

UNCLASSIFIED//FOR PUBLIC RELEASE
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,
ALI ABDUL AZIZ ALI,
MUSTAFA AHMED ADAM
AL HAWSAWI**

AE 254TTTTT

RULING

Motion for Reconsideration
of AE 254JJJJ, Order, Emergency
Defense Motion To Bar Regulations
Substantially Burdening Free Exercise Of
Religion And Access To Counsel

19 August 2016

1. Procedural Background.

a. On 28 April 2016, the Commission issued AE 254JJJJ¹ ruling upon AE 254Y (use of female guards as escorts), AE 254WW (alleged Unlawful Influence from public comments by senior military and civilian officials), and the other outstanding motions within the AE 254 series.² Within the ruling, the Commission denied the Accused's claims under both *Turner v. Safley*, 482 U.S. 78, 89 (1987), and *Bell v. Wolfish*, 441 U.S. 520 (1979).

b. Counsel for Mr. Mohammad moved for reconsideration,³ alleging the Commission erred in not permitting expert evidence of the "ongoing torture inflicted by the challenged

¹ AE 254JJJJ, Ruling: Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel, 28 April 2016.

² See AE 254 (WBA), Emergency Defense Motion to Permit Attorney-Client Meetings 3 and 4 December 2013, filed 3 December 2013; AE 254 (AAA Sup), Defense Supplement to AE 254 (WBA) Emergency Defense Motion to Permit Attorney-Client Meetings 3 and 4 December 2013, filed 12 June 2014; AE 254G (WBA) Emergency Defense Motion to Permit Attorney-Client Meetings 22 and 23 March 2014, filed 14 March 2014, AE 254I (WBA), Emergency Defense Motion to Permit Attorney-Client Meetings 5 and 6 April 2014, filed 1 April 2014; AE 254L (MAH Sup), Mr. Hawsawi's Joinder and Supplemental facts to AE 254L, Defense Reply on Motion to Permit Client Meetings, filed 15 April 2014; AE 254L (MAH 2nd Sup), Mr. Hawsawi's Supplemental Facts to AE 254L (MAH Sup), Defense Reply on Motion to Permit Client Meetings, filed 8 August 2014; AE 254O (WBA), Defense Motion to Provide Mr. bin 'Attash Weekend and After-Business-Hours Access to Counsel When Reasonably Requested, filed 13 August 2014; AE 254S (WBA), Emergency Defense Motion to Compel Attorney-Client Meetings 13, 14, 15, and 16 September 2014, filed 11 September 2014; AE 254T (WBA), Defense Motion to Compel Production of Witnesses for AE 254(WBA), AE 254G(WBA), AE 254I (WBA), AE 254O (WBA), and Associated Pleadings, filed 11 September 2014; and AE 254Z (WBA), Emergency Defense Motion to Abate Proceedings Due to Denial of Access to Counsel, filed 23 October 2014.

³ AE 254PPPPP (KSM), Motion for Reconsideration of AE 254JJJJ, Order, Emergency Defense Motion To Bar Regulations Substantially Burdening Free Exercise Of Religion And Access To Counsel, filed 11 July 2016.

[female guard] regulations and procedures;” and the findings of a legitimate penological purpose were not supported by substantial evidence.

c. The Government responded,⁴ requesting the Commission deny the Defense motion for reconsideration or, in alternative, deny the relief requested if the Commission granted reconsideration. They argued there is no change in law or new facts within the Defense motion for reconsideration and, therefore, reconsideration is not appropriate. The Defense replied making additional argument in furtherance of the motion for reconsideration.⁵

d. The Defense requested oral argument.⁶ The Commission has heard extensive oral argument⁷ on all facets of the AE 254 series, to include counsel’s arguments addressing *Bell v. Wolfish* and proffers of expected testimony from the Defense expert. Pursuant to Rule for Military Commission (R.M.C) 905(h) and Military Commissions Trial Judiciary Rule of Court 3.9, the request for oral argument is **DENIED**.

