

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 524-34 (MFL)(RBS)

Motion for an Extension of Time to File a
Motion to Suppress in Accordance With
AE 524LLL

17 April 2019

- 1. Timeliness:** This request for an extension is timely filed.
- 2. Relief Sought:** Mr. Bin al Shibh respectfully requests a 90-day extension of time to file a motion to suppress the FBI statements and to produce his witness list, as ordered in AE 524LLL.¹ He further requests permission to ask for more time if his attempts to talk to witnesses are delayed through no fault of his own. An extension is necessary because of the importance and complexity of the issue, the ongoing burdens on the Accused's attempts to investigate, and the lack of fully cleared defense counsel with adequate time on the case.
- 3. Burden of Proof:** The Defense bears the burden of persuasion on this Motion.
- 4. Facts:**

Relevant Rulings and Motions in the AE 524 and AE 523 Series

¹ Mr. Bin al Shibh declines to use the term "Clean Team" in reference to the FBI interrogations of Mr. Bin al Shibh or his co-Accused. Whether the teams were "clean" will be an issue at the suppression hearings.

a. On 17 August 2018, the Commission issued its ruling in AE 524LL (RUL), suppressing the FBI statements made by Mr. Bin al Shibh and the other Accused because of the limitations on investigation imposed by Protective Order (PO) #4. At the time of the ruling, none of the Accused had filed a motion to suppress. Nor had any deadline for a motion been set or suppression hearing scheduled.

b. On 22 August 2018, the Government filed AE 524NN (GOV), a motion to reconsider and clarify AE 524LL.

c. On 28 December 2018, Mr. Bin al Shibh filed AE 524TT (RBS Sup), which argued that PO #4 was not working based on defense counsel's experience with a Unique Functional Identifier (UFI) witness who said s/he had not been presented the option of meeting with the Defense in person. Similarly, on 15 January, 2019, Mr. al Baluchi filed AE 524RR (AAA Sup), arguing that a different UFI witness had said that Mr. al Baluchi's request for an in-person interview had not been conveyed and that the Government had told him/her to wear a disguise.

d. On 3 April 2019, the Military Commission issued a ruling, AE 524LLL (RUL), finding that the Commission's previous suppression ruling was "premature," and ordering motions and a suppression hearing on the voluntariness of the FBI statements. *Id.* at 9. The Commission ordered the Accused to file any motions to suppress the FBI statements by 10 May 2019 and to give witness lists to the Government by the same date. *Id.* at 11. The Commission further ordered the Government to submit proposed modifications to PO #4 "to afford the Accused more opportunities to develop their claims" by 26 April 2019. *Id.* at 12.

e. On 2 April 2019, in AE 523M (RUL), the Commission approved a process for substituting Unique Medical Identifiers (UMIs) for JTF medical personnel who were related to

the Accused. Recognizing that these medical providers could be witnesses, the Ruling ordered the Government to provide the true names and contact information for the UMIs within 21 days of having the opportunity to convey the rights and responsibilities to those individuals. *See* AE 523M (RUL) at 8-9. This classified list of names was provided to the Defense on 17 April. On 12 April 2019, Mr. al Baluchi filed a motion to reconsider the ruling. *See* AE 523N (AAA).

f. There are currently hearings scheduled in Guantanamo Bay for the week of 29 April—3 May 2019, requiring travel from 27 April—4 May.

Other Facts Related to Mr. Bin al Shibh's Defense Team and Ongoing Investigation

g. In addition to Learned Counsel, Mr. Bin al Shibh has only two fully cleared defense attorneys at the present time—neither of whom has been cleared for more than five months. Mr. Wyatt A. Feeler, a civilian attorney who joined the team on 23 July 2018, was fully cleared on 19 December 2018. CPT John M. Balouziyeh, United States Army, joined the defense team on 25 February 2019, and was fully cleared only on 13 March 2019.

h. Mr. Bin al Shibh's other cleared attorneys are not available to work on the motion. Major Virginia Bare, USAF, began authorized [REDACTED] leave on 5 February 2019 and anticipates returning on 10 May. Lieutenant Mishael Danielson, United States Navy, left active duty on 1 March 2019 and transitioned to the United States Navy Reserve. He has not returned to the team at present. Additionally, his access to the Special Access Program (SAP) elapsed in the transition process. In February 2019, Ms. Alaina Wichner, civilian counsel, began transitioning off the team, as approved by Mr. Bin al Shibh and BGen John Baker, subject to a motion to the Commission for approval. Ms. Wichner no longer has an office in the defense team's space, has not actively worked on Mr. Bin al Shibh's case since February 2019 other than debriefing his

defense team and transferring attorney work product, and is now only working on administrative matters related to her pending departure.

i. Mr. Bin al Shibh's only other attorney, Lieutenant Commander Rachel Reddick, United States Navy Reserve, joined the defense team in October 2018 and is presently waiting on the adjudication of her TS/SCI clearance.

j. Mr. Bin al Shibh's entire defense team is scheduled at the end of May to move from their current office space, where they have worked since 2012. Members of the team are already doing work to prepare for this move, and the pace of preparations will only escalate over the coming weeks.

k. On 17 January 2019, defense counsel contacted the Prosecution, pursuant to PO #4 to request an interview with another one of the UFIs listed as willing to talk to the Defense. The Prosecution did not respond to this request. On March 5 2019, defense counsel sent a renewed request for an interview with the UFI. On 16 April 2019, counsel was informed that the witness was available [REDACTED] May 2019.

