

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

<p>UNITED STATES OF AMERICA</p> <p style="text-align: center;">v.</p> <p>KHALID SHAIKH MOHAMMAD; WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH; RAMZI BINALSHIBH; ALI ABDUL AZIZ ALI; MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>AE 359B (GOV)</p> <p>Government Reply</p> <p>To Defense Response to Government Motion for the Commission to Inquire into the Circumstances of Representation and Impose Procedural Requirements on Joint Defense Agreements to Further Safeguard the Accused’s Right to Conflict-Free Counsel</p> <p>22 May 2015</p>
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1. Timeliness

This Reply is timely under Military Commissions Trial Judiciary Rule of Court 3.7.e.(2) because the Prosecution filed it within seven calendar days of Mr. Ali’s Response.

2. Law and Argument

To invoke the protections of the joint-defense privilege, the Accused must have entered into an agreement “embodying a cooperative and common enterprise towards an identical legal strategy.” *Lugosch v. Congel*, 219 F.R.D. 220, 237 (N.D.N.Y. 2003); accord *Hunton & Williams v. DOJ*, 590 F.3d 272, 285 (4th Cir. 2010). Mr. Ali states that the Accused “have engaged in a common defense for virtually their entire Guantanamo incarceration.” AE 359A (AAA) at 6. And yet he resists committing any agreements to engage in that common defense to writing and submitting them to the Commission for its *ex parte*, *in camera* review. Mr. Ali opposes the Motion by, *inter alia*, dismissing it as an attempt by the government to involve itself in defense affairs, claiming that any joint-defense agreement would constitute protected work product, and arguing that a written joint-defense agreement is unnecessary because, unlike the defendants in *United States v. Stepney*, 246 F. Supp. 2d 1069 (N.D. Cal. 2003), the Accused are not cooperating with the government.

None of Mr. Ali's claims provides a basis for denying the Motion. First, the Prosecution asks the Commission to review the joint-defense agreements *ex parte* and *in camera*, thereby excepting itself from—not inserting itself into—the Commission's inquiry on the circumstances of the Accused's representation. Regardless, protecting fairly rendered verdicts on appeal and ensuring that the Accused receive conflict-free counsel, that fair legal proceedings are conducted within ethical standards, and that the Accused are informed of their rights under the joint-defense privilege are appropriately both governmental and judicial concerns. Second, the allegedly privileged nature of joint-defense agreements supports granting the Motion because it demonstrates that defense counsel who are party to such agreements may owe a limited duty of confidentiality toward their client's co-accused. As the Prosecution explains in its Motion (at 3-4), this limited duty of confidentiality presents the potential for a conflict of interest the Commission should examine. Also, the allegedly privileged nature of the agreements casts no obstacle because the Commission's review—done *ex parte* and *in camera*—would not terminate the privilege. Third, *Stepney* is apt because, although a defendant's cooperation with the government could heighten a pre-existing potential for a conflict of interest, the potential exists by virtue of the joint-defense agreement, irrespective of the defendant's cooperation.

Furthermore, based on past statements by both the Accused and counsel, it is also a distinct possibility that one or more of the Accused may decide to testify on their own behalf, not as Prosecution cooperators, but in their own defense, thus exposing themselves to cross-examination by defense counsel of other Accused who have had meetings and conversations with them on the topics of their testimony. To guard against this potential and ensure the Accused understand their rights and obligations under a joint-defense agreement, the Commission should grant the Motion, so that any potential conflicts can be identified at this early stage of the proceedings, when remedial action can still be taken, if necessary, without causing undue delay to the trial if it is revealed at a later date that one or more of the co-Accused's attorneys have conflicts of interest.

