

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 623 (WBA, RBS, AAA, MAH)

Motion for Order Regarding
the Parties' Understanding on the
Implementation of the
Privileged Written Communications Order
AE 18U (Third Amended)

Filed: 8 April 2019

1. **Timeliness:** This Motion is timely filed. *See* R.M.C. 905(c).
2. **Relief Requested:** The parties seek an order from the Commission that memorializes their existing understanding of an aspect of the Privileged Written Communications Order, AE 18U (Third Amended), so as to reaffirm to the Privilege Team the proper application of the order.

In particular, the parties again agree to the meaning of AE 18U Third Amended (28 Mar 2018), with respect to the role of Defense Counsel in determining whether documents sent the Accused are "lawyer-client privileged" or "other case-related" material, as defined in the Order. That is, the parties continue to agree that Defense Counsel have the sole discretion to determine what material falls into which category and is case-related, and the Privilege Team's role is limited to reviewing markings on the materials.

3. **Facts:**
 - a. In 2013, this Commission issued an updated Privileged Written Communications Order, AE 18U (PWCO), designed to govern the written communications between the accused in this case and their respective defense teams.

b. Paragraph 2(g)(1) of the PWCO defines “Other Case-Related Material,” in relevant part, as:

- (1) Communications between a Defense Counsel and the Accused that are directly related to the Accused’s military commission but are not privileged within the meaning of M.C.R.E. 502.

c. Paragraph 2(i)(4)) of the PWCO, which is part of the definition of “Contraband,” provides that:

- (4) Notwithstanding sub-paragraphs 2(i)(1) - (3), above, no information shall be considered Contraband if defense counsel reasonably believes it is directly related to the Military Commission proceeding involving the Accused.

4. **Argument:**

The Privileged Written Communications Order (AE 18U) has been in place and implemented daily to the satisfaction of the parties, for the last three years. Recently however, the Privilege Team began inappropriately encroaching on what has always been understood to be the sole province of the Defense Counsel. Specifically, the Privilege Team has been questioning Defense Counsel’s assessment of what material is and is not related to military commissions proceedings, engaging in improper substantive review, and refusing to allow categories of mail that had been submitted and approved consistent with the order for years, without question and without incident. The Privilege Team’s interference has significant repercussions on attorney-client communications and attorney-client relationships, in an already highly complex capital case.

The intent of the parties, as ratified in the Written Privileged Communications Order is and has been for Defense Counsel to make the determination of what is case related. As long as Defense Counsel are signing an attestation along with the materials being submitted for the Privilege Team’s review, indicating that it is Defense Counsels’ reasonable belief that the given

materials are related to the case, and provided the submitted materials are properly marked,¹ the Privilege Team does not have the authority to make any further determinations.

The parties seek to reaffirm this longstanding understanding regarding the Privileged Written Communications Order, and to obtain from the Commission a ruling to that effect, in order to avoid additional complications with the Privilege Team, which impacts the internal communications and attorney-client relationships with these capital defendants.

5. **Certificate of Conference:**

The Defense conferenced with the prosecution, who agrees that, under the Written Privilege Communications order, providing Defense Counsel attests to his/her reasonable belief that the material is related to the case and thus falls outside of the ‘Contraband’ definition, it is Defense Counsel’s decision to make, and not the Privilege Team’s decision.

6. **Attachments:**

- A. Certificate of Service;
- B. Proposed Order.

For Mr. al Hawsawi:

//s//
WALTER B. RUIZ
Learned Counsel

//s//
JENNIFER N. WILLIAMS
LTC, JA, USAR
Defense Counsel

//s//
SEAN M. GLEASON
Defense Counsel

//s//
SUZANNE M. LACHELIER
Detailed Defense Counsel

¹ These marking and attestation requirements are set out in Paragraph 3 of AE 18U (Third Amended).

//s//
JOSEPH D. WILKINSON II
MAJ, JA, USAR
Defense Counsel

//s//
DAVID D. FURRY
LCDR, JAGC, USN
Defense Counsel

For Mr. al Baluchi:

//s//
JAMES G. CONNELL, III
Learned Counsel

//s//
STERLING R. THOMAS
Lt Col, USAF
Defense Counsel

//s//
ALKA PRADHAN
Defense Counsel

//s//
BENJAMIN R. FARLEY
Defense Counsel

//s//
MARK E. ANDREU
Capt, USAF
Defense Counsel

For Mr. bin 'Atash

//s//
CHERYL T. BORMANN
Learned Counsel

//s//
WILLIAM R. MONTROSS, JR.
Detailed Defense Counsel

//s//
EDWIN A. PERRY
Detailed Defense Counsel

//s//
MATTHEW H. SEEGER
MAJ, JA, USA
Detailed Military Counsel

For Mr. bin al Shibh

//s//
JAMES P. HARRINGTON
Learned Counsel

//s//
WYATT A. FEELER
Defense Counsel

//s//
JOHN M. BALOUZIYEH
CPT, JA, USAR
Defense Counsel



CERTIFICATE OF SERVICE

I certify that on the 8th day of April 2019, I electronically filed **AE 623 (WBA, RBS, AAA, MAH) - Motion for Ruling Regarding the Parties' Understanding on the Implementation of the Privileged Written Communications Order AE 18U (Third Amended)** with the Clerk of the Court and all the counsel of record by e-mail.

 //s//
WALTER B. RUIZ
Learned Counsel for Mr. Hawsawi

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AE 018 ____ [PROPOSED] Order

**Memorializing the Parties
Understanding regarding the
Implementation of
AE 18U (Third Amended)
Privileged Written Communications
Order**

April 2019

1. The Defense moved the Commission to memorialize their existing understanding of an aspect of the Privileged Written Communications Order, AE 18U (Third Amended), so as to reaffirm to the Privilege Team the proper application of the order. The Defense motion asserts that the parties agree that Defense Counsel, not the Privilege Team, makes the decision as to whether material being sent to an Accused through the Privilege Team, is case-related. The motion further asserts that the parties are in agreement that, as long as Defense Counsel are signing an attestation along with the materials being submitted for the Privilege Team's review, indicating that it is Defense Counsels' reasonable belief that the given materials are related to the case, and provided the materials are properly marked,¹ the Privilege Team does not engage in further review.

2. The Prosecution does not oppose the Defense motion or the proposed order.

¹ These marking and attestation requirements are set out in Paragraph 3 of AE 18U (Third Amended).

3. **Ruling.** The motion is **GRANTED**. The Commission adopts the parties existing understanding regarding Defense Counsel and Privilege Team responsibilities with respect to the determination of what material is case-related within the meaning of the Commission's Privileged Written Communications Order, AE 18U (Third Amended).

So **ORDERED** this ____ day of March 2019.

K. A. PARRELLA
Colonel, U.S. Marine Corps
Military Judge

DRAFT ORDER/WBA RBS AAA MAH/08/04/19