

**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 615DD(WBA)**

**Defense Reply** to AE 615CC(GOV SRT),  
Response by Special Review Team to  
Defense Motion for Particularized  
Information Regarding Investigation of  
Defense Paralegal SSG Skeete.

**Date Filed: 9 April 2019**

1. **Timeliness**: This reply is timely filed. RC 3.7.e.2.
2. **Reply**: In AE 615BB(WBA), Counsel for Mr. bin 'Atash request that the Military Judge "inform Defense Counsel whether [REDACTED] provided to Defense Counsel by the SRT involves or concerns the detention of SSG Brent Skeete at Joint Base Myer-Henderson Hall in Arlington, Virginia, in July 2018." (AE 615BB(WBA) at 1). Defense Counsel detail that if the July 2018 incident at Joint Base Myer-Henderson Hall is the event precipitating or warranting the subsequent [REDACTED] then "Defense Counsel are witnesses in the investigation" and "possess critical and important evidence that would be necessary to any defense" offered by SSG Skeete. (AE 615BB(WBA) at 4). Moreover, Defense Counsel note that if the "investigation involve[s] any purported radicalization of SSG Skeete," Defense Counsel "have another conflicting obligation: to protect and defend Mr. bin 'Atash against any such allegation that he advanced or supported such radicalization." (AE 615BB(WBA) at 4).

The SRT responds, arguing that the "Military Judge decline to provide Mr. bin 'Attash's [sic] Defense Counsel with the information they seek because to do so would potentially jeopardize an [REDACTED] (AE 615CC(GOV SRT) at 1). The SRT first asserts that the [REDACTED] investigation was opened a full five months after the

incident described by Mr. bin ‘Attash [sic] in his motion.” (AE 615CC(GOV SRT) at 2). The SRT further claims that the FBI “was not involved in the arrest of SSG Skete [sic] in July 2018” and was not “involved in any determination regarding the resolution of that matter.” (AE 615CC(GOV SRT) at 2). The SRT then reveals that the “investigation remains pending, and no conclusion has been reached as to whether charges will be brought against the unidentified subject(s) of the investigation.” (AE 615CC(GOV SRT) at 2). In response to Defense Counsel concerns about an investigation into possible “radicalization of SSG Skete [sic],” that “would also give rise to a competing conflict to defend Mr. bin ‘Attash [sic] against allegations that he ‘advanced or supported radicalization,” the SRT argues that “[e]ven if correct, this potential conflict is a future conflict, and would not impact Defense Counsel’s current ability to ethically represent Mr. bin ‘Attash [sic].” (AE 615CC(GOV SRT) at 3, n.2).

The SRT’s Response is decidedly unhelpful in resolving the ethical conflict confronting Defense Counsel. Importantly, the SRT never denies that [REDACTED] provided to Defense Counsel by the SRT involves or concerns the detention of SSG Brent Skeete at Joint Base Myer-Henderson Hall in Arlington, Virginia, in July 2018.” (AE 615BB(WBA) at 1). The SRT also does not deny that the July 2018 incident at Joint Base Myer-Henderson Hall forms the precipitating or underlying event that has now culminated in a [REDACTED] investigation. Instead of issuing a simple denial, the SRT seeks to obfuscate and confuse.

The SRT pronounces that the “FBI was not involved in the arrest of SSG Skete [sic].” (AE 615CC(GOV SRT) at 2). This is not at issue and not germane. Defense Counsel have never claimed that the FBI was involved in the arrest of SSG Skeete in July 2018. The SRT then claims that the FBI was not “involved in any determination regarding the resolution of that matter.” (AE 615CC(GOV SRT) at 2). Again, Defense Counsel made no assertion that the FBI had been

involved in that determination. Whether the FBI was initially involved in the July 2018 incident is not germane to the current ethical dilemma.

The SRT goes on to claim that the [REDACTED] investigation was opened a full five months after the incident described by Mr. bin ‘Atash in his motion.” (AE 615CC(GOV SRT) at 2). Were that true, the FBI would have opened its [REDACTED] in December 2018. This assertion is at odds with earlier claims by the SRT; in an earlier pleading Defense Counsel were told that the investigation was opened before December 2018. [REDACTED]

[REDACTED] Notably, the SRT continues to ignore—and never denies—that SSG Skeete was interrogated by the FBI for more than two hours, under dubious circumstances, about Mr. bin ‘Atash and members of his Defense Team. (AE 615(WBA)). Regardless, none of the SRT’s immediate representations—some inconsistent with earlier declarations—answers the ultimate question: does this [REDACTED] investigation involve or arise from the July 2018 incident with SSG Skeete at Joint Base Myer-Henderson Hall in Arlington, Virginia?