I. For the Joint-Defense Privilege To Apply, the Parties Asserting the Privilege Must Have Entered into a Joint-Defense Agreement

Mr. Ali contends that the joint-defense privilege “protects co-defendants’ communications with each other and their attorneys, regardless of whether they participate in a joint defense agreement (JDA).” AE 359A (AAA) at 1. Although he does not appear to assert this contention as a basis for denying the Motion, his contention is incorrect. For the joint-defense privilege to apply, “an agreement there must be.” *Hunton & Williams*, 590 F.3d at 285; *accord Am. Mgmt. Servs., LLC v. Dep’t of the Army*, 703 F.3d 724, 733 (4th Cir. 2013) (concluding that, for the joint-defense privilege to apply, “there must be an agreement or a meeting of the minds”); *see United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989) (concluding that the joint-defense privilege applied after finding that “[t]he attorneys had agreed to cooperate in all matters of mutual concern relating to the investigation by the government then in progress”); *Minebea Co. v. Papst*, 228 F.R.D. 13, 16 (D.D.C. 2005) (“[S]hared or jointly created material must pass an additional test: It must be disclosed pursuant to a common legal interest and pursuant to an agreement to pursue a joint defense.”); *Lugosch*, 219 F.R.D. at 237 (“In order then for documents and communications shared amongst these litigants to be considered confidential, there must exist an agreement, though not necessarily in writing, embodying a cooperative and common enterprise towards an identical legal strategy.”).

Otherwise, the privilege could bind defendants—without their consent—from disclosing information they received from another defendant, even where the defendants had not agreed to pursue a joint defense with their co-defendant. And it could establish—without their consent—an implied attorney-client relationship between the defendants and their co-defendant’s counsel. As the Prosecution explains in its Motion, the joint-defense privilege is an extension of the attorney-client privilege and, as such, establishes an implied attorney-client relationship between the defendant and the co-defendant’s counsel. *See* AE 359 (GOV) at 4-5 (citing *United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000) (concluding that “[a] joint defense agreement establishes an implied attorney-client relationship with the co-defendant” for the limited purpose of invoking

the attorney-client privilege to shield shared confidences); *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977) (explaining that, in a joint-defense agreement, each defendant’s counsel “is, in effect the counsel for all for the purposes of invoking the attorney-client privilege in order to shield mutually shared confidences”). Like assuming the obligation to keep certain communications confidential and pursuing a joint defense, entering into an implied attorney-client relationship—particularly where it could present the potential for a conflict of interest that might lead to withdrawal or disqualification of counsel (*see* AE 359 (GOV) at 5)—requires the Accused’s agreement. *See, e.g., Hunton & Williams*, 590 F.3d at 285; *Am. Mgmt. Servs.*, 703 F.3d at 733; *Stepney*, 246 F. Supp. 2d at 1076-79.

Before concluding that the privilege applies, courts thus require the party asserting the privilege to demonstrate that it has entered into a joint-defense agreement. *See, e.g., Hunton & Williams*, 590 F.3d at 285; *United States v. Weissman*, 195 F.3d 96, 98-100 (2d Cir. 1999) (rejecting defendant’s argument that “his conviction was obtained through the use of information subject to the common interest rule arising out of the attorney client privilege” where the defendant failed to prove a joint-defense agreement existed); *In re Grand Jury Proceedings*, 156 F.3d 1038, 1043 (10th Cir. 1998) (concluding that the intervenor “failed to meet the elements of a joint-defense privilege because he has failed to produce any evidence, express or implied, of a joint-defense agreement with the Hospital, and he has failed to show how the documents at issue here furthered the putative joint-defense strategy”); *Minebea Co.*, 228 F.R.D. at 17. “Documents exchanged before a [joint defense] agreement is established are not protected from disclosure.” *Hunton & Williams*, 590 F.3d at 285; *see In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986) (concluding Bevill failed to sustain its burden of proving the joint-defense privilege shielded communications from disclosure because “Bevill produced no evidence that the parties had agreed to pursue a joint defense strategy”). For the privilege to protect their confidential communications, a joint-defense agreement is necessary. The Accused cannot invoke the protections of the privilege without one.

II. The Allegedly Privileged Nature of Joint-Defense Agreements Supports Granting the Motion

Mr. Ali argues that the Commission should deny the Motion, claiming that any joint-defense agreement would likely include work product. His claim, if true, supports the Motion. According to Mr. Ali, any joint-defense agreement would likely include “a detailed road map to the litigation, investigative or analytical work of the parties” and would “divide responsibility for litigation, investigation, and analysis tasks between the parties, or commit the parties to contribute certain resources” toward their shared defense. AE 359A (AAA) at 2-3. This alleged likelihood demonstrates why granting the Motion is necessary: in engaging in a “common defense” (*id.* at 6), they are sharing client confidences, work product, and legal strategy and, in the process, may be establishing implied attorney-client relationships between the Accused and their co-Accused’s counsel.

