

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA v. ABD AL-RAHIM HUSSEIN MUHAMMED ABDU AL-NASHIRI	AE 339RR Application for Withdrawal as Learned Counsel 7 June 2024
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1. **Timeliness:** This application is filed within the timeframe established by Rule for Military Commissions (“R.M.C.”) 905 and pursuant to Military Commissions Trial Judiciary Rule of Court (“RC”) 3.7.c.(1).

2. **Relief Requested:** Mr. Al-Nashiri respectfully requests that the Military Commission excuse Mr. Anthony J. Natale from further representation in the above captioned case at the expiration of his current contract, 14 September 2024, for the good cause of his retirement under Rule for Military Commissions 505(d)(2).

3. **Overview:** With the express consent of Mr. Al-Nashiri, Mr. Natale is seeking to withdraw as the Learned Counsel for Mr. Al-Nashiri’s capital case based upon Mr. Natale’s impending retirement. The Learned Counsel position, as structured within the Office of Military Commissions, is a term position which is renewed on an annual basis. Mr. Natale’s current term of employment expires on 14 September 2024, and Mr. Natale is winding down his practice and preparing for retirement due to his advanced age and family obligations. The Chief Defense Counsel has identified Mr. Natale’s replacement as Ms. Allison Miller and she has accepted the offer to become the next Learned Counsel for Mr. Al-Nashiri. The Chief Defense Counsel has

requested the appropriate funding from the convening authority. Mr. Al-Nashiri requests this Commission to grant Mr. Natale's withdrawal and excuse him as Learned Counsel in this Commission at the expiration of his current contract.

4. Burden of Proof: As the moving party, the defense bears the burden of persuasion.

5. Facts:

- a. Mr. Natale is a civilian term contractor of the Department of Defense. He serves as a civilian defense Learned Counsel and has been assigned to the Military Commissions Defense Organization since 11 October 2019 when he was detailed to represent Mr. Al-Nashiri.¹ He is licensed to practice law in the state of Florida and the District of Columbia.
- b. Mr. Natale's current contract will terminate on 14 September 2024.
- c. On 26 January 2024 Mr. Natale informed Brig. Gen. Jackie Thompson, Chief Defense Counsel for Military Commissions, that he was seeking to retire. Numerous factors informed this decision, including the necessity and duration of travel away from his wife and family, deteriorating health of family members, the fact that a trial date had not at that point been established, the reality that trial was seemingly more than 18 months away notwithstanding the government's interlocutory appeal which may drive any potential trial date further into the future, his advancing age (72), and the desire to ensure Mr. Al-Nashiri could onboard a new Learned Counsel with as much time as

¹ AE 339N.

possible to become familiar with the case who could see this case through to the finish at some indeterminate time. Mr. Natale told BG Thompson that he would not seek, nor would he agree to an extension of his contract beyond the current expiration date of 14 September 2024.

- d. Mr. Natale had a lengthy discussion with Mr. Al-Nashiri who agreed that Mr. Natale should be allowed to withdraw as his Learned Counsel based on Mr. Natale's retirement.
- e. The Chief Defense Counsel for Military Commissions has been active in identifying, recruiting, and interviewing candidates to replace Mr. Natale as Learned Counsel. After an extensive search, the Chief Defense Counsel selected Allison Miller to serve as Learned Counsel for Mr. Al-Nashiri and has requested that the Convening Authority immediately "approve [his] reasonable request for the appointment of qualified outside Learned Counsel."²
- f. Mr. Natale has been actively engaged in the search for a new Learned Counsel and he is committed to aiding the smooth transition of Ms. Miller as Learned Counsel for Mr. Al-Nashiri.

6. Law:

According to the Rules Regulating the Florida Bar, "a lawyer may withdraw from representing a client if: (1) withdrawal can be accomplished without material adverse effect on the

² RTMC 9-1(a)(6)(D).

interests of the client...(4) the representation will result in an unreasonable financial burden on the lawyer... or (5) other good cause for withdrawal exists.”

The Rules of Professional Conduct for the District of Columbia Bar are substantially similar: “a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if...(4) The representation will result in an unreasonable financial burden on the ...(5) The lawyer believes in good faith, in a proceeding before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.”

R.M.C. 505(d)(2)(B) states, “After an attorney-client relationship has been formed between the accused and any counsel for the accused, only the military judge may excuse or change counsel upon a showing of good cause on the record.”³ The “good cause” referenced in R.M.C. 505 is defined in paragraph (f): “Good cause. For purposes of this rule, ‘good cause’ includes physical disability, military exigency, and other extraordinary circumstances which render the member, counsel, or military judge unable to proceed with the military commission within a reasonable

