

UNITED STATES OF AMERICA

v.

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

D-____

Defense Motion to Compel Production of
Transcripts in Arabic

Ali Abdul Aziz Ali

29 August 2008

1. **Timeliness:** This Motion is submitted timely and pursuant to the Military Judge's Order of 1 July 2008.
2. **Relief Sought:** With the consent, and at the direction of, Mr. Ali, standby counsel respectfully request the Commission provide him the following:
 - a. Draft copies of the transcripts of all pretrial motions sessions as they are prepared;
 - b. A written Arabic translation of the transcripts; and
 - c. The opportunity to object to and submit corrections to the transcripts.
3. **Overview:** The accused in this case have repeatedly raised the issue of poor quality translation.¹ The accused do not have access to defense interpreters at Guantanamo Bay to assist them in the preparation and filing of motions. The accused intend to use the transcripts to assist them in developing and filing motions. Additionally, the accused use the transcripts to refresh their recollection of the proceedings in an effort to understand the legal hearings. In making this request, the accused rely on the fundamental precepts of equal protection and due process as well as the Sixth and Eighth Amendments to the U.S. Constitution.
4. **Burden and Standard of Proof:** As the moving party, the burden of persuasion lies with the defense. In addition, the defense bears the burden of proof on any question of fact. This burden is met by a showing of a preponderance of the evidence. R.M.C. 905(c).
5. **Facts:**
 - a. The Commissions Trial Judiciary's current practice is to require that counsel (or a *pro se* defendant) file a request detailing the need for the production of transcripts when appropriate. The accused are requesting a standing order dispensing with the requirement that they make separate requests after each hearing.
 - b. The Trial Judiciary must ensure that the transcripts are subject to a classification

¹ See D-018, Motion to Stay Proceedings Until a Competent Commissions' Interpreter is Provided; D-25, *Pro se* filing of Mr. Ali (Translators/*Pro Se* Status); and D-29, *Pro se* filing of Mr. Mohammed (Translators).

review prior to their release.

- c. Counsel and standby counsel have cited to the transcripts in several of their recent pleadings and anticipate a continued need to use the transcripts as an important part of the factual basis for the defense motions.
- d. At the 5 June arraignment, the 9 July hearing and in his written pleadings, Mr. Ali requested that the Military Judge provide him a native translator familiar with his dialect.
- e. The government contracted to provide the co-accused in this case with translators who possessed the appropriate security clearances. With the exception of Mr. Bin al Shibh, none of the translators provided the accused are native speakers of Arabic.
- f. Mr. Ali has addressed the Commission in English. As he indicated at the arraignment, he does understand and can speak some English. However, he and the other accused have difficulty understanding legal terms and concepts in English.
- g. With the exception of Mr. Mohammed, the remaining accused have addressed the Commission in Arabic and understand only a limited amount of English.

6. **Law and Argument:**

The co-accused request Arabic copies of the transcripts for two interrelated reasons. First, reviewing the transcripts in Arabic assists them in understanding the proceedings. Second, the transcripts assist the co-accused in preparing their motions for the Commission. Finally, the other co-accused have expressed their concern that the Commission's translations have been inaccurate. Consequently, the co-accused would like the opportunity to file written objections to the draft transcripts for the Clerk's consideration. The nature of the proceedings precludes the co-accused from commissioning their own transcripts or recording the proceedings. Even if this were a possibility, the co-accused are indigent and could not afford their preparation or recordation.

The pretrial litigation in any capital case is complex. Here, the complexities are compounded by language and cultural barriers. Under these unique circumstances, the Military Judge should err on the side of providing the accused with additional procedural protections to ensure that they understand the proceedings and, in the case of the *pro se* accused, have the ability to petition the court. The Supreme Court's concern for heightened procedural protections in capital cases supports the co-accused' requested relief.

“[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.” *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Because “death is different,” the United States Constitution requires that “extraordinary

measures [be taken] to insure that” the accused are ““afforded process that will guarantee, as much as is humanly possible, that [a sentence of death not be] imposed out of whim, passion, prejudice, or mistake.” *Caldwell v. Mississippi*, 472 U.S. 320, 329 n.2 (1985) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1981) (O'Connor, J., concurring)). Indeed, “[t]ime and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case.” *Caspari v. Bolden*, 510 U.S. 383, 393 (1994) (quoting *Strickland v. Washington*, 466 U.S. 668, 704-705 (1984) (Brennan, J., concurring in part and dissenting in part)).