As the *Stepney* court explained, the joint-defense privilege—an extension of the attorney-client privilege and work-product doctrine—imposes “on counsel a limited duty of confidentiality toward their client’s co-defendants regarding information obtained in furtherance of a common defense.” 246 F. Supp. 2d at 1075. This limited duty of confidentiality presents “the potential for conflicts of interest that might lead to the withdrawal or disqualification of a defense attorney late in the proceedings or the reversal of conviction on appeal.” *Id.* at 1077. To guard against this potential and ensure the Accused are informed of their rights under the privilege, the Commission should require the Accused and their counsel to commit their joint-defense agreements to writing, sign them, and submit them for the Commission’s review to ensure no conflicts will develop from the agreement, as the *Stepney* court did. *See id.* at 1076-79. Avoidance of conflicts is of special import in this case, where counsel for certain Accused continue to assert conflicts of interest even after the Military Judge has found none exist. *See* Joint Defense Motion for Reconsideration of AE 292QQ, AE 292SS (KSM, AAA).

Mr. Ali urges the Commission to disregard *Stepney* as factually distinguishable because, unlike in this case, not all the defendants in *Stepney* faced the same charges or had “positively

cohesive” interests. AE 359A (AAA) at 4-5. In ordering the defendants to commit their agreements to writing (and sign and submit them to the court for its review), the *Stepney* court noted that some of the defendants faced different charges and lacked “cohesive interests.” *Stepney*, 246 F. Supp. 2d at 1078. But it did so to explain why these facts made the potential for conflict (and thus the potential for disqualification and reversal on appeal) already presented by the joint-defense privilege *greater*. *Id.* It did not conclude that the potential for conflict, or the potential for disqualification or reversal on appeal, would cease to exist without these facts. To the contrary, as explained above, the court evinced that the joint-defense privilege itself is the source of the potential conflict of interest; this means that the potential exists irrespective of a defendant’s cooperation with the government. *Id.* at 1077. According to Mr. Ali, the Accused have agreed to engage “in a common defense for virtually their entire Guantanamo incarceration.” AE 359A (AAA) at 6. With the Accused having agreed to do so—an agreement being the *sine quo non* of the joint-defense privilege—the Commission should require the Accused and their counsel to commit those agreements to writing, sign them, and submit them to the Commission to guard against potential conflicts and ensure the Accused are informed of their rights under the privilege.

Mr. Ali notes an additional benefit of the joint-defense agreement: it has the benefit of “setting clear rules for withdrawal from the joint pool of information and strategy.” *Id.* at 4. No method other than committing such rules to writing could make those rules any clearer. Courts have recognized that although the privilege does not require an accused to commit joint-defense agreements to writing, it is the most effective method of proving a joint-defense agreement exists—a requirement for invoking the privilege’s protections. *See, e.g., Minebea Co.*, 228 F.R.D. at 16-17. It is also the most prudent course because it “protects against misunderstandings and varying accounts of what was agreed to by the attorneys and their clients,” *Stepney*, 246 F. Supp. 2d at 1079 n.5, and it “allow[s] each defendant the opportunity to fully understand his rights prior to entering into the agreement,” *United States v. Almeida*, 341 F.3d 1318, 1326 n.21 (11th Cir. 2003). This is particularly important here, where the Accused “have engaged in a common defense for virtually their entire Guantanamo incarceration” and yet might not be aware of or fully

understand the legal implications of their agreement to engage in a common defense. AE 359A (AAA) at 6.

