

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

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)	
UNITED STATES,)	
)	Case No. 18-002
)	
)	APPELLEE'S MOTION FOR LEAVE
)	TO FILE MOTION TO FILE A
)	SUPPLEMENTAL BRIEF
)	
)	
)	
)	Date: 19 April 2018
)	

**TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW**

Comes now Appellee, Abd Al-Rahim Hussein Al-Nashiri, and moves this Honorable Court for leave to file the accompanying Motion to File a Supplemental Brief.

Respectfully submitted,

/s/ Alaric Piette
 Alaric Piette
 LT, JAGC, USN
 Detailed Defense Counsel
 Military Commissions Defense Organization

CERTIFICATE OF SERVICE

I hereby certify that on 19 April 2018, I caused copies of the foregoing to be served on the counsel for Appellant via e-mail.

Respectfully submitted,

/s/ Alaric Piette

Alaric Piette

LT, JAGC, USN

Counsel for Appellee

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES,)	
)	
)	Case No. 18-002
)	
<i>Appellant,</i>)	
v.)	
)	APPELLEE’S MOTION TO FILE A
)	SUPPLEMENTAL BRIEF
ABD AL-RAHIM HUSSEIN AL-)	
NASHIRI,)	
)	
<i>Appellee.</i>)	Date: 19 April 2018
)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW

Comes now Appellee, Abd Al-Rahim Hussein Al-Nashiri, by Counsel, pursuant to Rule 21, Rules of Practice for the United States Court of Military Commission Review (“Rules of Practice”), and moves this Honorable Court to file a supplemental brief with this Court no later than 25 May 2018, when counsel of choice will be able to represent Appellee.

As this Court is aware, the Military Judge ordered the recall of Commander (CDR) Brian Mizer, JAGC, USN, to serve as Appellee’s detailed defense counsel. Commander Mizer is a highly experienced appellate attorney, whose recall to active status was deemed so essential to the fairness of these proceedings that the Secretary of Defense personally ordered his re-mobilization. This past weekend, CDR Mizer began the necessary in-processing and is presently expected to report to duty no later than 21 May 2018. At that time, CDR Mizer will take command as detailed defense counsel in this case. Given this responsibility, given CDR Mizer’s far greater legal experience compared to undersigned counsel, and given Appellee’s longstanding desire to be represented by CDR Mizer, Appellee believes it is important that CDR Mizer review the record, motions, and pleadings submitted in this appeal to ensure that they are both accurate and sufficiently represent Appellee’s interests. Appellant has been consulted and opposes this motion.

STATEMENT OF FACTS

Appellee is charged before a Military Commission in Guantanamo Bay, Cuba. The prosecution is seeking the death penalty. On 21 February 2018, Appellant gave notice of its intent to seek a § 950d interlocutory appeal to this Court to challenge an oral order from the Military Judge that abated the proceedings against Appellee. On 23 February 2018, this Court ordered the filing of briefs and assigned judges to preside over Appellant's appeal.

The cause for the present abatement traces back to 11 October 2017, when the Chief Defense Counsel permitted the withdrawal of three (3) of Appellee's longtime civilian counsel pursuant to his authority under R.M.C. 505(d) for good cause. The Chief Defense Counsel promptly filed a notice with the Convening Authority that steps were being taken to secure replacement counsel and undersigned counsel notified the Military Commission of counsel's withdrawal. *See* AE 339J, 339K, and 339L. Undersigned counsel also filed a motion requesting an abatement of the trial proceedings until a new learned counsel could be appointed. AE 389.

The Military Judge denied that motion to abate finding that, based upon the Military Commission Trial Judiciary Rules of Court, only the Military Judge could excuse counsel, and held that the presence of learned counsel was neither required nor practicable at the present stage of pre-trial proceedings. AE 389F. Over the course of subsequent hearings, the Military Judge ordered, *inter alia*, the Convening Authority to recall CDR Brian Mizer, JAGC, USN, to active duty in order to serve as replacement learned counsel.

