

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY**

UNITED STATES OF AMERICA

v.

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

AE152SS(RBS)

Defense Reply to
Government Response to AE152OO
Defense Motion to Compel Witnesses

Date Filed: 1 March 2016

1. Timeliness: The present motion is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.

2. Relief Requested: Mr. Bin al Shibh respectfully requests the Military Commission deny the relief requested in the AE152PP, Government Response to AE152OO Defense Motion to Compel Witnesses.

3. Facts:

a. On 2 November 2015, this Commission gave the Government a written order, AE152HH "...not to subject Mr. Bin al Shibh to disruptive and harassing noises and vibrations."

b. On 11 December 2015, counsel for Mr. Bin al Shibh gave notice to this Commission that Mr. Bin al Shibh is still being subjected to harassing noise and vibrations and filed AE152LL(RBS) Emergency Motion for Show Cause Why the Government, JTF Camp Commander and JTF Guard Force Members Should Not be Held in Contempt.

c. On 20 January 2016, counsel for Mr. Bin al Shibh emailed the Government and requested that they identify and make available JTF Guard force personnel who Mr. Bin al Shibh believes has information relating to his allegations.

d. On 5 February 2016, the Government responded to the defense request stating that the witnesses have denied to be interviewed by the defense and submitted the Potential Witness Forms that is at issue in this case. As a result, the defense filed AE152OO, Defense Motion to Compel Production of Witnesses.

e. On 24 February 2016, Mr. Bin al Shibh testified regarding the allegations contained in the AE152 series and stated that the current JTF guard force is continuing to subject him to noises and vibrations and that he had complained to the JTF guard force personnel who failed to even investigate his complaints. Further, the JTF guard force personnel have stated to Mr. Bin al Shibh that they were ordered not to follow the Commission's Order, AE152HH. Instead of allowing the defense the opportunity to speak with some of these JTF guards that would have information regarding Mr. Bin al Shibh's complaints, the Government provided the defense with the Potential Witness Forms that are signed by the JTF guards that indicate that they have declined to speak with the defense.

f. This is not the first time that the Government has utilized the Potential Witness Form to discourage witnesses from speaking with and being interviewed by members of Mr. Bin al Shibh's defense team.

g. In March 2015, investigators for Mr. Bin al Shibh, travelled to the 747th Military Police Company Headquarters in Ware, Massachusetts. These investigators spoke to "The Former Camp Commander¹" of the 747th MP Company that guarded detainees at Camp VII. Investigators informed The Former Camp Commander that they were attempting to contact

¹ This witness has testified before in this proceeding under this pseudonym.

members of her Company who were female guards at Camp VII, Guantanamo Bay, Cuba (GTMO).

h. On 17 and 18 March 2015, the investigators spoke to two female guards, SGT [REDACTED] and SPC [REDACTED]², who had contacted the investigators voluntarily and provided information concerning their positions while at GTMO. Both female guards indicated willingness for future conversations regarding their experiences as guards at Camp 7.

i. On 4 January 2016, investigators made an attempt to interview SGT [REDACTED] and SPC [REDACTED] for a second time. Both SGT [REDACTED] and SPC [REDACTED] did not answer the phone calls and investigators left voicemail messages with both witnesses. Neither witness returned the phone calls. On 5 January 2016, investigators again called both witnesses and left voicemail messages with no response from the witnesses. As a result of the lack of response, investigators attempted to make personal contact with both witnesses to determine why neither witness was responding and left their business cards. On 6 January 2016, SPC [REDACTED] called the investigators. Investigators explained that they were just following up as they had previously discussed back in March 2015. SPC [REDACTED] stated she was told by her commander that “the situation has changed and I am not allowed to speak to you” or words to that effect.

j. Investigators contacted The Former Camp Commander regarding SPC [REDACTED]’s perception that she was prohibited from speaking with investigators. The Former Camp Commander told investigators that she received a form and guidance from Trial Counsel Ed Ryan and based upon that the guard members were told not to speak to defense investigators.

² Names of former guards have been redacted and will be provided to the Prosecution in a separate correspondence.

