

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD,
 WALID MUHAMMAD SALIH MUBARAK
 BIN 'ATTASH,
 RAMZI BIN AL SHIBH,
 AMMAR AL BALUCHI (ALI ABDUL AZIZ
 ALI),
 MUSTAFA AHMED ADAM AL HAWSAWI

AE152 (RBS)

Emergency Defense Motion

To Order the Cessation of External Use of
 Sounds and Vibrations to Interfere with Mr. Bin
 al Shibh's Confinement and with the Attorney-
 Client Relationship and to Allow Expert
 Inspection of his Cell, Substructure/Foundation,
 Surrounding Areas of the Cell, and the Cell
 Control Room

3 April 2013

1. **Timeliness:** This motion is timely filed.
2. **Relief sought:** Mr. Bin al Shibh moves this Military Commission to enter an order directing the Joint Task Force, Guantanamo Naval Station to cease the use of sounds and vibrations in Mr. Bin al Shibh's confinement facility and to allow the Defense to inspect Mr. Bin al Shibh's cell, cell walls, substructure/foundation, area surrounding his cell, and the control room for the cells within the confinement facility. The Defense also moves this Military Commission to allow experts, such as qualified engineers, audio experts, and other technical specialists, to assist the defense in investigating the confinement conditions.
3. **Burden of Proof:** The Defense has the burden of proof by a preponderance of the evidence. R.M.C. 905(c).
4. **Overview:** The Military Commission previously entered an order on February 19, 2013 under AE 108 which permits the visitation and inspection of Mr. Bin al Shibh's cell and other specific areas within his confinement facility by three members of the defense team. The order

also places certain restrictions on how the visit may be conducted. On January 18, 2013, Mr. Bin al Shibh filed AE 108B, a supplemental motion, with the Commission requesting an order to permit qualified engineers and other technical specialists to assist in the inspection of the confinement facilities. This supplement alleged Mr. Bin al Shibh has been consistently and intentionally subjected to cruel and abusive treatment through sounds introduced into his cell by JTF personnel. The Commission did not address this request in its order.

Mr. Bin al Shibh's conditions have become increasingly intolerable for him and are having a significant adverse impact on the attorney-client relationship.

5. Facts Relevant to Motion:

- a. Mr. Bin al Shibh was taken into United States custody on September [REDACTED] 2002. He has been held at Guantanamo Naval Station as a detainee continuously since September [REDACTED] 2006.
- b. On information and belief, during his detention at Guantanamo, Mr. Bin al Shibh has been subjected to various sounds and vibrations designed to disrupt his daily life and his sleep. This treatment continues to this day.
- c. These sounds and vibrations make it extremely difficult for Mr. Bin al Shibh to concentrate on issues critical to his defense. Moreover, because the sounds and vibrations interfere with Mr. Bin al Shibh's ability to sleep, Mr. Bin al Shibh is sleep deprived which further affects his ability to focus and concentrate, either in his cell or during attorney meetings.
- d. Mr. Bin al Shibh has, in fact, cancelled a number of meetings with various members of his defense team.
- e. Getting relief from this treatment has become Mr. Bin al Shibh's overriding

concern and priority. As a result, this issue dominates attorney-client discussions.

- f. Upon information and belief, the detention facility was specifically designed and constructed to facilitate on-going abusive treatment.
- g. Numerous complaints and requests for relief from this conduct by Mr. Bin al Shibh and his counsel to JTF personnel have resulted in routine denials that there is any problem or that he is being exposed to sounds or vibrations.
- h. Recent proceedings before the Commission regarding the listening and monitoring devices in the courtroom and the detainee visitation rooms for attorney client meetings demonstrate the government is willing and able to use surreptitious electronic devices against detainees.

6. Discussion:

The Detainee Treatment Act prohibits the Government from inflicting cruel, inhuman, or degrading pretrial confinement conditions on Mr. Bin al Shibh. 42 U.S.C. § 2000dd(a).

"Cruel, inhuman, or degrading treatment" means the cruel, unusual, and inhumane treatment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States. 42 U.S.C. § 2000dd(d). This prohibited treatment includes sleep deprivation and alteration. *See Vance v. Rumsfeld*, 701 F.3d 193, 206 (7th Cir. 2012)(Wood, J. Concurring). The determination of when certain conduct becomes cruel and inhuman will depend on the facts and circumstances in each case.

