

**MILITARY COMMISSIONS TRIAL JUDICIARY  
NAVAL STATION 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

AE 380LL(WBA)

Defense Motion  
to Abate Commission Proceedings  
Until Resolution of the AE 380 Series

Date Filed: 14 March 2016

**1. Timeliness:** This motion is timely filed.

**2. Relief Sought:**

The Commission must abate all proceedings in this case until the Commission-ordered independent counsel resolves his/her task of conducting an inquiry and determining whether he should or ethically can file motions in an attempt to sever Mr. bin 'Atash's relationship with his current defense attorneys. Because Commission-ordered independent counsel must make an independent determination of whether such a severance request is properly founded in fact and law, he must investigate the conduct of Mr. bin 'Atash's current defense counsel. A pending investigation of current defense counsel in this capital case creates a conflict that impermissibly burdens defense counsel while the independent counsel's inquiry is pending.

**3. Overview:**

On 21 February 2016, this Commission issued AE 380II, an order directing the Chief Defense Counsel for Office of Military Commissions, BGen John Baker, to "file a memorandum of appointment for an appropriately cleared independent defense counsel to advise and assist Mr. bin 'Atash regarding his desire to sever his attorney/client relationship with [Detailed Learned Counsel Cheryl Bormann] and [Detailed Defense Counsel Michael Schwartz] to include any potential impacts from such a severance." (AE 380II at 3-4). This order came after the

Commission found no good cause to sever the attorney-client relationship between Mr. bin ‘Atash and Ms. Bormann on 28 October 2015 (AE 380BB) and no good cause to sever Ms. Bormann and Mr. Schwartz on 17 February 2016. Claiming that it was “unreasonable,” for Mr. bin ‘Atash to rely on detailed defense counsel (who at the time also included military counsel MAJ Matthew H. Seeger, USA, and civilian attorney Edwin A. Perry) to “help him file a motion to establish good cause to sever” his relationship with counsel, the Commission ordered independent counsel to conduct an inquiry. (AE 380II at 3). Although the Commission ordered BGen Baker to detail independent counsel or provide a status update of the detailing within 21 days of the order (14 March 2016), the Commission did not cancel the remainder of the February 2016 hearings and abate further proceedings until resolution of the independent counsel’s inquiry.

By issuing AE 380II, the Commission has ordered independent counsel detailed to conduct an inquiry into whether Mr. bin ‘Atash’s current defense counsel should be permitted to continue representing Mr. bin ‘Atash. Until the inquiry into defense counsels’ performance and conduct is resolved, detailed defense counsel burden under the conflict of investigation and Mr. bin ‘Atash is effectively unrepresented before the Commission. Because Mr. bin ‘Atash is four years into a complex capital case, continued proceedings without counsel would violate the Due Process Clause of the Fifth Amendment and the Sixth Amendment, and render any verdict of death contrary to the Eighth Amendment. As the Commission recognized in AE 292QQ, AE 292LLL, and AE 325H, conflict brought on by investigation of counsel must be handled by allowing the investigation to proceed while suspending substantive hearings before the Commission. In response to the AE292 series of filings, this Commission cancelled several hearings to allow independent counsel to advise and assist Ramzi bin al Shibh and report back to the Commission. Similarly, here the Commission cannot force Mr. bin ‘Atash to proceed with

his current detailed defense counsel while AE 380II and its inquiry on behalf of Mr. bin 'Atash remains ongoing. Accordingly, this Commission must abate the proceedings unless and until the inquiry envisioned in AE 380II is concluded and there is a resolution of the AE 380 series.

#### **4. Burden of Proof:**

The defense bears the burden of persuasion; the standard of proof is a preponderance of the evidence. R.M.C. 905(c)(1).

#### **5. Facts:**

- a. In April 2014, Defense Counsel for all of the Accused filed a joint motion to abate the proceedings and allow independent counsel to conduct an inquiry into potential conflicts of interests generated by an investigation by the FBI into one or more defense teams. (AE 292). After considering the statements and submissions by the Government regarding the nature and extent of the FBI investigation, this Commission ordered the appointment of independent counsel for Mr. Mohammad and Mr. bin al Shibh to advise them “on the possible conflict, the impact of the possible conflict and possible resolutions to the conflict.” (AE 292H at 3). This Commission thus directed the Chief Defense Counsel to file a memorandum of appointment within 7 business days. (AE 292H at 3-4). The Commission later found no need to for independent counsel for Mr. Mohammad. (AE 292QQ at 31).
- b. Although never in official abatement, this Commission canceled hearings scheduled in October 2014, December 2014, April 2015, June 2015, and August 2015, (AE 292LLL; AE 325H; AE 342D), because Mr. bin al Shibh’s counsel was subject to inquiry and burdened by conflict as a result. The Commission first ordered that Mr. bin al Shibh be severed from the other Accused, but held it in abeyance and ultimately rescinded the order after the Government agreed that a halt of the proceedings would be necessary to

resolve the issues raised in AE 292. (AE 292JJJJ at 4). Only after the Prosecution Special Review Team and Mr. bin al Shibh's independent counsel reported their findings and opinions to the Commission in October 2015 did the Commission resume hearings in Mr. bin al Shibh's case. (AE 292JJJJ at 6).

