

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

P-009

Defense Opposition
To Prosecution's Motion for Reconsideration

10 October 2008

1. **Timeliness**: This Opposition is filed within the timeframe established by the Military Commissions Trial Judiciary Rules of Court and the Military Judge's ruling on the Defense Request for Special Relief.

2. **Relief Sought**: The Prosecution's Motion for Reconsideration should be denied.

3. **Overview**:

Accused: "If you ask me what the color of this paper is, I will tell you the color is white. You say no, it's black. I say white, you say black. I say fine, it's black. Then you say no, it's white. This is the American government."

(Transcript of Proceedings, 28 April 2008, at 280.)

On August 7, 2008, the United States Government said to Mr. Hamdan: "You are sentenced to 66 months, reduced by credit for pretrial confinement in the amount of 61 months, eight days."

Now the United States Government wants to say to Mr. Hamdan: "Your sentence is NOT 66 months, reduced by credit for pretrial confinement in the amount of 61 months, eight days. In fact, we would like to re-sentence you to a much longer term." No wonder Mr. Hamdan is distrustful of the Government.

Actions speak louder than words. On August 7, 2008, the Administration heralded the verdict in *U.S. v. Hamdan*, releasing a statement to the press emphasizing the fairness of the outcome. Now, 65 days later, the Administration demonstrates that, in fact, it was sorely disappointed in the verdict, because it now seeks to have the Military Judge vacate the sentence

that the Members of the Commission saw fit to impose. The Prosecution's attempt to have the sentencing verdict thrown out is nothing more than "sour grapes" and an unvarnished attempt to impose a longer sentence on Mr. Hamdan than the Commission Members deemed appropriate. In short, the Administration's position is that it should have two opportunities to seek a sentence that it deems long enough, first during the trial based on the evidence and information the Commission Members considered, and then later by changing the evidence and information on which the Members relied.

The Members knew exactly what they were doing when they imposed a sentence that Mr. Hamdan will serve in full by year-end. They understood before they announced their decision that a 66-month sentence would result in Mr. Hamdan being released in five months given the 61-months credit for pretrial confinement he already had received. It would be totally unfair now -- two months after the Commission Members completed their deliberations -- to reassemble the Panel and ask the Members to impose a longer sentence just because the Administration would like to avoid releasing Mr. Hamdan in December. Doing so would make our system of justice appear ridiculous to the rest of the Western World and would demonstrate that the Administration can ignore the Rule of Law when it wishes, and retry a case whenever it thinks the Panel Members were too lenient.

The Prosecution's Motion should be denied. First, the Prosecution not only waived any objection to the instructions the Members received, it also affirmatively concurred that the Members should be informed that whatever sentence they imposed would be reduced by 61 months, eight days credit for pretrial confinement. The Members relied on that instruction in fashioning their sentencing verdict, and the Prosecution should not be allowed to have it both ways -- agreeing that the Members should be made aware on August 7 that their verdict would

be reduced by 61 months, eight days, and then challenging two months later the Members' entitlement to take pretrial credit into account when determining their verdict. Second, the untimely relief sought by the Prosecution now is barred by the Military Commissions Act ("MCA") and the Rules for Military Commissions. Third, the Military Judge was well within his discretion and authority to rule on credit for pretrial credit, and there was no abuse of discretion in the Military Judge's Ruling awarding 61 months, eight days credit.

4. **Burden and Standard of Proof:** The Prosecution correctly acknowledges that it bears the burden of persuasion. RMC 905(c)(2).

5. **Facts:**

- A. On 5 August 2008, outside the presence of Commission Members, the Military Judge heard oral argument on Mr. Hamdan's motion for pretrial confinement credit (D-019)¹ (See Attachment A, Trial transcript (unauthenticated) for 5 August 2008 session at 23-29).
- B. On 6 August 2008, again outside the presence of the Members, the Military Judge announced a partial ruling on D-019, granting Mr. Hamdan some credit for time served, to be credited against any sentence imposed. In making that ruling, the Military Judge stated that he would "instruct the members" that Mr. Hamdan would be given day-for-day credit for the period from 1 July 2003 to the present; that Mr. Hamdan be given no credit for the period from his capture on 24 November 2001 through 30 June 2003; and that the Members should consider his detention during that earlier uncredited period "as a factor in determining what

¹ Defense Motion for Relief from Punitive Conditions of Confinement and for Confinement Credit D-019, originally was filed on 1 February 2008, and thus had been pending for over seven months at the time it was decided. Prosecution cannot pretend to be surprised that credit for pretrial confinement was considered before the Members deliberated their sentencing verdict.

sentence they consider appropriate." (Attachment A, Trial transcript (unauthenticated) for 6 August 2008 session at 65.)

