

UNITED STATES OF AMERICA

v.

KHALID SHEIKH MOHAMMED;
WALID MUHAMMED SALIH
MUBARAK BIN 'ATTASH; RAMZI BIN
AL SHIBH; ALI ABDUL AZIZ ALI;
MUSTAFA AHMED ADAM AL
HAWSAWI

Defense Motion

To Stay the Commission Proceedings
Until a Competent Commission
Interpreter Is Provided.

30 July 2008

1. Timeliness: This motion for appropriate relief is not beyond any Commission-ordered deadline and thus is timely filed.

2. Relief Requested: Detailed Defense Counsel for Mustafa Ahmed Adam Al Hawsawi and Ramzi Bin al Shibh and Standby Counsel for Walid Muhammad Salih Mubarak Bin 'Attash,¹ Khalid Sheikh Mohammed, and Ali Abdul Aziz Ali, at the direction of and with the consent of the pro se accused, (hereinafter "the Defense") respectfully request that this Commission ensure that the accused receive a fair trial and stay all proceedings until the Commission is able to retain competent Arabic interpreters.

3. Overview: The Rules for Military Commission (hereinafter "RMC") require true, verbatim translations between English and Arabic. To provide all accused a trial that both complies with the RMC and is fundamentally fair, this Commission must provide Commission interpreters who provide accurate, verbatim translations of the Commission proceedings. Inaccurate translations by Commission interpreters, including omissions and mistranslations in the last two hearings have interfered with the accused's exercise of rights under the RMC and, if not cured, will continue to affect each stage of the Commission proceeding.

4. Burdens of Proof and Persuasion: Pursuant to RMC 905(c), the burden is on the moving party.

5. Facts:

a. On 5 June 2008, this Commission arraigned the five co-accused in the case of *United States of America v. Khalid Sheikh Mohammed, et al*, (hereinafter "this case").

b. The Military Judge inquired into all the accused's need for an interpreter during the proceedings. *See* Attachment 1 at 19-27.

c. Mr. al Hawsawi indicated he needed the assistance of an interpreter because he does not have a good command of English. Attachment 1 at 26:18.

¹ Due to limited communications, this motion is filed in advance of Mr. Bin 'Attash's permission in order to preserve his right to file jointly with the co-accused. If Mr. Bin 'Attash decides not to join, then stand-by counsel will withdraw from this motion at that time.

d. Early in the arraignment, the Commission interpreter stopped translating the English proceedings into Arabic. Attachment 1 at 19:1-2.

e. The Commission interpreter stopped translating at other points during the proceeding:

[COL KOHLMANN] “I’m not sure why I’m not getting a broadcast of the Commission’s translator at this time.”

[MR SHEIKH MOHAMMED] “Excuse me”

[COL KOHLMANN] “Mr. Mohammed, what I am waiting for you is when you or anybody else is speaking in Arabic, there’s supposed to be a simultaneous broadcast in English.” Attachment 1 at 42: 18-25.

f. During the Commission’s counsel inquiry with Mr. Bin ‘Attash several errors in the translation were noted. The phrase “I am appointed by the chief defense counsel” was improperly translated into “I was appointed by the prosecutor.” Attachment 1 at 64:11-14.

g. Mr. McMahon, civilian legal advisor to Mr. Bin Attash, informed the Commission that “the proceedings are going too quickly for the translator.” Mr. Bin ‘Attash stated: “They can’t go fast.” The interpreter assisting the defense in Mr. Bin ‘Attash’s case elaborated: “He has spoken to me in Arabic a few minutes ago. And he’s basically saying that the simultaneous translator is not given enough time to translate what you say, what the defense attorneys are saying or the prosecution are saying.” Attachment 1 at 31:5-6, 17, 20-24.

h. Indicating a problem with the translation, Mr. Attash stated, “I think this is a mistake.” “There is a mistake here, some of us don’t understand.” Attachment 1 at 91:2, 4.

i. Mr. Mohammed brought to the Commission’s attention errors in Mr. Bin al Shibh’s translation. “[T]he translating for Ramzi Binalshibh [sic] is not accurate for you, they are not accurate, they are not giving you accurate translations from Arabic. When I said Arabic, it’s not being translated 100 percent to English. There’s some both English and Arabic so they are mistranslating.” Attachment 1 at 105:16-22.