- c. On 28 October 2015, Mr. bin 'Atash requested that this Commission sever his relationship with Ms. Bormann and order the appointment of new Learned Counsel. (Unofficial/Unauthenticated Transcript 28 Oct 2015 at 8858). The Commission engaged in a colloquy with Mr. bin 'Atash and determined that no good cause existed to sever the attorney-client relationship. (AE 380BB).
- d. During the February 2016 hearings, Mr. bin 'Atash again attempted to sever his relationship with Ms. Bormann; this time adding his desire to sever his relationship with Mr. Schwartz. This Commission received into the record a letter written by Mr. bin 'Atash, which it construed as a motion to reconsider its October 2015 order denying his request to sever Ms. Bormann. (AE 380EE). After engaging in some colloquy with Mr. bin 'Atash (Trans. 16 Feb 2016 at 10196-10208) and reviewing a declaration by Chief Defense Counsel BGen John Baker finding no good cause to remove Ms. Bormann or Mr. Schwartz (AE 380GG), this Commission denied the request of Mr. bin 'Atash. (Trans. 17 Feb 2016 at 10244).
- e. Although this Commission found no good cause to remove Ms. Bormann and Mr. Schwartz, it ordered that the Chief Defense Counsel "file a memorandum of appointment for an appropriately cleared independent defense counsel to advise and assist Mr. bin 'Atash regarding his desire to sever his attorney/client relationship with [Detailed Learned Counsel Cheryl Bormann] and [Detailed Defense Counsel Michael Schwartz] to include any potential impacts from such a severance." (AE 380II at 3-4). Although the

Commission ordered BGen Baker to detail independent counsel or provide a status update within 21 days of the order (14 March 2016), the Commission did not cancel the remainder of the February 2016 hearings and abate further proceedings until there was a resolution of Commission-ordered inquiry into Mr. bin 'Atash's defense counsel.

- f. On 8 March 2016, this Commission issued a written order explaining the procedural history of the AE 380 series and reiterating its earlier findings that it found no good cause to sever the attorney-client relationship. In particular, this Commission held that Mr. bin 'Atash's "claim of loss of trust in his counsel was not objectively reasonable." (AE 380KK at 5). This Commission also opined that, although Ms. Bormann's attempt to withdraw as counsel and her opinion that the Military Commissions system did not allow for an effective attorney-client relationship was sincere, there was no "legitimate conflict of interest that would prevent appropriate representation." (AE 380KK at 6).

## **6. Law and Argument:**

Mr. bin 'Atash and the other accused before this Military Commission have both statutory and constitutional rights to counsel. See 10 U.S.C. §§ 948k, 949c (2012); Strickland v. Washington, 466 U.S. 668 (1984). An accused is entitled to counsel at every critical stage of the proceedings against him. Coleman v. Alabama, 399 U.S. 1, 7 (1970). The Commission sessions held in October 2015, December 2015, and February 2016 were part of a critical stage; and the sessions scheduled for April 2016 are also critical. The right to counsel is the right to effective assistance of counsel. See, e.g., McMann v. Richardson, 397 U.S. 759 (1970); Reece v. Georgia, 350 U.S. 85 (1955); Glasser v. United States, 315 U.S. 60 (1942). Inherent in the Sixth Amendment right to the effective assistance of counsel is the right to the assistance of counsel unencumbered by conflicts of interests. See Wood v. Georgia, 450 U.S. 261, 271 (1981) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a

correlative right to representation that is free from conflicts of interest.”); see also Glasser, 315 U.S. at 70 (“[T]he ‘Assistance of Counsel’ guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.”); United States v. Hurt, 543 F.2d 162, 165 (D.C. Cir. 1976).