³ It is worth noting that, prior to the update to the Manual for Military Commissions in 2019, R.M.C. 505(d)(2)(B) stated, “After an attorney-client relationship has been formed between the accused and detailed defense counsel or associate or assistant defense counsel, *an authority competent to detail such counsel* may excuse or change such counsel only: (i) Upon request of the accused or application for withdrawal by such counsel; or (ii) For other good cause shown on the record.” (*emphasis added*). The rule was presumably changed based on the debacle that occurred in this case involving the withdrawal of Mr. Richard Kamen, a previous Learned Counsel. In that instance, when the former Chief Defense Counsel, Brigadier General John Baker, excused Mr. Kammen and two other attorneys in accordance with the rule, the military judge ordered General Baker to rescind the excusal, and when General Baker refused to rescind the excusal or to testify about his decision-making process, Judge Spath held him in contempt and sentenced him to 21 days of confinement to quarters. <https://www.politico.com/blogs/under-the-radar/2017/11/02/guantanamo-general-marine-corps-contempt-judge-244485>

time. ‘Good cause’ does not include temporary inconveniences which are incident to normal conditions of military life.”⁴

7. Argument: The rules applicable to military commissions, as well as the rules governing the professional responsibility of the jurisdictions where Mr. Natale is admitted to practice law, all permit a defense counsel to withdraw from representation. In this instance, the withdrawal of Mr. Natale is in the best interests of Mr. Al-Nashiri. When Mr. Natale began his representation in 2019, no one could have anticipated that in June of 2024, this case would still be 16 months away from the beginning of trial. Mr. Natale had long been considering at what point he would be able to retire, and though he hoped and expected in 2019 to be able to see this case through to its conclusion, when he made his decision to retire in January 2024, he recognized that, with the government’s interlocutory appeal and the prospect of a further appeal to the DC Circuit, that the beginning of trial could still be years away. Part of his decision was informed by the desire to give successor Learned Counsel as much time as possible to prepare. Mr. Al-Nashiri deserves a Learned Counsel who can be fully committed to his defense. Mr. Natale’s retirement, informed by his advancing age and the best interests of his family, prevents him from giving the care and attention that this capital case requires. Ms. Miller has agreed to become successor Learned Counsel and is only awaiting funding from the convening authority before she can begin getting up to speed.

Mr. Natale’s decision to retire amounts to good cause. He is 72 years old, and his contract is expiring. This case has been replete with extraordinary circumstances, all of which took valuable

⁴ Again, it is worth noting that this language is lifted directly from the corresponding Rule for Courts-Martial, without any consideration for the fact that Military Commissions are set up differently, function with different types of counsel, and have historically been protracted in length of time far beyond any comprehensible court-martial.

time away from forward progress in this case and Mr. Natale's initial goal and expectation that he would finish this case: from the appellate court vacating all of Judge Spath's rulings, to a global pandemic, to the retirement of the previous military judge. Retirement is an extraordinary circumstance in the course of one's life. It is not a decision taken lightly or often. Mr. Natale's contract with the Department of Defense to be a Learned Counsel in this case expires on 14 September 2024. The termination of Mr. Natale's contract ends his employment as Mr. Nashiri's counsel, and Mr. Al-Nashiri agrees with and understands Mr. Natale's decision to retire and seek withdrawal as Learned Counsel in this case. As such, Mr. Natale is compelled to submit this application for withdrawal to the Military Judge prior to the expiration of his term of service with the Department of Defense. The military judge—based on the change to R.M.C. 505(d) made in the 2019 Manual for Military Commissions—is the excusal authority for counsel. The responsibility for ensuring that the record contains an accounting of Mr. Natale's "absence and departure that [is] accurate as a matter of law and fact rest[s] with the military judge under R.C.M. 813(c)."⁵ Mr. Natale, consistent with his duty, therefore comes before this Commission and requests that the Military Judge grant his application for withdrawal based on good cause and ensure that the record has set forth the basis for the good cause determination.

8. Oral Argument: Mr. Natale does not request oral argument on this application.

9. Witnesses: None.

⁵ *Hutchins*, 69 M.J. at 290-91

10. **Conference with Opposing Counsel:** Mr. Natale conferenced this application with trial counsel, who noted their opposition “without a clearer understanding of the transition plan and the potential impact on the trial schedule.”

11. **List of Attachments:**

- A. Certificate of Service, dated 7 June 2024
- B. Proposed Draft Order

Respectfully submitted,

/s/ Anthony J. Natale
ANTHONY J. NATALE
Learned Counsel

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 7th of June 2024, I filed the forgoing document with the Office of Military Commissions Trial Judiciary and served a copy on all counsel of record.

/s/ Anthony J. Natale
ANTHONY J. NATALE
Learned Counsel

ATTACHMENT B

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

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1. Mr. Natale's decision to retire at the end of his current contracted term as Learned Counsel, amounts to good cause shown in accordance with R.M.C. 505(d)(2)(B). As such, his request for withdrawal as Learned Counsel, with the express consent of Mr. Al-Nashiri, is approved and he is hereby excused as Learned Counsel at the expiration of his contract on 14 September 2024.
2. AE 339RR is hereby **GRANTED**.
So **ORDERED** this ____ day of June, 2024.