

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 624I (KSM)

Mr. Mohammad's Motion
To Permit the Absence of Counsel of
Record Pursuant to R.M.C. 805(c)

22 April 2019

1. Timeliness:

This motion is timely pursuant to R.C. 3.7.c.(1).

2. Relief Sought:

Pursuant to R.M.C. 805(c) Mr. Mohammad requests permission from the Military Judge for Mr. Gary Sowards to be absent from the hearings scheduled from 29 April—3 May 2019.

3. Burden of Proof:

The burden of proof is on the moving party, R.M.C. 905(c)(1)-(2); R.C. 3.8.

4. Facts:

The next Military Commission hearing is scheduled for 29 April—3 May 2019. Mr. Sowards has professional matters which require his absence from these hearings. Mr. Mohammad has consented to Mr. Sowards's absence from these hearings.

5. Law and Argument:

R.M.C. 805(c) provides that “[a]s 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.” The Military Judge has freely permitted the absence of counsel under similar circumstances.

Mr. Mohammad consents to Mr. Sowards’ absence.

Mr. Nevin, Lt. Col. Poteet, and Ms. Radostitz will be present at the hearings. Particularly under the present circumstances, Mr. Sowards’s presence will not be required. As counsel have previously represented to the Military Judge, in view of the events underlying AE 615, and the long history in this case of similar events, counsel reasonably believe that they are again under government investigation and/or that the government has again compromised (or worse, has never ceased to compromise) the confidentiality of communications within Mr. Mohammad’s defense team. Counsel have repeatedly pointed to the as yet unexplained facts that give rise to these beliefs. Although the Military Judge has also recognized that counsel have a professional obligation to resolve these issues, counsel remain of the opinion that neither the Military Judge’s rulings nor the materials provided by the government, have so far enabled counsel in good faith to do so.

As a result, counsel are unable to conclude on the present record that they are not laboring under a conflict of interest, and are pursuing expedited appellate remedies.¹ Recognizing that, in the meantime, the Military Judge intends nonetheless to proceed, and mindful that when counsel have raised similar issues in the past the Military Judge has ruled that counsel’s continued presentation of substantive pleadings and participation in hearing sessions effectively waived any

¹ See USCMCR Case No. 19-003 Motion for Stay (filed 27 March 2019) and Citations to Authority (filed 8 April 2019).

conflict of interest, until such time as counsel can secure resolution of the issue, counsel are constrained to decline to present substantive pleadings or to participate in hearing sessions.²

Accordingly, Mr. Sowards's physical presence will not be required, and the present motion should be granted.

7. Conference:

The government does not oppose the motion.

8. Oral Argument:

None requested.

9. 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

² This declination is not intended, and does not reflect, an implied or actual waiver by Mr. Mohammad of any of his rights, including to counsel generally or to be heard on individual issues. As in previous recent hearing sessions, and with the Military Judge's permission, counsel will request the opportunity to make a brief, respectful statement of this objection at the outset of the proceedings and to request a continuing objection to further proceedings; but not otherwise participate in the proceedings.

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 22nd day of April 2019, I electronically filed AE 624I (KSM), Mr. Mohammad's Motion To Permit the Absence of Counsel of Record Pursuant to R.M.C. 805(c), with the Chief Clerk of the Military Commissions Trial Judiciary and delivered the foregoing on all parties by electronic mail, serving only Special Trial Counsel on behalf of the prosecution..

//s//
DAVID Z. NEVIN
Learned Counsel