4. Argument:

a. The Government's use of the current Potential Witness Form unreasonably restricts Mr. Bin al Shibh's due process rights and is in violation of Mr. Bin al Shibh's Fifth, Sixth, and Eight Amendment Constitutional rights. The current form has had a chilling effect on witnesses and the Government has failed to demonstrate that there is a legitimate overriding interest that would support the denial of Mr. Bin al Shibh's right to due process and equal access to witnesses.³ The Government mistakenly relies on the military commission case of *United States v. Hadi Al-Iraqi* and the Government's Bench Brief that was filed in that case that is attached to AE342(WBA) Attachment C, as authorization for the use of such forms. However, the Government has failed to address the facts and circumstances in Mr. Bin al Shibh's case and that would demonstrate the overriding interest that would allow the Government to continue to prevent defense counsel from speaking to witness as contemplated by *United States v. Cook*.⁴

b. The Potential Witness Form provided by the Government to potential witnesses identified by Mr. Bin al Shibh has been the issue of litigation in *United States of America v. Abd Al Hadi Al Iraqi*. In *Al-Iraqi*, the Government confirmed it has a policy in place to provide potential witnesses the form that advises them of their right not to speak to defense counsel in this case.⁵ In *Al-Iraqi*, the form originally contained the statement "If you agree to speak with Mr. Hadi's defense team, they may write down what you tell them. Whatever you say to Mr. Hadi's defense team can be used as a basis to examine or cross-examine you if you testify in a

³ See *United States v. Cook*, 608 F.2d 1175, 1180 (9th Cir. 1979); *Dennis v. United States*, 384 U.S. 855 (1966)

⁴ 608 F.2d 1175, 1180 (9th Cir. 1979)

⁵ See *United States v. al-Iraqi*, Unofficial/Unauthenticated Transcript, November 18, 2014, 1:09pm – 2:55pm, at p. 173 and 185 (enter portion of transcript here)

preliminary hearing or at trial.”⁶ The Military Judge in *Al-Iraqi* held that these statements “may have the effect of unnecessarily discouraging cooperation by prospective witnesses” and ruled that these statements were prohibited in further rights advisements of potential witnesses.⁷

c. While the current Potential Witness Form in this case is in conformity with the Military Judge’s ruling in *Al-Iraqi*, it has not been litigated in Mr. Bin al Shihb’s case. The court in *Al-Iraqi* held that the use of the Potential Witness Form did not have “the purpose or effect of discouraging witnesses from cooperating with the counsel of the accused.”⁸ Here, there is actual evidence of the form’s obstructive impact on the defense’s right to access and interview witnesses. This is evidenced by the interpretation of the witnesses such as The Former Camp Commander and SPC [REDACTED]. Both witnesses freely spoke to the defense investigators prior to the use of this form. After receiving this form and instructions from the Prosecution, The Former Camp Commander and SPC [REDACTED] believe that “things have changed” and as the witness SPC [REDACTED] stated, she “was not permitted to speak to the defense” because it needed to be run through her chain of command. This is clear evidence that this form, in Mr. Bin al Shihb’s case, has an immediate chilling effect on potential witnesses identified by the defense and therefore, constrains Mr. Bin al Shihb’s ability to prepare a meaningful defense.

d. In AE152OO, the defense requested the Commission to compel the Government to produce the witnesses identified as “1629 Watch Commander,” “1559 Watch Commander,” “1604 Watch Commander,” and “MP Badge #1601.” The defense request was to question these witnesses about both the underlying allegations by Mr. Bin al Shihb and about the facts and circumstances surrounding what they have been told and/or ordered in regards to speaking about

⁶ *United States v. al-Iraqi*, AE029B, *Ruling on Access to Witnesses*, at 3-4 (23 December 2014)

⁷ *Id.*

⁸ *U.S. v. al Iraqi*, AE029B, *Ruling on Access to Witnesses*, citing *United States v. Rich*, 580 F.2d 929, 934 (9th Cir. 1978)

Camp 7 to defense counsel. It is clear, based upon the conversations with previous guard members who were provided the Potential Witness Form and received advice from the Trial Counsel, that the Government is using this form to discourage witnesses from speaking to the defense.⁹

e. The Government cannot simply state that witnesses are provided this form in a vacuum. In reality, the JTF guard force personnel are formally indoctrinated for SCI, provided Non-Disclosure Agreements, and given other orders and documents from their chain of command that essentially state they are not to discuss what happens in Camp 7.¹⁰ Then, at some future date, the same person who provided the order not to discuss what happens in Camp 7 approaches the JTF guards and tells them “do you want to speak to the defense about what happens here...you don’t have to talk to them...here is a form that explains your rights,” or words to that effect. The defense knows that JTF guard force personnel are required to sign other documents, that when considered in relation to the Potential Witness Form, further discourages the witness from speaking with Mr. Bin al Shibh’s counsel.