5. Law and Argument:

a. The suppression of Mr. Bin al Shibh's statements to the FBI presents one of the most important issues in this pre-trial litigation.² Not only is the issue critical to the defense of this capital case, but the voluntariness of a statement requires a thorough and fact intensive inquiry. *See Reck v. Pate*, 367 U.S. 433, 442 (1961) (finding that the voluntariness determination requires

² The Government recognized as much in its motion to reconsider, AE 524NN (GOV), highlighting several times how significant this decision was. The Government called the evidence that has been suppressed "critical," and the issue "important" in the motion overview. AE 524NN (GOV) at 2. It referred to the facts as having "important details," the impact of the decision as risking "important evidence," and evidence as to the Accused's knowledge and states of mind as "vitally important." *Id.* at 3, 35, 51. The government reiterated that the evidence is "critical" seven times in this filing. *Id.* at 30, 34, 47, 65.

a thorough inquiry into the circumstances of each case). Indeed, counsel are aware of no case in United States history that has involved anything approaching the amount of time, quantity of evidence, and number of witnesses related to Mr. Bin al Shibh's experiences in the Rendition, Detention, and Interrogation (RDI) program and subsequent transfer to Guantanamo Bay.

b. Prior to AE 524LLL, Mr. Bin al Shibh, as well as the other Accused in this case, had not filed a motion to suppress. Nor had the Commission set a deadline to do so, and for good reason. Despite the passage of more than a decade since the statements at issue, much of the evidence that goes to the very heart of a voluntariness claim – especially regarding the involvement of the FBI in the RDI program – was only provided to the Defense in late 2018. Given the importance of this issue and the thorough consideration required, the Commission should give the Defense more time to file its motion.

c. Equally importantly, the Commission should grant an extension specifically because of the investigative hurdles the Defense have faced in preparing for this issue. The Commission is well aware of the problems counsel for both Mr. Bin al Shibh and Mr. al Baluchi encountered in talking to witnesses. *See* AE 524TT (RBS Sup); AE 524RR (AAA Sup). The Defense remains unaware of whether it has actually had full access to all the witnesses who would be willing to speak to counsel. Mr. Bin al Shibh continues to face challenges in setting up interviews under the strictures of PO #4, and the modifications ordered by the Commission from the Government on 26 April 2019, the contents of which are still unknown, will do nothing to rectify this problem in terms of the motion and witness list currently due on 10 May 2019. Even if the modifications are helpful, two weeks is not enough time to conduct an investigation of any magnitude, let alone

one of this scope, especially when one of those two weeks is a hearing week scheduled at Guantanamo Bay.

d. Moreover, Mr. Bin al Shibh only received the list of the names and contact information for JTF medical personnel contemplated in AE 523M (RUL) on 17 April. Medical personnel who provided care to Mr. Bin al Shibh could provide relevant testimony about his ability to give the statement at issue voluntarily as well as relevant testimony about any lingering effects of his treatment in the RDI program. Mr. Bin al Shibh should have additional time to investigate and develop this evidence before he has to file a motion to suppress and a witness list.

e. Finally, Mr. Bin al Shibh's team currently faces staffing issues that prevent the filing of such an important motion on such an expedited deadline. The team only has one military counsel – who has been cleared for only one month and has had full computer access for only three weeks. The only civilian attorney besides Learned Counsel, Mr. Feeler, only received his TS/SCI clearance on 19 December 2018. Two new civilian attorneys have been offered positions on Mr. Bin al Shibh's defense team, but will not begin working until after the middle of May at the earliest and must begin the security clearance process without having had any clearance in the past. Mr. Bin al Shibh requests more time to enable his attorneys to thoroughly analyze the extensive evidence required to litigate this question and to draft a motion that will adequately raise all of the issues necessary for a full and fair consideration.

For all these reasons, Mr. Bin al Shibh respectfully requests a 90-day extension from the current deadline to file his motion to suppress and produce his witness list. He further requests permission to seek more time if his attempts to interview witnesses are frustrated or delayed through no fault of his own.

6. Witnesses: None

7. Conference: The Prosecution opposes any motion for an extension in filing a motion to suppress.

8. Attachments:

A. Certificate of Service

Respectfully submitted,

//s//
JAMES P. HARRINGTON
Learned Counsel

//s//
WYATT A. FEELER
Defense Counsel

//s//
JOHN M. BALOUZIYEH
CPT, USA
Defense Counsel

//s//
MISHAEL A. DANIELSON
LT, JAGC, USN
Defense Counsel

//s//
ALAINA M. WICHNER
Defense Counsel

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on 17 April 2019, I electronically filed AE 524-34 (MFL)(RBS) Motion for an Extension of Time to File a Motion to Suppress in Accordance With AE 524LLL and served it on all counsel of record by e-mail.

//s//

JAMES P. HARRINGTON
Learned Counsel