

v.

MUSTAFA BIN-AHMAD AL-HAWSAWI

(October 26, 2008)

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1. Statement of Timely Filing: The military judge has not established any time frame for filing this motion.

2. Defendant requests that his military commission proceeding be stayed pending the appearance of his retained counsel, Scott L. Fenstermaker, Esq.

3. Mr. al-Hawsawi retained the undersigned, by letter dated May 2, 2008, to act as his attorney in the instant matter. By notice of appearance dated September 19, 2008, the undersigned notified the Office of the Trial Judiciary of his appearance on Mr. al-Hawsawi's behalf, with copies to the Chief Prosecutor and the Chief Defense Counsel. The undersigned also sent a courtesy copy of his notice of appearance to the presiding military judge, Colonel Ralph Kohlmann, USMC. Major Jon Jackson, Mr. al-Hawsawi's detailed defense counsel, was also notified of the undersigned's appearance. The undersigned requested that Major Jackson notify the military judge of the undersigned's involvement. Major Jackson did not comply with this request. The undersigned has reason to believe that Mr. al-Hawsawi's matter is proceeding in the undersigned's absence, and asks that this matter be stayed pending his appearance on Mr. al-Hawsawi's behalf.

4. Ordinarily, the party seeking a stay bears the burden of proof. *See Clinton v. Jones*, 520 U.S. 681, 708 (1997), *citing Landis v. North American Co.*, 299 U.S. 248, 255 (1936). Here, however, for the reasons stated below, the prosecution should shoulder the burden of opposing the requested stay.

#### **Statement of Facts**

5. Mr. al-Hawsawi is currently detained at the United States Naval Station located at Guantánamo Bay, Cuba.

6. Mr. al-Hawsawi initially contacted the undersigned by letter dated August 24, 2007. *See* October 26, 2008 Declaration of Scott L. Fenstermaker, Esq. (the "Fenstermaker Declaration"), ¶ 3.

7. The undersigned initially notified the Department of Defense in December of 2007 or January of 2008 of his intent to visit his clients at Guantánamo Bay. *See* Fenstermaker Declaration, ¶ 6.

8. On or about January 11, 2008, Robert M. Loeb, Esq., an attorney with the Department of Justice, informed the undersigned, via telephone, that the Department of Justice

was denying the undersigned's request to visit Mr. al-Hawsawi and his other clients at Guantánamo Bay. *See* Fenstermaker Declaration, ¶ 7.

9. Mr. al-Hawsawi is currently facing capital charges related to his alleged involvement in the terrorist attacks that occurred on September 11, 2001. *See* referred charges.

10. Mr. al-Hawsawi retained the undersigned, by letters dated August 24, 2007 and May 2, 2008 to serve as his attorney in this matter. *See* Fenstermaker Declaration, ¶¶ 3 and 4.

11. Upon learning that the United States military had denied his retained counsel permission to attend the military commissions' proceedings, Mr. al-Hawsawi, and his codefendants, elected to proceed *pro se* in their defense of their capital case.

12. By e-mail dated July 1, 2008, the Department of Justice informed the undersigned that he was no longer permitted to send privileged mail to detainees held at Guantánamo Bay, Cuba. *See* Fenstermaker Declaration, ¶ 11.

13. The undersigned received Mr. al-Hawsawi's May 2, 2008 letter on Friday, September 19, 2008. *See* Fenstermaker Declaration, ¶ 4.

14. The undersigned filed a notice of appearance in this matter on or about September 19, 2008. This notice was filed with the Office of the Trial Judiciary for the Office of Military Commissions, with copies to all appropriate parties, including the presiding military judge, Colonel Ralph Kohlmann. *See* Fenstermaker Declaration, ¶ 8.

15. The Office of the Trial Judiciary for the Office of Military Commissions has apparently not acted upon the undersigned's notice of appearance. *See* Fenstermaker Declaration, ¶ 9.

16. Major Jon S. Jackson, Mr. al-Hawsawi's assigned military counsel, has informed the undersigned, on at least three occasions, that the undersigned does not represent Mr. al-Hawsawi.<sup>1</sup> Major Jackson has not provided corroboration for his claims. *See* Fenstermaker Declaration, ¶ 10.

17. When the undersigned asked Major Jackson to put his concerns regarding the undersigned's involvement into writing, Major Jackson responded with expletives and has never submitted those concerns in writing as requested. *See* Fenstermaker Declaration, ¶ 10.

18. Mr. al-Hawsawi's military commissions' matter is apparently proceeding without the undersigned.

19. Subsequent to the Department of Justice's July 1, 2008 e-mail notifying the undersigned that he may no longer send privileged mail to his clients at Guantánamo Bay, the

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<sup>1</sup> After meeting with Major Jackson, Mr. al-Hawsawi rejected Major Jackson's assistance and decided to proceed *pro se* until his chosen counsel, the undersigned, became available to act in his defense.

Department of Defense has rejected and returned 41 pieces of mail to the undersigned from Guantánamo Bay. *See Fenstermaker Declaration*, ¶ 11.

20. Some of the undersigned's rejected and returned mail was not marked privileged. *See Fenstermaker Declaration*, ¶ 11.

### Statement of Law

21. Mr. al-Hawsawi has a constitutional right to due process of law and counsel of his choice. *See United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) (holding that a trial court's erroneous deprivation of a criminal defendant's choice of counsel entitles the defendant to a reversal of his conviction, irrespective of prejudice or lack thereof).