f. The Government, in their response, wishes to rely on the fact that the Commission in *Al-Iraqi* held that “the protection of sensitive, official or classified information is a compelling reason to establish procedures for regulating defense access to witnesses possessing this information.” While the defense agrees that there should be some procedures to protect sensitive, official or classified information, this should not give the Government the ability to prevent defense counsel from interviewing witnesses that have information critical to an issue before the Commission. What the Government fails to address in their response is what

⁹ See *State v. Williams*, 485 S.E.2d 99 (S.C. 1997)(“Unconstitutional intimidation” includes advise to a potential defense witness that it would not be in his “best interest” to talk to the defendant or his attorney)

¹⁰ These orders and other documents are the subject of Mr. Bin al Shibh’s discovery request that was submitted to the Government on 11 February 2016.

overriding interests exists in this case, when other JTF guards have testified, have been interviewed, and have been allowed to speak to the defense counsel without obstruction.¹¹

g. “[W]hen the free choice of a potential witness to talk to defense counsel is constrained by the prosecution without justification, this constitutes improper interference with a defendant's right of access to the witness.”¹² Here, the Government is attempting to put forth the proposition that simply because witnesses have sensitive, official, or classified information, defense counsel can be denied access without any further justification. “Justification on the part of the prosecution to interfere with that right can be shown only by the clearest and most compelling considerations.”¹³ The D.C. Circuit Court of Appeals held in *Gregory v. United States*, that a request to have a government agent present at meetings between witnesses and the defense was impermissible interference with the defendant's right to access witnesses.¹⁴ Just as in *Gregory*, where the advice by the prosecution to the witnesses was impermissible interference, the current Potential Witness Form, provided in conjunction with all the other NDAs, indoctrinations, and guidance from senior military officers and Trial Counsel, is an impermissible interference with Mr. Bin al Shihb’s right to access to witnesses and obstructs Mr. Bin al Shihb’s compulsory process right under the 5th Amendment.¹⁵

¹¹ Recently, on 26 February 2016, the Commission ordered a JTF Guard member to testify during the AM session of the hearing. The OIC of Camp 7 was able to testify before the Commission in an unclassified setting without disclosing any sensitive information.

¹² *Kines v. Butterworth*, 669 F.2d 6, 9 (1st Cir. 1981).

¹³ *Id.*

¹⁴ 369 F.2d 185, 188, 125 U.S. App. D.C. 140 (D.C. Cir. 1966).

¹⁵ *Id.*; See *United States v. Peter Kiewit Sons’ Co.*, 655 F.Supp. 73 (D.Colo.,1986) (the court ordered depositions “where prosecution's advice at least strongly implied that witnesses should decline requested defense interviews); *United States v. Carrigan*, 804 F.2d 599 (10th Cir.1986)(sustaining district court’s order granting discovery depositions as a proper sanction for prosecutorial misconduct in preventing defense counsel’s access to government witnesses).

h. Mr. Bin al Shibh requests that the Military Commission deny the relief requested in the AE152PP and order the Government to produce the requested witnesses to testify during future AE152 hearings.

5. Witnesses

Mr. Edward Ryan
Trial Counsel
Office of the Chief Prosecutor

The Former Camp Commander
Assistant Chief of Staff - Army
Joint Force Headquarters-MA

CPT [REDACTED]
747th MP Company

SPC [REDACTED]
747th MP Company

SGT [REDACTED]
747th MP Company

Investigator John Murphy
Military Commission Defense Organization

6. Attachments:

A. Certificate of Service

Respectfully submitted,

//s//
JAMES P. HARRINGTON
Learned Counsel

//s//
ALAINA WICHNER
MAJ, USA
Defense Counsel

//s//
TRI NHAN
CDR, USN
Defense Counsel

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on 1 March 2016, I electronically filed the attached Defense Reply to AE152PP(GOV) with the Trial Judiciary and served it on all counsel of record by e-mail.

//s//

JAMES P. HARRINGTON

Learned Counsel

Attachment A