has been directly relied upon by the Military Judge in finding no harm and no foul and failing to sanction intrusion on the defense function. Accordingly, in the judgment of counsel, the best resolution of their obviously recurring dilemma is achieved in the current circumstances by following their Rules of Professional Conduct which prohibit them from representing Mr. Mohammad until resolution of the apparent and presumptive conflict. Counsel therefore decline to file a pleading containing his objections to taking the testimony of the interpreter in closed session, despite the fact that this will result in his being denied the opportunity to be heard timely on this important issue.

Counsel for Mr. Mohammad therefore give notice that they respectfully decline to prepare and file Mr. Mohammad’s objections to taking the testimony of the interpreter in closed session unless and until they receive appropriate information on the basis of which they may exercise their independent professional judgment, that they are not presently laboring under a conflict of interest. If and when such information is received, Mr. Mohammad will respectfully

⁵ AE 530S (KSM), Response to AE 530F, 20 November 2017, at pp. 14-23.

⁶ AE 292QQ, AMENDED1 ORDER, Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel’s Representation of Accused, 16 December 2014, p. 20.

move the Military Judge for leave to file his objections out of time and, if the issue has been resolved as to other parties without his objections being considered, subject to the limitations applicable to a motion to reconsider. *See* R.M.C. 905(f). The present notice and the subsequent non-filing referred to in this pleading, as well as the notice and non-filing referred to in AE 555FFF⁷ and AE 614D,⁸ are not intended to be, and do not act as, a waiver under R.M.C. 905(e).

3. Conference.

Pursuant to RC 3.10.a.(9), a certificate of conference is not required for the filing of a Notice.

4. Service.

Pursuant to RC 3.5.1, Mr. Mohammad has provided notice of the filing of the present Notice to all parties.

5. List of Attachments.

A. Certificate of Service.

Respectfully submitted,

//s//

DAVID Z. NEVIN
Learned Counsel

//s//

GARY D. SOWARDS
Defense Counsel

//s//

DEREK A. POTEET
LtCol, U.S. Marine Corps
Defense Counsel

//s//

RITA J. RADOSTITZ
Defense Counsel

Counsel for Mr. Mohammad

⁷ AE 555FFF (KSM), Mr. Mohammad's Notice Regarding Non-Filing of Reply to AE 555DDD, 11 January 2019.

⁸ AE 614D (KSM), Mr. Mohammad's Notice Regarding Non-Filing of Reply to AE 614 (GOV), 14 January 2019.

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 16th of January, 2019, I electronically filed AE 616B (KSM) Mr. Mohammad's Notice Regarding Non-Filing of Response to AE 350SSS/AE 616 with the Clerk of Court and served the foregoing on all counsel of record by electronic mail.

//s//
DAVID Z. NEVIN
Learned Counsel