

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 615D (GOV SRT)

Reply by Special Review Team
to AE 615 (WBA), Defense Motion to
Conduct Thorough Inquiry into Actual
and/or Potential Attorney Conflict of
Interest Pursuant to R.M.C. 901 and
Holloway v. Arkansas, 435 U.S. 475 (1978)
and to Cancel Proceedings Pending Inquiry

17 January 2019

1. Timeliness

This reply by the Special Review Team ("SRT") to AE 615 (WBA) is timely filed pursuant to the Commission's order of 11 January 2019. AE 615B.

2. Relief Sought

Because there is no conflict of interest and the procedures outlined by the Commission in AE 292QQ (Amended Order) were followed, the SRT respectfully requests that the Commission deny Mr. bin 'Attash's Motion (AE 615 (WBA)), which seeks an inquiry into an alleged actual and/or potential attorney conflict of interest and the cancellation of proceedings in the above-captioned case during the pendency of such an inquiry.

3. Burden of Proof

The Defense, as the moving party, must demonstrate by a preponderance of the evidence that the relief sought in AE 615 (WBA) is warranted. R.M.C. 905(c)(1)-(2).

4. Facts

On 9 January 2019, Mr. Walid bin ‘Attash filed a motion to conduct an inquiry into actual or potential attorney conflict of interest and to cancel proceedings until an inquiry has been completed. AE 615 (WBA). On 11 January 2019, the Commission ordered expedited briefing on the issue raised by Mr. bin ‘Attash in AE 615, and indicated that the Government Special Trial Counsel, as detailed in AE 0003L (GOV), is the appropriate counsel to represent the United States in connection with AE 615 (WBA).¹ AE 615B.

5. Overview

In AE 615, counsel for Mr. bin ‘Attash assert that they are suffering from a conflict of interest. This assertion is based on the incorrect assumption that their defense team is under investigation by the Federal Bureau of Investigation (“FBI”). As explained in the attached declaration, no counsel of record nor any known current member of the defense team for Mr. bin ‘Attash is currently under criminal investigation by the FBI. Accordingly, Mr. bin ‘Attash’s defense team cannot be burdened by a conflict of interest arising from such an investigation, and no further inquiry into whether a conflict exists is warranted.

6. Law and Argument

A. There Is No Possible Conflict of Interest Because There Is No FBI Investigation of Any Current Counsel of Record or Known Defense Team Member for Mr. bin ‘Attash.

Counsel for Mr. bin ‘Attash have asserted that they are conflicted because their “Defense Team is under investigation by the Federal Bureau of Investigation.” AE 615 (WBA) at 3, 21. *See also id.* at 13 (“In December 2018, Defense Counsel for Mr. bin ‘Atash learned that they were

¹ The Special Trial Counsel detailed in AE 0003L (GOV) is referred to herein as the Special Review Team (“SRT”).

now the subject of an FBI investigation.”), 20 (“At this moment, Mr. bin ‘Atash’s Defense Team is under investigation by the FBI.”), 25 (suggesting that defense counsel for Mr. bin ‘Attash are “the target of an ongoing FBI investigation”). The claim by Mr. bin ‘Attash’s counsel that they are being investigated by the FBI appears to be an assumption based on information provided by [REDACTED], a former paralegal for Mr. bin ‘Attash’s defense team, about questions the FBI asked him after he was no longer a member of the defense team.² This assumption is incorrect. As described in the attached declaration, searches of FBI holdings provided no indication that any current counsel of record for Mr. bin ‘Attash nor any current known member of his defense team³ is under investigation by the FBI. *See* Attachment B (Declaration of Supervisor Special Agent John F. Stofer), ¶¶ 8-12. Mr. bin ‘Attash’s motion for an inquiry into an actual or potential attorney conflict of interest and a cancellation of proceedings pending the outcome of such an inquiry should therefore be denied.

