

**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 615G (RBS)

Mr. Bin al Shihb's Reply to 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.

23 January 2019

1. Timeliness: This Reply is timely filed pursuant to the expedited briefing schedule set out in AE 615B.

2. Law and Argument:

The Special Review Team (SRT) asserts that there is *no possible* conflict raised by the interrogation of SSG Brent Skeete and that the Military Commission need conduct *no inquiry* because, based on an FBI database search there is no current FBI criminal investigation of any known current Defense team member. *See* AE 615D (GOV SRT) at 2-3. The SRT makes this assertion despite its own admission that the FBI opened a full investigation in November and despite the evidence Mr. bin 'Attash has presented that this investigation led to questioning of a

former Defense team member about privileged attorney-client communications and about the actions Mr. bin ‘Attash’s counsel. AE 615 (WBA), Attach. B at 7-8. The Military Commission should reject the SRT’s attempt to prevent the military judge and Defense counsel from discovering whether Defense teams are operating under a conflict of interest that could ultimately violate the defendants’ right to counsel under the Sixth Amendment and governing statute. *See Holloway v. Arkansas*, 435 U.S. 475 (1978).

The SRT’s assurances sound disturbingly familiar. Much of the SRT’s filing could have been copied nearly verbatim from its preliminary filings in the AE 292 series. *See, e.g.*, AE 292R (GOV); AE 292R (GOV Sup); and AE 292RR (GOV). There, as here, the SRT hedged its language—referring only to current investigations of current team members. AE 292R (GOV) at 2. There, as here, the SRT used a declaration from an FBI agent that he had searched a database to assure the Military Commission that there could be no conflict. AE 292R (GOV Sup), Attachment D. There, as here, the SRT took an incredibly narrow view of what can constitute a conflict of interest for defense counsel. AE 292R (GOV) at 3-7. And there, as here, the SRT said no inquiry whatsoever was required.¹ AE 292R (GOV Sup) at 3-6; AE 292RR (GOV) at 2.

¹ The cases relied on by the SRT in its filing are generally inapposite. None of them, as far as Counsel can determine, deal with anything like what happened here: extensive questioning by law enforcement about the relationship between a defendant and his counsel in the context of a full, federal investigation. Most of the cases are also not helpful to the SRT’s position on the need for an inquiry into a conflict because they dealt with whether there was an actual conflict *following an inquiry by the trial judge*. AE 615D (GOV SRT) at 2-8. Of the cases the SRT cites for the argument that no inquiry need be conducted, one actually did involve an inquiry, *United States v. Lowry*, 458 F.3d 791, 807-08 (8th Cir. 2006), one involved only an allegation about an IRS audit that was unrelated to the case, *Moss v. United States*, 323 F.3d 445, 472-73 (6th Cir. 2003), and one suggested that the Government could obviate the need for an inquiry with an affidavit that counsel *was never under investigation*. *Lafuente v. United States*, 617 F.3d 944, 947 (7th Cir. 2010). None support the SRT’s position under the circumstances of this case.

In that instance, Judge Pohl refused to accept these assurances, instead ordering the appointment of conflict counsel for Mr. Bin al Shihb, ordering the Special Review Team to provide information on the investigation of the defense, and essentially stopping hearings on all other matters for over a year. AE 302C (ORD); AE 292LL (ORD); AE 292QQ (ORD); AE 292JJJJ (ORD). As the Commission and Defense learned over the next year-and-a-half, there was much more going on. Eventually, Judge Pohl found that there had subsequently been a full investigation of Mr. Bin al Shihb's defense team involving the FBI and U.S. Attorney's Office for the Northern District of Illinois as well as an investigation by the Department of Defense. *See* AE 292JJJJ (ORD). The military judge noted that, "Based upon the subsequent inquiry into the potential for security violations and the possibility of a conflict of interest, it is evident that the concerns of the Commission at that time were not unwarranted." *Id.* at 7. The Military Commission should follow the same course of action that it did before, both for legal consistency in these proceedings and because later revelations proved it to be correct.²

Here, unlike at the beginning of the AE 292 litigation, the Government has admitted that a full investigation has already been opened by the FBI, and it is clear that this investigation led to extensive questioning of a former Defense team member about the relationship between Mr.

² The day before this filing, the Military Commission issued AE 615H (INT ORD), ordering at least one member of the SRT to appear *ex parte* before the military judge on 24 January, 2019 and provide a "robust presentation on the facts and circumstances surrounding the FBI investigation and what additional investigative steps, if any, are contemplated." *Id.* at 2-3. While, as Mr. Bin al Shihb argues here, the military judge is correct to require the provision of more information by the SRT, the Defense continues to maintain that the judge must *also* conduct a full inquiry that is as transparent as possible, provide discovery to the Defense to the extent possible, and abate all other proceedings until it is able to make an adequate determination that none of the Defense teams are operating under a conflict. As in the AE 292 series, the Defense objects to *ex parte* proceedings. *See* AE 292G (Mohammad et al) at 4; AE 292J (AAA) at 3-5.

bin 'Attash and his attorneys. AE 615D (GOV SRT), Attach. B at 2. Specifically, SSG Skeete attests that he was asked about what civilian attorneys were on the defense team, about whether Mr. bin 'Attash communicated with his attorneys, about the work and personalities of the Defense attorneys, and about whether other defendants were similar to Mr. bin 'Attash. *See* AE 615 (WBA), Attach. B at 7-8. The SRT's filing does nothing to explain why the FBI's investigation would require answers to these questions.