- C. The Prosecution did not object to any aspect of the 6 August ruling. Nor did the Prosecution take any steps to seek interim review of the ruling before it was implemented, or to stay its effect. Indeed, there were no questions from counsel concerning the 6 August ruling, and no objections were made concerning the anticipated instruction to the Members. (*Id.* at 66.)
- D. The very next day, 7 August 2008, was to be the last day of trial. Based in part on the manner in which they intended to present oral argument at the end of the sentencing phase, Defense counsel initially requested that the Commission Members not be instructed regarding the pretrial credit that would be applied against any sentence they decided. (Attachment A, Trial transcript (unauthenticated) for 7 August 2008 session at 69-71). The Prosecution did not object to excluding that instruction. Nor did the Prosecution insist that the information not be communicated to the Members. Nor did the Prosecution object to the prior day's ruling that credit for pretrial confinement would be applied.
- E. The Military Judge, with the concurrence of counsel, indicated initially that he would not mention pretrial credit to the Commission Members, but rather would instruct them that they should consider Mr. Hamdan's pretrial detention generally and give it the weight they deemed appropriate, without requiring any specific formula to be used with respect to it. (*Id.* at 73-74).
- F. During the sentencing phase of trial, the Defense submitted evidence going to the

full range of issues relevant to the Commission Members' sentencing decision, including matters in extenuation and mitigation, factors relating to deterrence, rehabilitative potential, and likelihood of future dangerousness. The evidence included testimony from psychiatrist Dr. Emily Keram, relevant photographic evidence, and an unsworn statement to the Members made by Mr. Hamdan. (*See, e.g.,* Trial transcript (unauthenticated) (6 August 2008 session) at 76-124).

- G. Following the introduction of this evidence and oral argument from counsel regarding sentencing, Commission Members were instructed by the Military Judge on their sentencing determination. Specifically, the Military Judge instructed the Members on pretrial confinement credit in precisely the manner agreed upon with counsel: "You should consider the duration of the accused's pretrial confinement or detention, I should say. The law does not require that you use any specific formula in considering this pretrial detention, but it does require that you consider the detention and give it the weight you deem appropriate." (Attachment A, Trial transcript (unauthenticated) for 7 August 2008 session at 100.) There were no objections to the instructions in general or to this sentencing instruction in particular from either the Prosecution or the Defense. (*See* full instructions on sentencing, *id.* at 98-106).
- H. Prior to withdrawing for deliberations on sentencing, Commission Members submitted two written questions to the Military Judge. (AE 324, AE 325). Both questions went to the same issue, namely, how long Mr. Hamdan had been detained, and how "time already served" should be expressed in sentencing. (Attachment A, Trial transcript (unauthenticated) for 7 August 2008 session at

107, 113, 115).

- I. Based on evidence admitted during trial on the merits, the Commission Members were aware that Mr. Hamdan had been captured in Afghanistan on November 24, 2001, and that he had been transferred to the Guantanamo Bay Naval Station in 2002. The evidence at trial indicated that Mr. Hamdan had been in confinement without interruption since the date of his capture, and that he repeatedly had been interrogated in both Afghanistan and while imprisoned at Guantanamo.
- J. The Military Judge disclosed the Members' written questions to the Prosecution and the Defense. Neither side objected to the Military Judge providing an answer to the questions. (Attachment A, Trial transcript for 7 August 2008 session at 113-14).
- K. In an 803 session outside the presence of the Members, the Military Judge proposed that in responding to the Members' written questions "we tell them [the Members] the exact answer and exactly what he's going to get credit for and what he's not going to get credit for, and put it in their hands. That's where the burden should be." (*Id.* at 107.) No one suggested the issue be ignored in light of the explicit questions received from the Members.
- L. Defense counsel immediately agreed with that proposal, urging that the Members be told that credit would be given for the period from 1 July 2003 to the present, but that they could also consider the detention during the period from November 2001 up until 1 July 2003. (*Id.* at 108.) While the statements from the Prosecution were somewhat opaque, it appears that the concern articulated related to the period from November 2001 through 1 July 2003, specifically, that Mr.

Hamdan should not be given credit for that period. (*See id.* at 111: "[Asst. Trial Counsel]: I think it's appropriate to just tell them, sir, that [Mr. Hamdan's] been in detention since 24 November 2001. But that it is not appropriate for them to give him credit for that time" The Military Judge restated this by saying "Okay. What I'm going to do then is I'm going to [tell] them that [Mr. Hamdan] was held in detention during that period of time, that I haven't ordered credit for that, but that they should give it the weight they believe it deserves. And then I'll tell them that I've ordered credit for the other period [1 July 2003 to the present], and they should give that the weight it deserves." (*Id.* at 112.) This met with no objection from either side. (*Id.* at 112, 114.) Indeed, the last word on this proposed course of action prior to the delivery of the instruction came from Trial Counsel: "No objection from the government, your honor." (*Id.* at 114.)