An attorney who is under criminal investigation for the same or related offense as his or her client and by the same authority that is prosecuting his or her client may suffer from a conflict of interest requiring further inquiry by the court and, potentially, disqualification or a waiver of the conflict by the client. *See United States v. Lowry*, 458 F.3d 791, 807-08 (8th Cir. 2006)

² Mr. bin ‘Attash’s motion leaves the false impression that [REDACTED] was serving as a paralegal on Mr. bin ‘Attash’s defense team at the time he was interviewed by the FBI. *See* AE 615 (WBA) at 1 (“On 10 December 2018 . . . [REDACTED] was permitted by the Defense Team to assist his family in relocating from the Washington, DC area [REDACTED] 3 (“[REDACTED] “last day in the Defense Team’s physical office was 7 December 2018”). In fact, [REDACTED] detail to Mr. bin ‘Attash’s defense team ended on 7 December 2018, and he was not interviewed by the FBI until 20 December 2018, nearly two weeks after his detail with Mr. bin ‘Attash’s defense team ended. *See* AE 615 WBA, Attachment A (Declaration of [REDACTED]), ¶¶ 1, 4, 18.

³ The SRT is not aware of any authority stating that an investigation of a non-attorney member of a defense team can give rise to a conflict of interest. However, even if there were such authority, it would be unavailing. As the attached declaration states, comprehensive searches of FBI holdings showed no indication of any ongoing FBI investigation of any current attorney of record or known non-attorney member of Mr. bin ‘Attash’s defense team. *See* Attachment B, ¶¶ 8-12. Closed investigations or investigations of former members of a defense team likewise would not give rise to a conflict of interest. *See, e.g., United States v. Lewisbey*, 843 F.3d 653, 657 (7th Cir. 2016) (withdrawal of an attorney under criminal investigation cured potential conflict and removed any possible Sixth Amendment concern).

(conflict existed because attorney “was the subject of a fraud investigation – the same type of claim for which [the client] was being prosecuted – by the same United States Attorney’s office that prosecuted [the client]”); *Armiendi v. United States*, 234 F.3d 820, 824 (2d Cir. 2000) (actual conflict of interest may exist where lawyer “was being criminally investigated by the same United States Attorney’s office that was prosecuting” the client); *Thompkins v. Cohen*, 965 F.2d 330, 332 (7th Cir. 1992) (stating that a situation in which the criminal defendant’s counsel is under criminal investigation “can create a conflict of interest” because “[i]t may induce the lawyer to pull his punches in defending his client lest the prosecutor’s office be angered by an acquittal and retaliate against the lawyer”). *See also United States v. Saccoccia*, 58 F.3d 754, 772 (1st Cir. 1995) (conflicts based on investigation of counsel “tend to involve circumstances in which an attorney has reason to fear that a vigorous defense of the client might unearth proof of the attorney’s criminality”); *Briguglio v. United States*, 675 F.2d 81, 82 (3d Cir. 1982) (evidentiary hearing was required where counsel was under investigation by the same United States Attorney’s Office that was prosecuting the client and the client’s name had been mentioned at the trial of counsel’s co-defendants).

Where an attorney is under investigation for a different offense or by a different prosecuting authority, courts have generally found no conflict of interest. *See, e.g., Blake v. United States*, 723 F.3d 870, 881 n.10 (7th Cir. 2013) (“[Defense counsel’s] case was being investigated by a separate U.S. Attorney’s office under the direction of the Department of Justice. Thus, [defense counsel] would have had no basis on which to fear that in representing [his client] in a case being prosecuted within the Southern District of Illinois he would provide the U.S. Attorney’s office in the Central District additional evidence about his own misconduct, or that he was somehow incited to pull punches in [his client’s] defense”); *Moss v. United States*, 323 F.3d 445, 473 (6th Cir. 2003) (no

conflict where there was no nexus between an alleged Internal Revenue Service investigation of counsel and counsel's representation of the client); *id.* (“this Court has held that an actual conflict of interest does not arise where the client and the attorney are being investigated by different authorities”); *Roach v. Martin*, 757 F.2d 1463, 1479 (4th Cir. 1985) (no conflict where attorney “was not under investigation by the same authorities that were prosecuting” client).

And where there is no investigation of counsel at all, as is the case here (*see* Attachment B, ¶¶ 8-12), courts have held that there is no possibility of a conflict. This makes sense, as where there is no threat of prosecution, counsel necessarily has neither an incentive to pull punches nor a reason to fear exposing his or her culpability. For example, in *Harrison v. Motley*, 478 F.3d 750 (6th Cir. 2007), a capital case, the court of appeals stated: “Although a conflict of interest may arise where defense counsel is subject to a criminal investigation, *see Taylor v. United States*, 985 F.2d 844, 846 (6th Cir. 1993), we have noted previously that ‘[t]here lacks any controlling authority to support the proposition that an attorney’s *fear* of investigation may give rise to a conflict of interest.’” *Id.* at 757 (quoting *Moss*, 323 F.3d at 473) (emphasis in *Harrison*); *see also* AE 292QQ (AMENDED ORD) at 26 (recognizing and adopting this rule).