Commander Mizer had been initially detailed to serve as Appellee's lead defense counsel in 2013. In 2015, CDR Mizer demobilized from active status, forcing him to unilaterally withdraw from further representation. Since demobilizing in 2015, CDR Mizer served as learned appellate defense counsel for the Air Force Appellate Defense Division. In this capacity, he handled several serious matters, including succeeding in having the United States Court of Appeals for the Armed

Forces (“C.A.A.F.”) order a sentence rehearing in *United States v. Witt*, 75 M.J. 380 (C.A.A.F. 2016), the Air Force’s only capital case on direct appeal. Commander Mizer had previously served as assistant detailed counsel in the trial of Salim Hamdan and as detailed defense counsel for one of the 9/11 accused, during a prior deployment in the Military Commissions Defense Organization.

Commander Mizer’s severance from this case was over Appellee’s strenuous objection and in the face of the Chief Defense Counsel having requested the Navy Judge Advocate General to keep CDR Mizer mobilized. Appellee’s remaining counsel filed a prompt motion to abate in order to compel the Navy to keep CDR Mizer on active status. AE 348. But a year later, in September 2016, the Military Judge denied the motion to abate on the basis of an *ex post* finding of good cause. AE 348L. The Military Judge then reconsidered this decision *sua sponte* in November 2017 and ordered Appellant to secure CDR Mizer’s return to the case finding “that CDR Mizer’s attorney/client relationship with the Accused should not be severed in light of these new facts.” AE 348M.

Over the next four (4) months, Appellant did the necessary paperwork to recall CDR Mizer back onto active status. This required a direct order from the Secretary of Defense. Over the weekend of 14-15 April 2018, CDR Mizer began the necessary in-processing to be mobilized to the Military Commissions Defense Organization and to return to represent Appellee. He is presently expected to report to the Military Commissions Defense Organization no later than 21 May 2018. At such time, he will commence service as Appellee’s lead detailed defense counsel.

ARGUMENT

Since this appeal was docketed two (2) months ago, Appellant has submitted thousands of pages of briefing, records, and motions. Appellee, for its part, has submitted more than a hundred pages of briefing and filed numerous motions, the majority of which have not yet been acted upon by this Court. In nearly every one of its briefs to this Court, Appellant has accused undersigned counsel of “mischaracterizing” or “misunderstanding” the relevant law and facts. It has accused undersigned counsel of being a co-conspirator or, at best, a dupe in some vaguely described plot that it calls “M.C.D.O.’s ‘revolution to the system.’” App. Opp. to Motion to Dismiss for Want of Jurisdiction under 10 U.S.C. § 950d, at 2 (5 March 2018).

Undersigned counsel, of course, objects to Appellant’s *ad hominem* strategy. Other than paranoid accusations, Appellant has come forward with no evidence to show that any nefarious plot exists in anything other than the minds of its attorneys. Appellant has no explanation, for example, for why this revolutionary plot would only affect Appellee’s case and not the dozen other Military Commission cases that continue to progress at various stages of litigation. Nor can Appellant explain why the Military Commission Defense Organization immediately sought (and continues to seek) counsel to replace those who withdrew. Nor, in attempting to tar undersigned counsel’s reputation, does it explain how even the Military Judge, who undoubtedly took umbrage at the Chief Defense Counsel’s competing claim to authority over the supervision of defense counsel, nevertheless repeatedly emphasized that he “recognized the position [Lieutenant Piette was] in. I’ve said that. I have great empathy.” Trans. 11046-11050.

With respect to Appellant’s accusations of so-called “mischaracterizations” or “misunderstandings” in its pleadings to this Court, undersigned counsel simply wishes to assure this Court that he has done the best he can, in good faith, with the very limited time and legal resources available to him. And despite numerous instances where Appellant has unquestionably

distorted the facts of this case, ignored or misrepresented relevant legal authorities, or sought to impugn his professionalism, undersigned counsel has refrained from responding in kind against Appellant's counsel. Instead, he has done his best to state as plainly as possible the relevant law and facts known to him in the hope that it is ultimately the law that matters to this Court and not the grinding of Appellant's axes.