j. Mr. Bin al Shibh notified the Commission that the translator was incorrectly translating one of his statements, “I don’t know, they say the translator was incorrect. I’m saying the translation into English is not correct.” Attachment 1 at 113:8-10.

k. Speaking to the Commission, Mr. al Hawsawi stated, “I believe the translation is wrong, I think the error is on your end, not on her.” Attachment 1 at 162:20-21.

l. The translation problems continued throughout the arraignment as Mr. Mohammed pointed out: “They are not translating well, they are still missing the words.” Attachment 1 at 172:9-10.

m. On 9 July 2008, this Commission held an individual hearing for Mr. al Hawsawi to investigate whether intimidation occurred during the 5 June 2008 arraignment.

n. During that hearing the Military Judge stated that the procedures involved in the case were “legally and factually complex.” The Commission interpreter omitted “legally and factually” and simply said that the procedures were “complex.” Attachment 2 at ¶ 7(b).

o. The Military Judge discussed the effect of possible intimidation referencing “possible intimidation” and “alleged intimidation” many times. In almost every instance, the Commission interpreter omitted the words “possible” and “alleged”. Attachment 2, at ¶ 7(c).

p. Further when the Military Judge stated that the intimidation may have taken place “by one or more of the accused” the Commission interpreter cut off part of the phrase and merely translated the statement as “by the accused” causing some confusion on the part of Mr. al Hawsawi. Attachment 2 at ¶ 7(d).

q. The Commissions translator dropped other phrases during the hearing. When the Military Judge was explaining his concern for making the trial as fair as possible, he prefaced his statement with the English phrase, “Whether or not you believe it.” This preface was completely omitted by the interpreter in the Arabic translation. Attachment 2 at ¶ 8(a).

r. When elaborating on the qualifications of a potential defense counsel the interpreter did not translate anything about a security clearance even though the qualification was listed by the Military Judge. Attachment 2 at ¶ 8(b).

s. When the Military Judge cited specific RMC rule numbers the Commission interpreter did not translate the numbers verbatim but added the phrase “According to the military rules” to the Arabic translation. Attachment 2 at ¶ 8(c).

t. The Military Judge explained during the hearing that the use of an ineffective assistance of counsel claim is limited in *pro se* representation. In the Arabic translation, the Commission interpreter left out the word “claim” in the translation which resulted in an interpretation that was confusing and implied that *pro se* accused could not later change their mind and have attorneys represent them. Attachment 2 at ¶ 8(d).

u. At the 9 July hearing, Mr. al Hawsawi indicated he had not made a decision regarding election of counsel and expressed his concerns, on the record, about his perceived unfairness in the process and lack of trust in the military attorneys.²

v. Also at the hearing, MAJ Jackson, USAR, indicated to the Commission that he is attempting to locate a Muslim attorney at the request of Mr. al Hawsawi.

w. During the 10 Jul 08 hearing, the court translator ceased interpretations of the prosecutor's, Mr. Ed Ryan, comments regarding what evidence would be provided to a *pro se* accused. Mr. Ryan's statements were in direct response to Mr. Bin 'Attash's concerns in this area and were a factor in Mr. Bin 'Attash's ultimate decision of whether to represent himself. Nevertheless, the court translator stopped all translations from English to Arabic because he was unable to keep up with the speed at which Mr. Ryan spoke. In the end, no translation was provided, however the Military Judge summarized the statement and Mr. Bin 'Attash continued to question the court regarding this matter.³

6. Law and Argument:

a. The Commission Rules Require a Verbatim Translation of Arabic into English In Order to Preserve a Verbatim Record

Court reporters are required to make verbatim recordings of Commission proceeding. RMC 501(c) and RMC 502(e)(3)(B). The record of trial is prepared from and must include verbatim transcripts of all Commission sessions. RMC 1103(a)(2)(A). Further, all interpreters are required to take an oath swearing to make a true interpretation of the proceedings⁴. RMC 807, *See* MCRE 601.

A true⁵ translation is a correct and accurate translation and read in conjunction with other Commission rules, a true translation must be a verbatim translation. The court reporter has not created a verbatim transcript if statements made in open court are not being transcribed the record. On several occasions, the Commission interpreter stopped translating from Arabic to English during the arraignment. At one point, the Commission had to request a simultaneous translation of Mr. Mohammed because the translation stopped. Thereafter, Mr. Mohammed pointed out that statements made in Arabic were not being translated accurately into English. Mr. Bin al Shihb objected that he believed statements in Arabic were not being translated into English correctly. Towards the end of the arraignment, the same concerns were expressed by Mr. al Hawsawi and again confirmed by Mr. Mohammed. Words being said in Arabic were not being translated

² The Defense submitted a request for the transcript of Mr. al Hawsawi's 9 July 2008 hearing. Upon receipt, the Defense will supplement this motion with specific citations to the transcript, if needed.