The guarantee of conflict-free counsel takes on added constitutional dimensions in capital cases. The Sixth Amendment mandates the assistance of counsel because it is essential to effectuating the due process right “to receive a fair trial.” United States v. Cronin, 466 U.S. 468, 658 (1984). The Eighth Amendment, in turn, requires a heightened degree of fairness and reliability in capital prosecutions. Beck v. Alabama, 447 U.S. 625, 638 (1980). Denial of conflict-free counsel is the functional equivalent of failing to provide a defendant with any counsel at all. See Mickens v. Taylor, 535 U.S. 162, 167 (2002). The imposition of a death sentence following such a constitutional deprivation in a capital cases would be perilously close to “judicial murder.” Powell v. Alabama, 287 U.S. 45, 69 (1932). The nature of defense counsel conflicts of interest in a criminal trial is such that, where a defendant on appeal shows that “a conflict of interest actually affected the adequacy of his representation,” the defendant “need not demonstrate prejudice in order to obtain relief.” Cuyler v. Sullivan, 446 U.S. 335, 349 (1980); see also Mickens, 535 U.S. at 174; Strickland, 466 U.S. at 692.

In this instance, the record demonstrates that current defense counsel for Mr. bin ‘Atash are operating under the burden of conflict as a result of inquiry into their actions instituted by this Commission. Despite the Commission finding no good cause to sever the attorney-client relationship in October 2015 and February 2016, the Commission ordered an independent counsel to inquire into what further basis might exist for severing the relationship between Mr. bin ‘Atash and his defense counsel. The very existence of the Commission’s ruling in AE 380II

ordering that the Chief Defense Counsel appoint an independent counsel can only mean that an inquiry into defense counsels' conduct and performance remains ongoing. Indeed AE 380II directs the independent counsel to "advise and assist Mr. bin 'Atash regarding his desire to sever his attorney/client relationship with Ms. Bormann and Mr. Schwartz to include any potential impacts from a severance." (AE 380II at 3-4). Furthermore, because the sufficiency of any inquiry into the conduct and performance of defense counsel must be made clear on the record for purposes of appellate review, independent counsel must determine anew whether Mr. bin 'Atash's complaints and concerns have a factual basis and whether an additional motion for substitution of counsel is forthcoming. See United States v. Smith, 640 F.3d 580, 594 (4th Cir. 2011).

The issuance of AE 380II ordering independent counsel to inquire into defense counsels' performance and conduct places defense counsel in a position of conflict until the inquiry is resolved. Because defense counsel are operating under the burden of conflict, Mr. bin 'Atash effectively is without counsel during a critical stage in this proceeding. See Mickens, 535 U.S. at 167. To proceed with the hearings as scheduled would be reversible error in myriad ways because it would subject Mr. bin 'Atash to a violation of his Fifth Amendment right to due process and Sixth Amendment right to counsel, Cronic, 466 U.S. at 658, which in turn would render any verdict of guilt in this matter contrary to the Eight Amendment, Beck, 447 U.S. at 638 (1980).

When defense counsel for Mr. bin al Shibh and others were operating under potential conflict due to an FBI investigation of defense team members, this Commission understood the need for the proceedings to be halted until the independent counsel and Special Review Team had accomplished their work. (AE 292JJJJ at 4). Although this Commission did not

characterize the delay as an abatement, it did cancel several hearings in 2014 and 2015. (AE 292LLL; AE 325H; AE 342D).

Here, the Commission-ordered inquiry by independent counsel into the performance and conduct of defense counsel to advise and assist Mr. bin 'Atash regarding his desire to sever his attorney-client relationship warrants similar analysis to that done when the FBI was investigating defense team members working for Mr. bin al Shibh. Accordingly, the Commission must abate the proceedings unless and until the inquiry envisioned in AE 380II is completed and the Mr. bin 'Atash's defense counsel are conflict-free. See Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir. 1991); United States v. Wadsworth, 830 F.2d 1500, 1510-11 (9th Cir. 1987).

#### **7. Oral Argument:**

Because this Commission should hold no further sessions while independent counsel is conducting an inquiry into current defense counsel, a request for oral argument would be inappropriate. If the Commission deems that sessions should be held despite defense counsel operating under the burden of conflict, defense counsel request the opportunity to be heard in oral argument.

#### **8. Witnesses:**

None at this time.

#### **9. Conference with Opposing Counsel:**

The Prosecution cannot state a position until it reads the instant motion.

#### **10. Attachment:**

A. Certificate of Service

/s/  
CHERYL T. BORMANN  
Learned Counsel

/s/  
MICHAEL A. SCHWARTZ  
Detailed Defense Counsel

/s/  
EDWIN A. PERRY  
Detailed Defense Counsel

/s/  
MATTHEW H. SEEGER  
Major, U.S. Army  
Detailed Defense Counsel

# Attachment A

**CERTIFICATE OF SERVICE**

I certify that on 14 March 2016 I electronically filed with the Trial Judiciary and served on all counsel of record by e-mail the attached **Defense Motion to Abate Commission Proceedings Until Resolution of the AE 380 Series**.

/s/  
CHERYL T. BORMANN  
Learned Counsel

Attachment A