Mr. bin ‘Attash relies on *Holloway v. Arkansas*, 435 U.S. 475 (1978), to argue that the Commission must defer to defense counsel’s own averments that they are conflicted. *See* AE 615 (WBA) at 20-21. However, *Holloway* involved a different kind of conflict from the one at issue here, and the rationale offered in that case for adopting defense counsel’s own assessment of whether they are burdened by conflict does not apply. In *Holloway*, the potential conflict arose from a single counsel’s representation of multiple codefendants with potentially divergent interests—not a potential conflict from a criminal investigation of defense counsel as is alleged here. The Supreme Court in *Holloway* considered whether a defendant was deprived of his right

to counsel when the trial court denied defense counsel's motion to appoint separate counsel for codefendants and declined to inquire further into the risk of conflict arising from the joint representation. Defense counsel in that case, who had been appointed to represent multiple codefendants in a state criminal trial, alerted the court that he faced a potential conflict of interest in light of confidential information he received from separate clients. *Id.* at 476. It was against this backdrop—in which confidential client communications formed the basis for the conflict-of-interest claim—that the Court noted that “an ‘attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.’” *Id.* at 485 (quoting *State v. Davis*, 513 P.2d 1025, 1027 (1973)). Mr. bin ‘Attash’s motion quotes from this language selectively, omitting that it applies specifically to “an ‘attorney representing two defendants in a criminal matter’”—a circumstance not present here. *See* AE 615 (WBA) at 20. Even in the context of joint representation, the Court indicated that defense counsel’s own assessments of conflict are merely one of several persuasive considerations, adding that its holding does not “preclude a trial court from exploring the adequacy of the basis of defense counsel’s representations regarding a conflict of interests” *Id.* at 487.

When a defense counsel asserts a potential conflict arising from an alleged criminal investigation of counsel, the case law is clear that where no ongoing investigation of counsel exists, there necessarily cannot be any conflict, regardless of whether counsel has a subjective fear of an investigation or its potential consequences. In *Moss*, 323 F.3d at 472-74, the court found no conflict of interest where the government made clear that it had not launched an investigation against the attorney. And in *United States v. Montana*, 199 F.3d 947, 949 (7th Cir. 1999), the court of appeals found no conflict where the lawyer was not under investigation. The court

dismissed as “pure speculation” the argument that the lawyer “*may* have feared that he would be investigated if he didn’t pull his punches,” *id.* (emphasis in original), and added that because the lawyer “was not in jeopardy of being prosecuted,” there was “no basis for an inference that he was intimidated by a threat of prosecution if he didn’t pull his punches in defending his client,” *id.* See also *Lafuente v. United States*, 617 F.3d 944, 947 (7th Cir. 2010) (“If [defense counsel] was not investigated, or at least was unaware of any investigation, there would be no conflict of interest, and [defendant’s conflict] claim would necessarily fail.”); *Thompkins*, 965 F.2d at 332 (“presumably the fear [of retaliation by the government] would have to be shown before a conflict of interest could be thought to exist”); *United States v. Jackson*, Nos. 07 C 6409, 96 CR 815, 2008 WL 4814919, at *7 (N.D. Ill. Nov. 4, 2008) (“The trial judge held a hearing on the issue of conflict and found that Jackson’s counsel was not under any investigation. Since the court determined that Jackson’s counsel was not under investigation, it found that there was no conflict.”); *United States v. Hoffman*, 926 F. Supp. 659, 678 (W.D. Tenn. 1996) (no actual conflict of interest where there was “no proof that [counsel] had been indicted or arrested for any criminal charges” and “no proof that there was an on-going criminal investigation relating to these potential charges against [counsel]”). Indeed, this Commission has already concluded in this case that “if there is no ongoing investigation, there is no conflict of interest.” See AE 292QQ (AMENDED ORD) at 24.