Here, Mr. Bin al Shibh has experienced and continues to experience daily harassment in the form of sounds and vibrations which interrupt his concentration, sleep, and tranquility.

The Defense believes the facility is equipped to use such sounds and vibrations on detainees and that the JTF personnel intentionally create these sounds and vibrations to accomplish these results.

This is consistent with the Government taking similar covert actions, such as having the capability to listen to attorney-client conversations. *See* Motion AE 133D of Feb. 5, 2013. As a result, Mr. Bin al Shibh requests this court order the immediate cessation of any and all use of noises and/or vibrations within the detention facility for any purpose.

Moreover, to thoroughly evaluate this confinement condition, the Defense moves this Military Commission to allow an investigation into Mr. Bin al Shibh's cell, cell walls, substructure/foundation, area surrounding his cell, and the control room for the cells within the confinement facility. Furthermore, the Defense moves this Military Commission to allow experts, such as qualified engineers and other technical specialists, to assist the defense in inspecting and investigating these confinement conditions. *See also* AE 108B (RBS Sup).

Mr. Bin al Shibh is entitled to expert assistance for this issue because he can satisfy the test under *United States v. Lloyd*, 69 M.J. 95 (C.A.A.F. 2010). "An accused is entitled to expert assistance provided by the Government if he can demonstrate necessity." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010)(citation omitted). "The accused has the burden of establishing that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial." *Id.* at 99 (citations omitted). In order to satisfy the first prong of this test, the defense must satisfy a three-part analysis: (1) why the expert is necessary; (2) what the expert would accomplish for the accused; and (3) why defense counsel is unable to gather and present the evidence that the expert

would be able to develop. *Id.* at 99 (citing *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994)).

Addressing the first prong, defense counsel, paralegals, and ordinary investigators do not possess the requisite knowledge or expertise in the area of mechanical design, construction, and technology to be able to identify and assess the relevant design features (the specific design features and technology will be more fully developed through oral argument and testimony). In this case, defense counsel have reason to believe the relevant detention facility was designed and constructed in such a way as to facilitate on-going abusive treatment of the accused. Defense counsel also have reason to believe the above-mentioned features would only be detectable by individuals with specialized technical training (i.e., the features were designed to be covert). Consequently, expert assistance is absolutely necessary to identify and prevent on-going abuse, rebut aggravating evidence regarding behavior in confinement, formulate a mitigation strategy and develop grounds for clemency, determine whether there is a basis to assert an Eighth Amendment violation, and determine whether there is a basis to assert a due process violation based on past and present confinement conditions. Defense counsel cannot reasonably be expected to obtain the necessary engineering knowledge and skill to identify features that were intentionally designed to avoid detection. *Lloyd*, 69 M.J. at 99.

Addressing the second prong, a reasonable probability exists that denial of expert assistance would result in a fundamentally unfair trial. Without the expert assistance, Mr. Bin al Shibh may continue to suffer abuse in the detention facility in violation of his Eighth Amendment and due process rights. Moreover, he will be unable to counter any aggravating evidence regarding confinement presented by the prosecution.

To address these abusive confinement conditions and the effect on the Defense's ability to represent Mr. Bin al Shibh, the Defense moves this Military Commission to allow experts, such as qualified engineers and other technical specialists, to assist the defense in investigating the confinement conditions. The Prosecution does not agree with the relief requested.

7. Request for Oral argument: Oral argument is requested.

8. Request for Witnesses: None.

9. Certificate of Conference: The Defense conferred with the Prosecution and the Prosecution objects to the requested relief.

10. Attachments:

A: Certificate of Service

Respectfully submitted,

//s//
JAMES P. HARRINGTON
Learned Counsel for Mr. Bin al Shibh

//s//
KEVIN BOGUCKI, LCDR, USN
Defense Counsel for Mr. Bin al Shibh

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 3rd day of April 2013, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by electronic mail.

//s//
KEVIN BOGUCKI, LCDR, USN
Defense Counsel for Mr. Bin