- N. Based on the parties' concurrence, the Military Judge proceeded in reliance on what everyone understood was an agreed basis. The Military Judge specifically instructed the Members in conformity to that agreed-upon proposal. (*Id.* at 115-116.) Specifically, the Judge explained to the Members that Mr. Hamdan would be given 61 months, 8 days credit for pretrial confinement, which would be credited against and subtracted from whatever sentence the Members returned. (*Id.* at 115-117.) The Defense then requested that, to avoid any confusion, the Military Judge provide an arithmetic example of how that credit would operate, using a hypothetical sentence of confinement for a given number of months. (*Id.* at 118.) That request for clarification elicited no objection from the Prosecution. The Military Judge then gave a specific example of how the credit for time served

would operate. Again, no objection of any sort was raised by the Prosecution before or after this exchange precipitated by the Members' written questions. (*Id.*)

- O. The Commission Members then withdrew to decide an appropriate sentence, returning later the same day (7 August 2008) to announce that they had reached a sentence of 66 months total confinement. (*Id.* at 123.) The trial having concluded, the Military Judge then adjourned the Military Commission and dismissed the Members.
- P. As of the date of this Opposition, the record of trial has not yet been authenticated.
- Q. At the outset of the trial, the Commission Members had been instructed that, at all times prior to rendering a verdict and possible sentence, the Members should avoid publicity about the matters they were to decide, and were to base their verdict and any possible sentence only on the evidence presented in Court and the instructions from the Military Judge.
- S. On 24 September 2008, the Prosecution moved for "reconsideration and reversal of the Military Judge's ruling and sentencing instruction that the accused is entitled to credit against the adjudged sentence for time spent in detention . . . prior to trial." (Govt. Motion at 1.) At no time prior to 24 September – 47 days after the sentence was returned, and the trial concluded, and the Members dismissed – did the Prosecution object or otherwise attempt to prevent the Members from reaching a sentence that they fully understood would be offset by 61 months, 8 days.

6. **Law and Argument:** The Prosecution's motion to set aside the sentence as the product of legal error should be denied. To begin with, the Prosecution waived any objection to the sentencing instructions by failing to voice those objections prior to the Members withdrawing to deliberate on the sentence. RMC 1005(f). But even had their objection be properly preserved, both the MCA and the RMC prohibit the reconsideration sought here, as the sentence imposed is legal on its face, no extraneous information prejudicial to the substantial rights of the accused was introduced, and the only purpose the Prosecution hopes to serve by the post-trial session – to increase the severity of the sentence – is expressly prohibited by RMC 1102. Moreover, the Prosecution is simply wrong in asserting that it is beyond the authority of the Military Judge to award credit for pre-trial confinement. As discussed below, "credit for pretrial confinement and/or punishment has a long history in military law," *United States v. Rock*, 52 M.J. 154, 156 (C.A.A.F. 1999), and nothing in the MCA or the RMC suggests that military commissions cannot consider pretrial confinement in determining a proper sentence. On the contrary, the MCA calls for military commissions to generally "apply the principles of law . . . [employed] by general courts-martial," and the RMC expressly provides that "the sentence to be adjudged is a matter within the discretion of the military commission." MCA § 949a; RMC 1002. The Prosecution, however, would prefer that no law apply.

In this case, the sentence of 66 months of confinement was imposed with the knowledge and expectation that 61 months, 8 days credit would be given against that sentence. Thus, the reality of the sentencing decision announced by the Members was that they imposed a sentence of 4 months and 22 days of additional confinement for Mr. Hamdan. They knew what they were doing. The Prosecution has identified no valid basis for reconsidering that determination. To the extent the Prosecution claims that it merely wants to remedy a legal error (should the Prosecution acknowledge that it is barred from increasing the severity of the punishment imposed – in reality as well as in form), its Motion fails to demonstrate that the purported error amounts to "plain error," which is the standard applicable here. Indeed, the Prosecution's motion calls for a pointless exercise and a vast waste of time, money, and effort, as all that can occur under the

MCA and RMC is to move a large number of people to Guantanamo for the purpose of expressing the same sentence in different words: "4 months and 22 days," rather than "66 months with a credit of 61 months, 8 days." That is a long way to go for such a trivial result.

A. The Prosecution Waived Any Objections to the Sentencing Instructions

The Prosecution's motion should be denied because its newly-asserted objection that the sentence is the product of legal error has been waived. RMC 1005(f) provides, in pertinent part:

Rule 1005. Instructions on sentence

(f) *Waiver.* Failure to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence constitutes waiver of the objection in the absence of plain error.

In this case, the Defense initially requested that the Commission Members not be informed about the decision of the Military Judge to grant credit for pre-trial confinement. (Attachment A, Trial transcript (unauthenticated) for 7 August 2008 session at 69.) However, when the Members asked about "time already served" and how that should be expressed in the sentence, neither party objected to instructing the Members about the pre-trial credit. (*Id.* at 113-14). That information then became an integral part of the instructions. After being informed about the award of credit, the Members closed to deliberate, and then returned and announced the sentence. Accordingly, pursuant to RMC 1005(f), the Prosecution waived its objection to the sentencing instructions and to the credit that was one of the most significant elements of the instructions.

B. The Relief Sought by the Prosecution Is Barred by the MCA and the Rules for Military Commissions

Even if the Prosecution had preserved its objection to the sentencing instruction (which, as the record reflects, it did not), the relief requested by the Prosecution is expressly barred by both the MCA and the Rules for Military Commissions.

1. The MCA Prohibits the Re-sentencing Hearing in the Absence of Material Prejudice to the Substantial Rights of the Accused

The Prosecution acknowledges that its motion "presents a pure question of law." (Govt.