The Supreme Court has long recognized that defendants cannot be denied access to resources, such as transcripts, that are necessary to their defense, based on their indigent status:

Griffin v. Illinois and its progeny establish the principle that the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners. While the outer limits of that principle are not clear, there can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal. (footnote omitted).

Britt v. North Carolina, 404 U.S. 226, 227 (1971).

The co-accused are, in fact, indigent. Given, the restrictions on these proceedings, however, the co-accused have no alternative but to request that the Commission provide them transcripts. The *Britt* opinion provides an analogous situation and the factors considered by the Court are likewise relevant here: (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript. *Id.* at 227-28. The defendant does not bear the burden of showing that any proposed alternatives are inadequate. *Id.* at 230.

The Supreme Court rejected the suggestion that Britt be required to demonstrate particularized need before he would be entitled to the transcripts of his prior proceedings. *Id.* at 228. Here, the value of transcripts for the co-accused is self-evident: the co-accused need transcripts in their native language to prepare their defense. More fundamentally, the co-accused require the transcripts to assist them in understanding these proceedings, which are unique even to Westernized legal systems.

There are no alternative devices that would perform the same function as the provision of transcripts in the co-accused’s native language. The co-accused do not have defense translators available to them at GTMO. Any type of verbal recounting of the proceedings would have to be undertaken by an individual who was subject to the attorney client privilege. The translators currently provided have inadequate training and experience to understand and communicate, given the co-accused’s dialect and the complexity of the legal terminology involved. Consequently, the co-accused respectfully request the Commission grant them access to transcripts as they are prepared in Arabic.

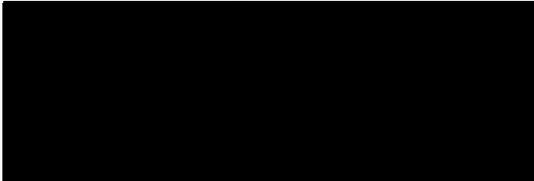
7. **Request for Oral Argument:** The Defense requests oral argument to allow for thorough consideration of the issues raised by this motion. R.M.C. 905(h) provides that "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have an evidentiary hearing concerning the disposition of written motions."

8. **Conference with Opposing Counsel:** Counsel sought to confer with the prosecution regarding their position on the requested relief but has not received a response.

9. **Attachments:** None.

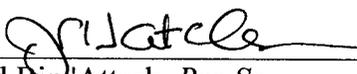
Respectfully Submitted,

FOR: 
Khalid Sheikh Mohammed, *Pro Se*
CAPT Prescott L. Prince, JAGC, USNR
LTC Michael Acuff, JA, USAR
Standby Counsel for Mr. Mohammed



David Z. Nevin
Scott McKay
NEVIN, BENJAMIN, MCKAY &
BARTLETT, LLP
Advisory Civilian Counsel



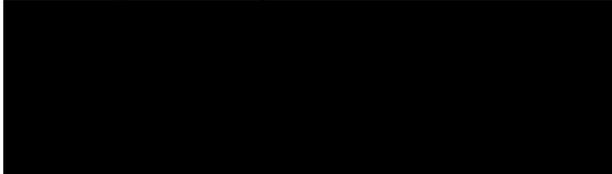
FOR: 
Whallid Bin Attash, *Pro Se*
LCDR James Hatcher, JAGC, USNR
Capt Christina Jimenez, JAGC, USAF
Standby Counsel for Mr. Bin Attash



Edward B. MacMahon, Jr.
Advisory Civilian Counsel



FOR: 
Ali Abdul Aziz Ali, *Pro Se*
LCDR Brian Mizer, JAGC, USN
MAJ Amy Fitzgibbons, JA, USAR
Standby Counsel for Mr. Ali



Jeffery Robinson
Amanda Lee
Schroeter Goldmark & Bender
Advisory Civilian Counsel