Because the potential conflict claim raised by Mr. bin ‘Attash’s counsel stems from their assertion that they are under investigation by the FBI, the FBI (as the alleged investigating agency) is in the best position to provide information on whether there is an ongoing investigation that could give rise to a potential conflict for Mr. bin ‘Attash’s counsel. The attached declaration certifies that no current counsel of record or known defense team member for Mr. bin ‘Attash is the subject or target of an investigation by the FBI. See Attachment B, ¶¶ 8-12. While the

Commission has been informed *ex parte* and in camera of additional facts related to the issue raised by Mr. bin ‘Attash in AE 615 (WBA) in compliance with Amended Order AE 292QQ, the Commission need not rely on nonpublic statements to deny Mr. bin ‘Attash’s motion requesting additional inquiry into attorney-client conflict and a cancellation of proceedings. The attached declaration, which certifies under penalty of perjury that the declarant is not aware of any ongoing investigation of counsel of record for Mr. bin ‘Attash or any known member of his defense team after undertaking extensive steps to determine the existence of any such investigation (*see* Attachment B, ¶¶ 8-12), provides a sufficient basis for the Commission to rule that Mr. bin ‘Attash’s counsel is not operating under a conflict of interest and no further inquiry is required.

As stated in Mr. bin ‘Attash’s motion, attorneys also may have conflicts of interest under the relevant professional responsibility rules. Generally, a lawyer shall not represent a client if there is a significant risk that the representation of the client will be materially limited by a personal interest of the lawyer. Model Rules of Prof’l Conduct R. 1.7(a)(2). Where there is no criminal investigation of counsel, there is no risk that the representation of the client will be materially limited by the lawyer’s personal interest in avoiding prosecution. For the reasons stated earlier and supported by the attached declaration, there is no conflict of interest under the professional responsibility rules.⁴

Mr. bin ‘Attash’s motion also suggests that the FBI has obtained privileged information in connection with an investigation that involved the interview of [REDACTED]. *See* AE 615 (WBA) at 21. While this assertion does not itself bear on the question of whether Mr. bin ‘Attash’s counsel suffers from a conflict of interest, the SRT exists, in part, to ensure that if the FBI has been or in the future is exposed to any privileged Defense Team information, the prosecution team in the

⁴ All jurisdictions’ professional responsibility rules are based on the Model Rules.

above-captioned case is not exposed to any such information. Accordingly, to protect the integrity of the prosecution and the Sixth Amendment rights of the defendants, the SRT has implemented protocols to “wall off” the prosecution team from any privileged Defense Team information that the FBI has or may in the future obtain. The SRT also continues to keep the Commission apprised of any investigations or referrals of the kind described in Amended Order AE 292QQ.

B. Because There Is No Possible Conflict of Interest, No Inquiry By the Commission Is Warranted.

Where there is no possibility of a conflict of interest because there is no investigation of defense counsel, no inquiry or colloquy by the court is warranted. As the Eighth Circuit said in *Lowry*, “[w]henever the court’s inquiry reveals that a criminal defendant’s attorney in fact suffers from an actual or potential conflict, the court has a subsequent “disqualification/waiver” obligation.’ . . . If, however, the court finds that no conflict exists at all, the court has no further obligation.” 458 F.3d at 807 (quoting *United States v. Levy*, 25 F.3d 146, 153 (2d Cir. 1994)). See *Lafuente*, 617 F.3d at 947 (“The government could obviate the need for an evidentiary hearing by simply confirming, through an affidavit, that [defense counsel] was never under investigation.”); *Moss*, 323 F.3d at 473-74 (where attorney “did not labor under even a *potential* conflict of interest,” no colloquy by court was required) (emphasis in original). See also *Blake*, 723 F.3d at 882 n.11 (requirement of evidentiary hearing under *Holloway v. Arkansas*, 435 U.S. 475 (1978), and *Cuyler v. Sullivan*, 446 U.S. 335 (1980), applies only where “the district court requires joint representation over a timely objection”).

Here, because no plausible claim of a conflict exists in light of the absence of any investigation of counsel for Mr. bin ‘Attash, it does not “appear[] that any counsel may be disqualified” on this basis, and no inquiry by the Commission is warranted. R.M.C. 901(d)(3); see

also R.M.C. 901(d)(4). The government's representation that no investigation of defense counsel is pending is sufficient to resolve the conflict-of-interest issue. *See Lafuente*, 617 F.3d at 947.