³ Standby counsel submitted a request from the transcript of Mr. Bin 'Attash's 10 July 2008 hearing. Upon receipt, the counsel will supplement this motion with specific citations to the transcript, if needed.

⁴ The required oath is: "Do you (swear) (affirm) that in the case now in hearing you will interpret truly the testimony you are called upon to interpret (, so help you God)?"

⁵ Per Merriam-Webster the definition of "truly" is: "in agreement with fact," "with exactness of construction or operation," or "in a proper or suitable manner."

into English and thus, were not captured by the court reporter or transcribed on the record making an incomplete transcript.

If the Commission interpreters repeatedly omit words and phrases from their translations, a verbatim transcript will not exist as the rules require. Accordingly, the Commission should insist on an accurate, word-for-word translation of all Arabic spoken during Commissions proceedings. Failure to do so is a violation of the Rules for Military Commissions.

b. The Commission Rules Require Fairness and Without a Verbatim Translation of Arabic Into English and English Into Arabic, the Accused Cannot Receive a Fair Trial

American jurisprudence is deeply rooted in a notion of fundamental fairness for judicial proceedings. *See generally* U.S. CONST. amends. IV (protecting from unreasonable search and seizure), V (protecting due process rights), VI (protecting an individual's right to a speedy trial, to confront witnesses and be represented by counsel), VII (protecting the right to a jury trial), and VIII (protecting against cruel and unusual punishments). In addition to existing Constitutional protections, the Commissions' rules themselves require fairness in their administration and interpretation. *See* RMC 102 and MCRE 102. Further, the preservation and open display of fair military commissions proceedings has been reiterated publicly by the Department of Defense. Attachment 3 (stating fair hearings are the "No. 1 priority for the Defense Department's legal system.").

To interpret the Commission rules as anything else that verbatim translation would undermine to the fundamental fairness of the proceedings. There have been only two hearings in this case thus far but the mistranslations have been so significant that they affect the most fundamental decisions the accused must make regarding their own defense. For example, Mr. al Hawsawi has the right to choose his counsel or waive his right to be represented. *See* RMC 506. The Arabic translation from the 9 July hearing suggested that he could not change his mind if he elected to represent himself. Additionally, he was incorrectly advised during the arraignment on 6 June that the military attorneys are appointed by the prosecution. It is not surprising that Mr. al Hawsawi expressed concerns about the fairness of the process and lack of trust in the military attorneys, or that he has been unable to decide whether to waive his right to be represented by counsel. Inaccurate translations only serve to exacerbate these concerns and undermine the guarantee of a fair trial.

Major Jackson also indicated at the 9 July hearing that Mr. al Hawsawi has requested assistance in locating a Muslim attorney. The Commission interpreter left out the Military Judge's listing of a key qualification for such an attorney – the ability to obtain a security clearance – in the translation from English into Arabic, an omission that further compounded Mr. al Hawsawi's confusion regarding his selection of counsel. Mr. al Hawsawi cannot make a knowing and voluntary decision regarding counsel if he is being provided inaccurate information by the Commission.

If, in the future, Mr. al Hawsawi elects to represent himself, similar errors by the Commission interpreters will negatively affect Mr. al Hawsawi's ability to conduct his own defense. Without accurate, verbatim translations into Arabic of all words said by the Military Judge and other counsel, Mr. al Hawsawi will not be able to respond to, or communicate with the Commission in an appropriate and relevant manner.

Whether an accused is represented by counsel or elects to represent himself, the accused will be called upon throughout the proceedings to make key decisions regarding his defense. *See generally* RMC 705, 804 and 910. These decisions will require that he communicate with the Commission and confront the evidence presented against him. Neither can occur if the translations continue to be inadequate. The fair trial rights afforded by the Commission rules or the Constitution are meaningless if, as a result of inaccurate translations by the Commission interpreters, any of the accused is unable to understand significant portions of the proceedings.