That said, undersigned counsel recognizes the limits of his professional experience. Appellant has made *ad hominem* attacks on undersigned counsel's competence a centerpiece of its litigation strategy during this appeal. And while he strongly disputes any claim that undersigned counsel has acted in bad faith, he is not embarrassed to say that the majority of his Naval career was spent not as a Judge Advocate, but as an enlisted Navy SEAL, and that he only graduated from law school in 2012. He is the first to admit that he does not have the experience of someone like CDR Mizer.

Commander Mizer is due to return to this case at Appellant's behest in a matter of weeks and to take charge as detailed defense counsel. In ordering his return to the case, the Military Judge went so far as to say that CDR Mizer had performed more ably "than the capitally qualified counsel when he was assigned here." Trans. 11136. And this judgment respecting CDR Mizer's indispensability is corroborated by the extraordinary lengths to which Appellant went to secure his remobilization. In fact, the Secretary of Defense had to personally order CDR Mizer's mobilization by name.

Undersigned counsel has conferred with CDR Mizer, who has expressly stated his desire to have input on this appeal, particularly given the breadth of Appellant's asserted Assignments of Error and the Military Judge's insistence that legal issues beyond Appellee's representation by learned counsel are at issue. And as its counsel of choice, Appellee wishes to have CDR Mizer's

individual professional judgment on whether undersigned counsel has adequately argued the law and defended Appellee's rights. While CDR Mizer has other obligations that he must attend to before returning to represent Appellee, undersigned counsel is arranging to provide him the unclassified briefing, record citations, and other materials as soon as possible. Given that his orders commence on Monday, 21 May 2018, CDR Mizer is confident that he will be able to prepare any supplemental pleading for submission to this Court no later than the close of business Friday, 25 May 2018.

While undersigned counsel has done the best he can to represent Appellee in the course of this appeal, Appellee is entitled to have its counsel of choice and, moreover, entitled to have more experienced counsel represent them in a case that raises so many novel and complicated issues as this appeal does. Given the complexity of this capital case, this "court must consider counsel's experience" and given the fact that his "experience is absent or minimal, either grant, if requested, a continuance or appoint more experienced counsel." *See Rastrom v. Robbins*, 440 F.2d 1251, 1256 (1st Cir. 1971). While Appellee recognizes that its rights to counsel of choice are not unlimited, Appellee "must be given a reasonable opportunity to employ and consult with [that] counsel; otherwise, the right to be heard by counsel would be of little worth." *Chandler v. Fretag*, 348 U.S. 3, 10 (1954); *see also United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) ("So also with the Sixth Amendment right to counsel of choice. It commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best."). Appellee never consented to CDR Mizer's departure from the case and it was Appellant that refused to take steps to secure his return until ordered to do so by the Military Judge in November 2017. The Military Judge's reversal of his prior ruling constituted a finding that CDR Mizer had not been terminated for good cause and "that CDR Mizer's attorney/client

relationship with the Accused should not be severed in light of these new facts.” AE 348M. Since at least the entry of this order, therefore, Appellee has been wrongfully denied its counsel of choice.

Here, the “more experience counsel” is due to imminently arrive and the deprivation of counsel of choice can be readily remedied by simply allowing CDR Mizer to meaningfully participate in this appeal. Appellant can show no prejudice in waiting a few more weeks to ensure that Appellee is effectively represented. And if Appellant was consistent in its position, it should welcome CDR Mizer’s input. There is no good reason that Appellant should want this Court to reach a hasty decision at a time when Appellee’s litigation resources are at their minimum and while Appellee is being wrongfully denied its counsel of choice.

CONCLUSION

WHEREFORE, in the interests of justice, Appellee moves this Court to grant the requested relief. Appellee asks to file a supplemental brief, represented by CDR Mizer, no later than 25 May 2018 without prejudice to Appellant’s opportunity to respond.

Respectfully submitted,

/s/ Alaric Piette

Alaric Piette

LT, JAGC, USN

Detailed Defense Counsel

Military Commissions Defense Organization

CERTIFICATE OF SERVICE

I hereby certify that on 19 April 2018, I caused copies of the foregoing to be served on the counsel for Appellant via e-mail.

Respectfully submitted,

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Counsel for Appellee