7. Oral Argument

The Special Review Team does not request oral argument.

8. Witnesses and Evidence

The Special Review Team relies on the attached declaration in support of this submission.

9. Attachments

A. Certificate of Service, dated 17 January 2019.

B. Declaration by FBI Supervisory Special Agent John F. Stofer, dated 17 January 2019.

Respectfully submitted,

//s//

Fernando Campoamor-Sánchez

Kevin Driscoll

Vijay Shanker

Heidi Boutros Gesch

Jocelyn Ballantine

Special Review Team

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 17th day of January 2019, I filed AE 615D (GOV SRT), the **Reply by Special Review Team** to AE 615 (WBS), Defense Motion to Conduct Thorough Inquiry into Actual and/or Potential Attorney Conflict of Interest Pursuant to R.M.C. 901 and *Holloway v. Arkansas*, 435 U.S. 475 (1978) and to Cancel Proceedings Pending Inquiry, and I served a copy on defense counsel of record by electronic mail.

//s//

Heidi Boutros Gesch
Special Trial Counsel
Office of Military Commissions

ATTACHMENT B

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

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	Declaration by Supervisory Special Agent John F. Stofer in Support of Government Submission by Special Review Team, AE 615D (GOV SRT) 17 January 2019
--	---

I, John F. Stofer, a Supervisory Special Agent with the Federal Bureau of Investigation, hereby depose and state as follows:

1. I make this declaration in support of the pleading, AE 615D (GOV SRT), filed on 17 January 2019 on behalf of the United States.
2. I have been employed with the Federal Bureau of Investigation (hereinafter "FBI") since 2004. I am currently a Supervisory Special Agent ("SSA") assigned to the Counterintelligence Division of the FBI [REDACTED].
3. In or about December 2018, my assignment to the Special Review Team (SRT) required that I assist with its representation of the United States in litigation before the Commission related to legal issues [REDACTED].
4. This declaration is intended to provide additional factual information to respond to allegations made by Mr. bin 'Attash's defense team in AE 615 (WBA).
5. In making this declaration, I have received information from other FBI agents and officials. In addition, I have reviewed documents and reports during the course of my work with the SRT. The statements contained in this declaration are based on my own observations, document reviews, and reliable information provided to me by other FBI agents and officials in the normal course of my employment with the FBI.

6. [REDACTED]

7. [REDACTED] was interviewed by the FBI on or about 20 December 2018.

8. As of 17 January 2019, I am not aware of any information indicating that any counsel of record or current known member of a defense team in *United States v. Mohammad, et al.*, is currently under investigation by the FBI. I make this representation based on the FBI's searches and review of FBI holdings across the FBI.

9. At my request, [REDACTED] conducted a query against the FBI's Central Records System (CRS) [REDACTED] of current counsel of record and current known defense team members for all defense teams in *United States v. Mohammad, et al.* [REDACTED]

[REDACTED] Searching the FBI's CRS is the means by which the FBI can determine what retrievable information, if any, the FBI may have in its files on a particular subject matter or individual.

10. On 16 January 2019, the identities of current known defense team members were furnished by the Department of Defense ("DoD") Washington Headquarters Services Office of Special Security (WHS OSS) to the SRT. [REDACTED]

[REDACTED] It is also my understanding that the identities of these personnel have not been shared with the regular Prosecution team and were only provided to me for the purpose of responding to *United States v. Mohammad, et al.*, AE 615 (WBA), Defense Motion to Conduct Thorough Inquiry into Actual and/or Potential Conflict of Interest to R.M.C. 901 and *Holloway v. Arkansas*, 435 U.S. 475 (1978), and to Cancel Proceedings Pending Inquiry.

11. The CRS was queried for all identities of current known defense team members provided by DoD to the SRT. The query included all case classifications contained within the CRS. Based on these searches, there is no indication that any current counsel of record or current

known defense team member is the subject of any open national security or criminal FBI investigation.

12. Based upon the efforts described above, as of 17 January 2019, on behalf of the FBI, I represent that the FBI is not aware of any information indicating that any current counsel of record or current known member of a defense team in the case of *United States v. Mohammad, et al.*, pending before the Military Commissions Trial Judiciary at Guantanamo Bay, is currently under investigation by the FBI.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on 17 January 2019.

//s//

Supervisory Special Agent John F. Stofer