2. **Law.** R.M.C. 905(f) permits the Commission to reconsider any ruling (except the equivalent of a finding of not guilty) prior to authentication of the record of trial. Either party may move for

⁴ AE 254RRRRR (GOV), Government Response To Defense Motion for Reconsideration of AE 254JJJJJ, Order, Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel, filed 22 July 2016.

⁵ AE 254SSSSS (KSM), Reply to AE 254RRRRR (GOV) Government Response to Mr. Mohammad’s Motion for Reconsideration of AE 254JJJJJ, Order, Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel, filed 29 July 2016; *amended by* AE 254SSSSS (KSM, MAH, AAA, WBA) Amended, Reply to AE 254RRRRR(GOV) Government Response to Mr. Mohammad’s Motion for Reconsideration of AE 254JJJJJ, Order, Emergency Defense Motion To Bar Regulations Substantially Burdening Free Exercise Of Religion And Access To Counsel, filed 15 August 2016.

⁶ AE 254PPPPP (KSM) at 14.

⁷ See Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 22 February 2016 from 1:31 P.M. to 3:40 P.M. at pp. 10720-10744; Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 26 February 2016 from 9:41 A.M. to 10:21 A.M. at pp. 11496-11497; Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 26 February 2016 from 10:32 A.M. to 12:09 P.M. at pp. 11500-11554; Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 26 February 2016 from 1:32 P.M. to 3:36 P.M. at pp. 11557-11629; Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 10 December 2015 from 1:25 P.M. to 3:02 P.M. at pp. 9909-9923; Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 10 December 2015 from 3:26 P.M. to 5:03 P.M. at 9920-9929.

reconsideration, but granting of the request is in the Military Judge's discretion. Generally, reconsideration should be based on a change in the facts or law, or instances where the ruling is inconsistent with case law not previously briefed.

3. Analysis.

a. In AE 254JJJJ the Commission found:

Despite Defense Counsel assertions that the minimal contact by female guards conducting an escort movement “is extremely painful to them[,]” no evidence was presented to the Commission that any Accused has been reliving alleged “torture” when incidentally touched by female guards conducting such movements. In fact, the record contradicts these claims. Complaints made by the Accused to the Camp Seven guards and chain of command regarding touching by female guards was based on cultural and religious objections, not pain or relived trauma.⁸

b. The Commission also footnoted the following:

Mr. Mohammad moved this Commission to produce an expert to discuss the effects of torture. However, an expert opinion about generalities regarding how one could feel about specific acts of torture is not relevant where there are no facts to establish the predicate. *See United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005) (upholding a trial judge’s denial of expert assistance to examine coercive interrogation techniques where the defense never presented evidence of, “abnormal mental or emotional problems” or a “submissive personality” such that he would make false incriminatory statements.) Like the appellant in *Bresnahan*, the Accused in this case have not presented any evidence to suggest that they have been reliving torture by the *de minimis* touching of a female guard.⁹

c. In their motion, the Defense stated: “[the Commission] has now denied the Defense Emergency Motion on the purported grounds that the defense failed to present any such expert testimony, thereby resulting (foreseeably) in the absence of evidence.” The Commission never stated the Defense failed to present *expert* evidence; instead the Commission noted the Defense put forward no evidence establishing the relevance of or need for the testimony of the proposed expert. A proffer by an expert is not evidence that establishes a personal belief or experience of “continued torture” or “extreme pain” of an Accused. Other witnesses or evidence could

⁸ AE 254JJJJ at 9.

⁹ *Id.* at 9 fn 38.

theoretically establish these facts, to include the Accused themselves, yet no such evidence was presented by the Defense.

d. All evidence brought forward during the hearing and within the motions, to include numerous witnesses, indicated the objection to the policy was based on religious grounds and not “extreme pain” or “reliving torture.” The Defense failed to put forward any evidence showing the Accused have been experiencing such trauma. An expert’s proffer or opinion does not establish these facts.

4. **Ruling.** Reconsideration is appropriate to address new facts, law, or changes in facts or law. The Defense has not raised any new matters to the Commission. The Defense Motion for Reconsideration is **DENIED**.

So **ORDERED** this 19th day of August, 2016.

//s//
JAMES L. POHL
COL, JA, USA
Military Judge