Mr. Ali nonetheless asks the Commission to deny the Prosecution's request, claiming that all joint-defense agreements are protected from compelled disclosure by the work-product doctrine. *Id.* at 2. Even assuming this claim is true,¹ it does not present the obstacle Mr. Ali portrays because the Prosecution does not seek to compel the Accused to disclose any joint-defense agreements to the Prosecution. The Prosecution asks the Commission to review any joint-defense agreements *ex parte* and *in camera*—the opposite of what Mr. Ali characterizes (*id.* at 6) as an attempt by the government to “involve itself in internal defense affairs.” Assuming Mr. Ali is correct that all joint-defense agreements are privileged, submitting the Accused's joint-defense agreements to the Commission for its *ex parte*, *in camera* review would not terminate the privilege. As the U.S. Supreme Court recognized,

[D]isclosure of allegedly privileged materials to the district court for purposes of determining the merits of a claim of privilege does not have the legal effect of terminating the privilege. Indeed, this Court has approved the practice of requiring parties who seek to avoid disclosure of documents to make the documents available for *in camera* inspection and the practice is well established in the federal courts.

United States v. Zolin, 491 U.S. 554, 568-69 (1989) (citation omitted). Mr. Ali fails to explain how the Commission's *ex parte*, *in camera* review will harm him despite this well established practice; despite his use of the *ex parte*, *in camera* procedure more than ten times;² and despite his

¹ Courts have expressed doubt about similar claims. *See, e.g., United States v. Hsia*, 81 F. Supp. 2d 7, 11 n.3 (D.D.C. 2000) (doubting that “either the existence or the terms of a [joint-defense agreement] are privileged”); *see also Stepney*, 246 F. Supp. 2d at 1078 (“To the extent that joint defense agreements simply set forth the existence of attorney-client relationships—implied or otherwise—between various attorneys and defendants, the contents of such agreements do not fall within the attorney-client privilege.”).

² *See* Defense Notice of Motion To Compel the Convening Authority To Provide Expert Assistance (Ex Parte/Under Seal), AE 124 (KSM, WBA, RBS, AAA); Defense Motion To Compel the Convening Authority To Fund Expert Assistance (Ex Parte/Under Seal), AE 153 (AAA); Defense Ex Parte Under Seal Reply, AE 156F (AAA); Defense Notice of Defense Ex Parte Under Seal DSO Notification, AE 222 (AAA); Defense Motion To Compel (Expert Assistance) Ex Parte/Under Seal, AE 224 (AAA); Defense Ex Parte/Under Seal Motion, AE 261 (AAA); Defense Ex Parte/Under Seal Motion, AE 262 (AAA); Defense Ex Parte Supplement to AE 262, AE 262 (AAA Sup); Defense Ex Parte Under Seal Motion To Compel Convening Authority To Provide

refusal to reveal to the Commission whether he is even a party to a joint-defense agreement, much less that any joint-defense agreement in this case constitutes work product. AE 359A (AAA) at 2. (Because the doctrine protects documents and not facts, the Accused cannot assert the work-product protection to prevent disclosure of underlying facts, like whether they are a party to a joint-defense agreement. *See generally* Edna S. Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 802 (5th ed. 2007).) And although Mr. Ali claims that no party “to a hypothetical” joint-defense agreement should have to provide strategy information to the Commission, this claim rings hollow, as he has already submitted his theory of defense to the Commission and has done so voluntarily. Unofficial/Unauthenticated Transcript at 4265-66 (“DC [MR. CONNELL]: And we did file our theory of defense.”). Mr. Ali’s generalized assertions of privilege and speculative claims of harm thus do not support denying the Motion.

III. Mr. Ali’s Hypotheticals Also Fail To Provide a Basis for Denying the Motion

Mr. Ali also urges the Commission to rely on a string of hypotheticals to deny the Motion: if he enters into a joint-defense agreement with a co-Accused; if it “bear[s] of [sic] the question of when an alleged conspiracy ended”; and if the Prosecution attempts to obtain it, then requiring him to put his joint-defense agreement in writing might create inculpatory evidence that could be used against him. AE 359A (AAA) at 3. These hypotheticals not only incorrectly presume that Mr. Ali must produce inculpatory evidence to the Prosecution, but they fail to acknowledge that the Prosecution does not seek the agreement’s production for its review. The Prosecution has asked the Commission to compel the Accused to produce any joint-defense agreements *to the Commission*—not the Prosecution. AE 359 (GOV) at 1. Because it would not have any of these agreements, the Prosecution could not use them against the Accused. Although the Commission would have the agreements, Mr. Ali does not articulate a scenario, hypothetical or real, in which the Commission could use them as evidence against the Accused. Also, the work-product doctrine