If the investigation relates to the July 2018 incident with SSG Skeete at Joint Base Myer-Henderson Hall, Defense Counsel are witnesses. Mr. Montross, one of the Undersigned Defense Counsel, was specifically questioned by a Fort Myer investigator about SSG Skeete’s state of mind and motive. Ms. Bormann and Mr. Perry were also both involved in attempts to secure their paralegal’s release and safeguard his property. Each of the civilian counsel are witnesses—seemingly favorable—should SSG Skeete face charges in a separate forum. Unfortunately, it is also more complicated. Should the Government suggest that SSG Skeete was somehow “radicalized” and poses a threat to national security similar to that posed by Nidal Hassan in the Fort Hood shooting, the Government will likely seek to implicate Mr. bin ‘Atash. Defense Counsel

will also defend and protect Mr. bin ‘Atash against those claims. However, like serving as a witness for the defense in any proceeding brought against SSG Skeete, Defense Counsel may best serve Mr. bin ‘Atash—and defend him against any claims that he participated or sought the radicalization of the paralegal—by also serving as a witness on his behalf. Indeed, Defense Counsel may be best positioned to refute any claim that Mr. bin ‘Atash attempted to radicalize any person. But unlike testifying on behalf of SSG Skeete in a non-Commission proceeding, the testimony of Defense Counsel on behalf of Mr. bin ‘Atash would occur in the very same proceeding where they serve as his attorneys. This poses an ethical conflict. See State v. Dunkle, 116 P.2d 494, 532 (Cal. 2005) (“An attorney must withdraw from representation, absent the client’s informed written consent, whenever he or she knows or should know he or she ought to be a material witness in the client’s cause.”). Of course, this matter becomes further complicated should the client or the defense paralegal take positions contrary to each other.

In response to the ethical concerns raised by Defense Counsel should the Government claim that Mr. bin ‘Atash “advanced or supported radicalization,” the SRT responded: “Even if correct, this potential conflict is a future conflict, not a current conflict, and would not impact Defense Counsel’s current ability to ethically represent Mr. bin ‘Attahs [sic].” (AE 615CC(GOV SRT) at 3, n.2). This strained notion of what constitutes a conflict is not supported by law. The conflict arises now. Because Defense Counsel are presently aware that they may have to serve as witnesses for their defense paralegal and/or as a witness for their client, the conflict is immediate. See United States v. Iorizzo, 786 F.2d 52, 57 (2nd Cir 1986) (finding that possibility of attorney serving as witness to either the government or on behalf of his client “to dispel any impression left upon the jury” would “constitute a disqualifying conflict under [the] Disciplinary Rule”). The

conflict does not arise only at the moment when the attorney is called as a witness; it is the threat of such testimony that renders the conflict ripe:

The existence of a conflict of interest does not depend on a finding that the attorney's judgment or conduct actually was affected by the circumstances. "Conflicts of interest broadly embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities . . ." to the attorney's other interests. It is the threat that the attorney's conduct might be affected by the conflicting interests that gives rise to an actual conflict. Whether the attorney's conduct actually was affected might well be something of which even the attorney was unaware, and could rarely be subject to certainty or proof.

Harris v. Superior Court, 225 Cal. App. 4th 1129, 1140 (Ct. App. 2014) (emphasis in original) (quoting State v. Bonin, 765 P.2d 460, 474 (Cal. 1989)). Were the Military Judge to accept the absurd mischaracterization of the SRT, no conflict would exist until the very moment that Defense Counsel were called to present evidence on behalf of Mr. bin 'Atash. That is clearly wrong. The conflict exists now because the threat exists now.

The Military Judge should provide the requested information.

**3. Attachments:**

**A. Certificate of Service**

**4. Signatures:**

/s/  
CHERYL T. BORMANN  
Learned Counsel

/s/  
EDWIN A. PERRY  
Detailed Defense Counsel

/s/  
WILLIAM R. MONTROSS, JR.  
Detailed Defense Counsel

/s/  
MATTHEW H. SEEGER  
MAJ, U.S. Army  
Detailed Military Counsel

# Attachment A

**CERTIFICATE OF SERVICE**

I certify that on the 9th day of April 2019, I electronically filed, via e-mail, AE 615DD(WBA), Defense Reply to AE 615CC(GOV SRT), Response by Special Review Team to Defense Motion for Particularized Information Regarding Investigation of Defense Paralegal SSG Skeete, with the Trial Judiciary and, served a copy on all defense counsel of record and the Special Review Team. Per paragraph 4.e of AE 615B(ORD), the Prosecution has been given notice of the aforementioned filing.

/s/

**CHERYL T. BORMANN**

Learned Counsel