The SRT's assurances that there can be no conflict are inadequate in other ways. There are myriad agencies, including military intelligence, that could be investigating in conjunction with the FBI, or that the FBI could turn an investigation over to, as happened previously with the Department of Defense. AE 292JJJJ (ORD) at 6. Indeed, SSG Skeete noted that there were other people involved in questioning him who claimed to be with another agency and with army intelligence. AE 615 (WBA), Attach. B at 9. The FBI's search of its own database does not resolve these concerns. Additionally, there is also no indication that the SRT contacted the FBI agents involved in the questioning, their superiors, or the other agents involved. Under these circumstances, the military judge is required to do more than accept the assurance of an FBI agent that he has run defense team members' names through a database.

Finally, the SRT focuses exclusively on whether there is a current investigation of any current defense team members. AE 615D (GOV SRT) at 2. But this emphasis on current team members is too narrow. The attorney-client privilege does not end when a team member stops working on a case. *See Swidler & Berlin v. United States*, 524 U.S. 399 (1998). The privilege extends to the member who has left, and the rest of his former colleagues who continue working.

The SRT cites *United States v. Lewisbey*, 843 F.3d 653 (7th Cir. 2016), for the proposition that a conflict is over when a member of a Defense team who is under investigation leaves a case. AE 615D (GOV SRT) at 3. But *Lewisbey* involved very different facts. There, the defendant was represented by an attorney who was replaced by a new attorney on appeal when an investigation of the first attorney came to light after the defendant's conviction. *See* 843 F.3d at 657. Under these circumstances—a complete turnover of defense counsel after trial was over—there was no conflict. But where the rest of a team continues representing a client while a former member is being interviewed for some kind of undisclosed law enforcement investigation, the circumstances are very different. A more full inquiry is necessary to ensure that Defense Counsel are not acting under a conflict.

Because of their experience with the matters underlying AE 292, Defense Counsel for Mr. Bin al Shibh are well aware of the potential for conflicts—even in the face of the Government's assurances to the contrary—and the effects that an actual or even potential conflict can have on the defense. The Government's actions underlying the AE 292 motion series led to defense team members becoming suspicious of each other, a loss of defense team personnel, a breakdown of trust in the attorney-client relationship, and a loss of client confidence in the fairness of these proceedings. All of these problems can be fatal to a defense team in a capital case, which needs to work as a cohesive unit in conjunction with their client who is facing execution.

Counsel for Mr. Bin al Shibh have good reason to fear a potential conflict again in this instance. As SSG Skeete made clear, the FBI agents who interrogated him asked about other

defendants, not just Mr. bin ‘Attash. AE 615 (WBA), Attach. B at 8. Additionally, inadequate resourcing forces Mr. Bin al Shibh’s defense team to share a partially open physical office space with the bin ‘Attash team. Until December, SSG Skeete shared this space—sitting in a cubicle in the center of the office and holding access to the same Sensitive Compartmented Information Facility (SCIF). The potential for a conflict as to Mr. Bin al Shibh’s team is very real.

Finally, Defense Counsel have good reason to fear not only a criminal investigation, but other investigations as well. For national security lawyers, and for military attorneys, an investigation into a potential security violation or national security investigation may be as threatening or more threatening to their career and well-being than a criminal investigation. The lawyer’s personal interest may materially limit the representation of the client—or at least pose a significant risk, which is the standard set by the model rules. Model Rules of Prof’l Conduct R. 1.7(a)(2). The SRT’s contention that “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” (AE 615D (SRT) at 8) completely glosses over the significant risk a national security risk poses to counsel.

As it did in 2014, the Military Commission should once again abate proceedings on all other matters and conduct its own inquiry into the nature and extent of any conflict based on investigations of defense teams. Until it does so, the specter of a conflict will hang over all the Defense teams and interfere with the defendants’ Sixth Amendment and statutory rights to counsel and the ability of counsel to fully represent their clients.

3. Attachments:

A. Certificate of Service

Respectfully submitted,

//s//

JAMES P. HARRINGTON
Learned Counsel

//s//

ALAINA M. WICHNER
Defense Counsel

//s//

MISHAEL A. DANIELSON, LT, USN
Defense Counsel

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on 23 January 2019, I electronically filed with the Trial Judiciary, AE 615G (RBS) Mr. Bin al Shibh's Reply to 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, and served it on all counsel of record by e-mail.

//s//

JAMES P. HARRINGTON
Learned Counsel