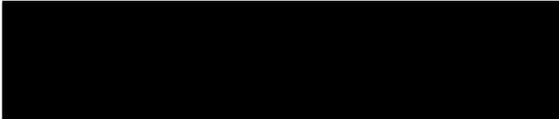


BY: _____

CDR Suzanne Lachelier, JAGC, USNR
LT Richard E.N. Federico, JAGC, USN

***Detailed Defense Counsel for
Ramzi bin al Shibh***

Office of the Chief Defense Counsel
Office of Military Commissions



BY: _____

MAJ Jon Jackson, JA, USAR
LT Gretchen Sosbee, JAGC, USN

***Detailed Defense Counsel for
Mustafa Ahmed Adam al Hawsawi***

Office of the Chief Defense Counsel
Office of Military Commissions



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WALID MUHAMMAD SALIH MUBARAK
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ALI ABDUL AZIZ ALI;
MUSTAFA AHMED AL HAWSAWI**

D-033

Prosecution Response

to

Defense Motion to Compel Production of
Transcripts in Arabic

5 September 2008

1. **Timeliness**: This response is filed within the time allowable by the Military Commissions Trial Judiciary Rules of Court.
2. **Relief Sought**: The Prosecution respectfully requests the Military Judge deny the Defense Motion to Compel Production of Transcripts in Arabic.
3. **Burden of Proof**: As the moving party, the Defense bears the burden of persuasion. See Rule for Military Commissions (RMC) 905(c).
4. **Facts**: No additional facts are necessary to a proper resolution of this motion.
5. **Discussion**:
 - a. In this joint motion to compel, the Defense seeks draft copies of transcripts of all pretrial sessions as they are prepared. The accused next wants the Prosecution to immediately translate the proceedings into Arabic so they can be used in subsequent proceedings or motions. Finally, all accused want the opportunity to object and submit corrections to transcripts.
 - b. The Prosecution has no objection to continuing with the Commissions existing practice of requiring counsel to file a request detailing the need for the production of transcripts. Military Commissions Trial Judiciary Rules of Court (RC) 6.10 governs “Transcripts of the Proceedings” and sets forth how, prior to authentication, counsel may request the release of the unauthenticated transcript or a portion thereof. The Rule requires that before a transcript of proceedings is given to anyone, it must be provided to the Military Judge for his review. Thus far, this Commission has not refused a request from counsel for a copy of a transcript of any session of the proceeding.
 - c. The Prosecution opposes “a standing order” to translate all proceedings into Arabic. Each of these accused have access to interpreter/translation support provided to them free of charge, and as such has more than adequate resources at its disposal to translate the proceedings into Arabic. Moreover, even if one or more of these accused do not understand a word or term, not every word needs to be translated into Arabic.

Each of these accused understand English in varying degrees; far better than defense counsel suggest. At least one of them graduated from a United States university with a degree in mechanical engineering. Another, who proclaimed, in English, that he is a “Microsoft Engineer” has had no difficulty conversing with the Military Judge in English on his choice of counsel and other matters related to the military commission.

d. Counsel and *pro se* accused will have an opportunity to submit *errata* prior to authentication. Accordingly, the Prosecution does not object to the Defense submitting its proposed corrections to the transcript according to the Military Commissions Trial Judiciary Rules of Court.

e. There is no sound reason for deviating from existing procedures by requiring that all sessions be translated into Arabic. Each of these accused has a government funded interpreter/translator at his disposal. Each accused has a detailed or stand by counsel who is fully capable of submitting a request to the Convening Authority for translator support, when necessary. If there are questions about legal terminology, then standby or detailed counsel can explain it to the accused with the assistance of an interpreter. The Defense has failed to cite a single case requiring the United States to translate an English transcript of court proceedings into the accused’s native language.

f. No one has to tell the Prosecution that this is a capital case; however, the fact that it is a capital case does not require that the Prosecution do anything more than what it is currently doing. Extraordinary measures are already in place ensuring that these accused will receive a fair trial.

6. **Conclusion:** The Defense request should be denied.

7. **Request for Oral Argument:** The Government does not request oral argument but reserves the right to respond to any oral argument the Defense may make.

Respectfully submitted:

/S/

Robert L. Swann
Prosecutor
Office of Military Commissions

■