Federal law grants a statutory right to an interpreter for an individual whose primary language is not English (*see* 28 U.S.C. §1827(d)(1)) and the appointment and conduct of interpreters are within the discretion of the individual trial judge. *United States v. Carrion*, 488 F.2d 12, 15 (1st Cir. 1973). Generally, the required standard for in-court translation is "continuous word for word translation for everything relating to the trial a defendant conversant in English would be privy to hear." *United States v. Joshi*, 896 F.2d 1303, 1309 (8th Cir. 1990) (citing, *United States v. Lim*, 794 F.2d 469, 470 (9th Cir.)). However, summary translations may be acceptable so long as they are not so inadequate as to render the proceedings "fundamentally unfair." *Valladares v. United States*, 871 F.2d 1564, 1566 (11th Cir. 1989) (citing *United States v. Tapia*, 631 F.2d 1207, 1210 (5th Cir.1980)). Interpreters should "strive to translate exactly what is said; courts should discourage interpreters from 'embellishing' or 'summarizing' live testimony." *United States v. Gomez*, 908 F.2d 809, 811 (11th Cir. 1989) (finding translation provided "plainly improper" where "Elks Lodge" was interpreted as "disco.")

Language barriers can render an individual's right to confront witnesses "meaningless" and put a testifying defendant in the dangerous position that "that he will either misunderstand crucial questions or that the jury will misconstrue crucial responses." *Carrion* 288 F.2d at 14. Fairness is assessed by evaluating "the defendant's understanding of the English language, and the complexity of the proceeding, issues, and testimony" with the ultimate concern that "no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment." *Id.*

The charges in this case allege a conspiracy spanning at least seven years⁶ and allege overt acts in at least thirteen different countries.⁷ The charge sheet alone consists of ninety pages. Most significantly, however, this is a capital case. That fact has profound legal consequences for the Commission's decision on this motion. The Supreme Court has long held that in capital cases, "the Eighth Amendment requires a

⁶ 1996-2003 (CHARGE I)

⁷ United States, Germany, Yemen, Saudi Arabia, Afghanistan, Malaysia, Thailand, Hong Kong, Pakistan, Belgium, Czech Republic, United Arab Emirates, and the United Kingdom (CHARGE I)

greater degree of accuracy and fact finding than would be true in a non-capital case.” *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993). As the Court has explained, “the penalty of death is qualitatively different from a sentence of imprisonment, however long,” and because of that difference, “there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.” *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). This “need for heightened reliability,” *Simmons v. South Carolina*, 512 U.S. 154, 172 (1994) (Souter, J., concurring), affects every procedure at a capital trial, including the procedures used to determine guilt and innocence as well as those that apply solely at the sentencing hearing. *Beck v. Alabama*, 447 U.S. 625, 638 (1980) (“[W]e have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination.”).

The concern for heightened reliability in capital case procedures is a principle of fundamental due process. In capital cases, doubtful factual and legal issues that might be decided in favor of the government in a non-capital case must instead be decided for the defendant “*in favorem vitae* [in favor of life].” *United States v. Smith*, 27 F.Cas. 1167, 1168, 1169 (2 Mason 143) (C.C. D.Mass. 1820) (Story, J., in circuit) (“If the present were a capital case, it would be our duty to adhere to the very letter of established doctrines *in favorem vitae*”); see also e.g. *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 628 (1818) (Marshall, C.J.) (“[I]n expounding a law which inflicts capital punishment, no over rigid construction ought to be admitted”); *Andres v. United States*, 333 U.S. 740, 752 (1948) (“In death cases doubts such as those presented here should be resolved in favor of the accused.”); *Williams v. Georgia*, 349 U.S. 375, 391 (1955) (“That life is at stake is of course another important factor in creating the extraordinary situation. The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant.”). And it has long been understood that the need for heightened reliability governs discretionary decisions as well as strictly legal ones. See e.g. *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824) (Story, J.) (no abuse of discretion where trial ruled mistrial in capital case; nevertheless, “in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner”); *United States v. Matthews*, 26 F.Cas. 1205, 1206 (C.C. S.D.N.Y. 1843) (severing joint indictments for murder solely because they were capital cases, “in favor of life”).

This doctrine has equal force in the military justice system. As Justice Harlan explained concurring in *Reid v. Covert*, 354 U.S. 1 (1957) – another extraterritorial capital military prosecution – there is a special need for heightened due process in military capital trials because of the danger of unlawful influence created by the command structure:

So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial where the judge and trier of fact are not responsive to the command of the convening authority . . . The distinction is by no means novel . . . nor is it

negligible, being literally that between life and death. *Id.*, 354 U.S. at 77.