22. Governmental interference with the relationship between an attorney and his client constitutes a violation of the client's Fifth and Sixth Amendment rights to due process of law and counsel of one's choosing. *See People v. Moore*, 57 Cal. App. 3d 437, 442 (Cal. App. 4<sup>th</sup> Dist. 1976) (prosecution's interference with an attorney-client relationship); *see also Commonwealth v. Manning*, 373 Mass. 438, 443 (1977) ("deliberate and intentional attack by government agents on the relationship between Manning and his counsel"); *United States v. Irwin*, 612 F.2d 1182 (9<sup>th</sup> Cir. 1980), citing *Moore* and *Manning*; *see also United States v. Amlani*, 111 F.3d 705, 711 (9<sup>th</sup> Cir. 1997) (prosecutor's repeated disparagement of defense counsel). The *Amlani* court held that a change in defense counsel caused by governmental misconduct is so egregious as to constitute grounds for a vacatur of conviction. *Id.* at 710; *see also Cinelli v. Cutillo*, 896 F.2d 650, 655 (1<sup>st</sup> Cir. 1990) (defense counsel termination as result of denigration by the police); *see also United States v. Morrison*, 449 U.S. 361, 364 (1981) (DEA agents' disparagement of counsel).

23. Here, the prosecution, which represents the United States, should bear the burden of establishing that a stay of the proceedings is inappropriate. Under the circumstances presented here, the United States has ended the undersigned's ability to communicate with Mr. al-Hawsawi. As of the Department of Justice's July 1, 2008 e-mail, the undersigned is no longer able to communicate with Mr. al-Hawsawi who confirmed his retention of the undersigned in his May 2, 2008 letter (which the undersigned received on September 19, 2008). As a result, the undersigned is unable to further develop evidence regarding Mr. al-Hawsawi's choice of counsel and the harm that would ensue, should Mr. al-Hawsawi's application for a stay be denied. *See Clinton v. Jones, supra.* (court must review "potential harm that may ensue" by failing to grant application for a stay).

24. Here, Mr. al-Hawsawi is facing the death penalty for his alleged involvement in one of the most notorious terrorist attacks in history. He is clearly dissatisfied with the choice of counsel the government has foisted on him. His June 5, 2008 decision to proceed *pro se* was the direct result of the government's refusal to permit him access to the undersigned, his counsel of his choice. *See United States v. Gonzalez-Lopez, supra.*

25. Mr. al-Hawsawi has received no legal training under any jurisdiction, and certainly none in American law. He is unfamiliar with death penalty practice, constitutional law, criminal law, and likely will have difficulty navigating the Military Commissions Act (the

“Act”), the rules and regulations promulgated pursuant to the Act, and questioning of witnesses, should the need arise. He is therefore ill-equipped to proceed *pro se*, particularly where his life literally hangs in the balance. His decision to proceed *pro se* was the direct result of the government’s interference with his attorney’s ability to provide effective representation, namely, to visit with and communicate with him and to appear before the military commission to defend against capital charges, or to identify and communicate with the prosecutors assigned to prosecute Mr. al-Hawsawi’s matter.<sup>2</sup>

26. Moreover, such interference with Mr. al-Hawsawi’s attorney-client relationship with the undersigned violates Mr. al-Hawsawi’s Fifth and Sixth Amendment rights to due process of law and counsel of his choice. Accordingly, proceeding without the undersigned’s presence and participation will certainly erode all confidence in the fairness of the proceeding and thereby nullify the judgment ultimately rendered.

#### **Request for Oral Argument**

27. Defendant requests oral argument before the military judge at Guantánamo Bay during Mr. al-Hawsawi’s next regularly-scheduled appearance at Guantánamo Bay.

#### **List of Witnesses**

28. Mr. al-Hawsawi will be called by the defense.

#### **Certificate of Conference**

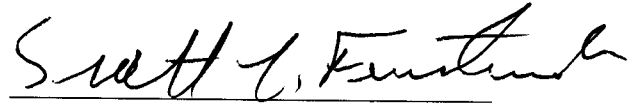
29. The undersigned requested the identities and contact information of the prosecutors assigned to Mr. al-Hawsawi’s matter in order to conference this matter from Colonel Lawrence Morris. Colonel Morris refused to provide this information to the undersigned. As a result, the undersigned has not conferenced this matter with opposing counsel.

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<sup>2</sup> See Paragraph 29 below.

**List of Attachments**

30. Attached is the Fenstermaker Declaration.



Scott L. Fenstermaker, Esq.<sup>3</sup>  
Counsel for Mustafa Bin-Ahmad Al-  
Hawsawi  
P.O. Box 3762  
Grand Central Station  
New York, New York 10163

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<sup>3</sup> The undersigned was notified by letter dated August 29, 2008 by Colonel Steve David, then the Chief Defense Counsel for the Office of Military Commissions, that he was suspended from the Pool of Qualified Civilian Defense Counsel. Colonel David's attempt to suspend the undersigned was undertaken in violation of the United States Constitution, the Act, the rules and regulations promulgated pursuant to the Act, and fundamental legal ethics. As such, it is a nullity. On behalf of Mr. al-Hawsawi, I object to Colonel David's illegal act as it violates Mr. al-Hawsawi's due process and right to counsel rights under the Fifth and Sixth Amendments to the United States Constitution.