Expert Assistance, AE 282 (AAA); Defense Ex Parte Under Seal Supplement To Compel Convening Authority To Provide Expert Assistance, AE 282 (AAA Sup); Defense Ex Parte/Under Seal Response, AE 282C (AAA); Ex Parte and Under Seal Joint Defense Motion, AE 326 (KSM, WBA, RBS, AAA); Defense Ex Parte/Under Seal Response, AE 339C (AAA).

is an evidentiary rule; so, if (as Mr. Ali claims) it applies to his hypothetical joint-defense agreement, and if the Prosecution were to seek its production (which it will not), the doctrine could protect the agreement from compelled disclosure to the Prosecution.³ And, as shown above, disclosing the agreement to the Commission would not terminate the protection. Finally, even if the agreement inculpated the Accused, there is “no ‘reverse *Brady*’ obligation” that would require Mr. Ali to produce inculpatory material to the Prosecution. *United States v. West*, 790 F. Supp. 2d 673, 681-82 (N.D. Ill. 2011). Because Mr. Ali fails to tether his hypotheticals to reality, the Commission should reject them as a basis for denying the Motion.

Mr. Ali’s fallback position then is that the Commission should decline to review any joint-defense agreements because of “factors unique to the military commissions.” AE 359A (AAA) at 5. One factor cited by Mr. Ali is that “[a]ll but two of the courtroom participants for defense, prosecution, and trial judiciary are paid by the Executive Branch of the United States government.” *Id.* To the extent Mr. Ali suggests that the Military Judge is biased, the Commission should reject the suggestion because no evidence supports it. Another factor is that the Chief Defense Counsel has the responsibility to guard against conflicts of interest. *Id.* While true, the Chief Defense Counsel is simply not accountable before this Commission for any failure to do so. The Commission has the clearest of duties to guard inquire and remedy such conflicts, and consigning its responsibility to the Chief Defense Counsel would risk the outcome that has afflicted other cases in which defense counsel, despite having similar responsibilities, failed to guard against conflicts, thereby precipitating counsel’s motion to withdraw on the eve of trial. *See, e.g., Henke*, 222 F.3d at 643 (reversing defendants’ convictions where the trial court improperly denied defense counsel’s motion to withdraw on the eve of trial). To avoid a similar outcome in this case, the Commission should grant the Prosecution’s Motion.

³ Work-product protection is not absolute. A court may order a party to disclose work-product materials when the movant demonstrates a substantial need for the work-product material and a hardship in obtaining the needed material by alternative, less intrusive means. *Hickman v. Taylor*, 329 U.S. 495, 511-12 (1947).

3. Conclusion

The Commission should grant the Motion because joint-defense agreements create the potential for a conflict of interest and, as Mr. Ali admits, the Accused “have engaged in a common defense for virtually their entire Guantanamo incarceration.” AE 359A (AAA) at 6. To guard against the potential for a conflict of interest presented by the Accused engaging in a common defense through consultations with the attorneys of his co-Accused, and to ensure the Accused understand their rights and obligations under any agreements to engage in a joint defense, the Commission should order the Accused and their counsel to commit their joint-defense agreements to writing, sign them, and submit them to the Commission for its *ex parte, in camera* review. Such an order would protect the allegedly privileged nature of the agreements and is consistent with the Commission’s and the parties’ interests in protecting fairly rendered verdicts on appeal and ensuring that the Accused receive conflict-free counsel, that fair legal proceedings are conducted within ethical standards, and that the Accused are informed of their rights under the joint-defense privilege.

4. Witnesses and Evidence

At this time, the Prosecution does not offer witnesses or evidence to support the Motion.

5. Additional Information

At this time, the Prosecution does not offer additional information to support the Motion.

ATTACHMENT A