Accord, id., 354 U.S. at 45-46 (Frankfurter, J., concurring) (“These cases involve the validity of procedural conditions for determining the commission of a crime in fact punishable by death. The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights.”).

Considering the accused’s expressed lack of proficiency in English, the immense complexity of the case and the severe possible penalty, insistence on a verbatim translation of English into Arabic and Arabic into English is essential to preserve the Commission’s record in accordance with the RMC and preserve each accused’s right to a fair proceeding under Commission rules and the Constitution of the United States. A failure to provide accurate, verbatim translations will result in a fundamentally unfair trial.

7. Oral Argument/Witnesses: The defense does not request oral argument, unless there is a dispute as to any material fact necessary for resolution of the issue. If such a dispute were to arise, the defense reserves the right to request production of witnesses and to request a hearing and oral argument.

8. Certificate of Conference: The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

9. Additional Information: In making this request, none of the accused waives any objection to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does any accused waive his rights to pursue any and all of his rights and remedies in all appropriate forms.

10. Attachments:

1. Transcript of the 5 June 2008 Arraignment
2. Sworn affidavit of [REDACTED]
3. Gerry Gilmore, Military Commission Hearings to Be Fair, Transparent, Trial Advisor Vows, American Forces Press Service, June 5, 2008.

Respectfully submitted,

By: _____/s/_____
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*Detailed Defense Counsel for
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ALI ABDUL AZIZ ALI

Pro Se

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3. **Facts:**

a. The Prosecution does not have the ability to verify all factual averments made in the Defense Motion, as some of the averments are based on statements the accused made to counsel. The Prosecution does agree with the overall thrust of the factual presentation in the Defense Motion-there were a variety of missed and/or mistranslations during previous Commission proceedings.

b. However, the Prosecution would note that there is even some inconsistency among the accused's and defense's perception of the problem. For example, the Motion cites several instances of problems with the translation during the arraignment proceeding on 5 June 2008 (Motion at pages 1-3). However, in a letter to the Military Judge dated 23 July 2008, accused Sheikh Mohammed stated that "the translators in [the] June 5, 2008 arraignment were more expert" than the interpreters from the 10 July 2008 hearing (letter attached).

4. **Argument:** The Prosecution believes that if the Military Commission were to direct the following, these actions would alleviate the translation issues:

a. In an earlier discussion, at least one of the accused indicated that the interpreter did not speak the correct dialect of Arabic with respect to that accused. To

the extent the Defense believes this is an issue contributing to the problems with the translation of commission proceedings, the Defense should inform the Commission so that this issue may be addressed.

b. The Commission should direct the Clerk, who is responsible for supervising the interpreters, to convene a meeting between Defense Counsel, Trial Counsel, the interpreter staff, the Senior Security Advisor, and other courtroom support personnel, to address the effectiveness of interpreter services during commission proceedings. Issues that should be addressed; (1) qualifications of interpreters with respect to the dialects of the accused; (2) the interpreters' ability to communicate to the Commission that they are facing challenges with the translation, such as when there is a loss of the audio feed, or when the interpreters are not able to keep up with the pace of courtroom proceedings so that the Military Judge can take corrective action, or when the interpreters need a rest break; (3) a procedure whereby any party to the proceeding-specifically the accused and/or defense counsel- can immediately alert the military judge of a problem with translations so that the Military Judge can take immediate corrective action (e.g., halt the proceedings pending resolution of a technological issue; directing a counsel

who is speaking too quickly to slow down and/or repeat what was said so that it can be translated).

c. This is not an issue that can be resolved through pleadings and litigations or stays of proceedings. Rather it is the type of issue-like many logistical issues-that can be resolved by having all the concerned parties meet so that they can present their concerns and resolve them.

5. **Conclusion:** Wherefore, for the reasons outlined above, the Prosecution respectfully requests that the Commission deny the Defense Motion, and issue any Order it believes appropriate to address the issues presented by the Defense Motion.

6. **Oral Argument:** The Prosecution does not request oral argument.

7. **Witnesses:** None.

8. **Additional Information:** None.

9. **Attachments:**

Letter from accused Sheikh Mohammed

10. Submitted by:

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