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 615I (KSM)

Mr. Mohammad's Reply
to 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.

2. Relief Sought:

The Military Judge should abate all other proceedings pending a full investigation into whether any government agencies are actively investigating current or former members of the defense teams and/or have contacted current or former members of defense teams for the purpose of enlisting and/or have enlisted them as government agents for the purpose of monitoring confidential defense team activities.

3. Overview:

As reflected in AE 615H[1], the purported facts and analysis proffered by the Special Review Team (SRT) in AE 615D[2] unquestionably fail to afford any basis for the Military Judge to conclude that Mr. Mohammad's counsel are not subject to potential conflicts arising from the

[1] AE 615H INTERIM ORDER, 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, 22 January 2019 ("AE 615H").
[2] 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, filed 17 January 2019 ("AE 615").

undisputed events underlying AE 615.[3] Significantly, the SRT concedes that the December 2018 interrogations and polygraph examination of a departing member of Mr. bin 'Attash's defense team were part of a "an FBI Full Investigation" into "a threat to national security." AE 615, Attachment B, ¶¶ 3 and 6. Equally significant, the SRT does not dispute that the interrogations and polygraph were conducted by agents from at least *three* government agencies – Army Counterintelligence, Federal Bureau of Investigation (FBI) and "another government agency" – who exploited the opportunity to delve into detailed discussion of the legal representation of Mr. bin 'Attash, as well as "the other defense teams and the other defendants" in this case. AE 615, Attachment B at ¶¶ 4, 18, 32, 36. Neither did the SRT deny that the interrogators had spoken with other, unnamed individuals and had obtained confidential information about the internal practices of at least the bin 'Attash team. *Id*. at ¶ 25.

As set forth with more particularity in AE 615A (KSM),[4] the nature of the reported government actions substantially burdens Mr. Mohammad's counsel with potential conflicts of interest in at least two respects: they indicate that (1) defense counsel are, yet again, the target of a government investigation; and (2) the FBI and other government agencies are, once again, attempting to infiltrate the defense teams, including obtaining confidential and privileged material, which is being used in such attempts. These governmental actions impose a constitutional, professional and ethical obligation on defense counsel to alert the Military Judge, and an equal duty on the Military Judge to conduct a thorough inquiry; adopt appropriate measures to resolve any conflicts; and afford Mr. Mohammad the advice of independent counsel.

[3] 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, 9 January 2019 ("AE 615").
[4] Mr. Mohammad's Motion to Suspend Briefing Deadlines Pending Resolution of AE 615, 11 January 2019 ("AE 615A").

The only public justification the SRT has offered in urging the Military Judge to conduct *no* inquiry is a declaration, attached as Attachment B to AE 615D. As the Military Judge has observed, while the SRT claims the declaration "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," (*id.* at 8 (emphasis added)), the declaration is actually less conclusive. It says only that the declarant's search of an FBI database found "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*." AE 615D, Attachment B ¶ 11 (emphasis added). Thus, the SRT has revealed nothing to eliminate the possibility that defense counsel and other team members are the focus of national security or criminal investigations by *other agencies*, including the agencies that were also involved in the interrogation of the bin 'Attash team member: the Department of Defense (Army Counterintelligence) and "another government agency" (e.g., the Central Intelligence Agency). There is not even a suggestion that any purported search of such agencies' relevant databases has been conducted.

As the SRT knows, such narrowly framed representations are inadequate under the circumstances here to assuage judicial concerns about the existence of a conflict of interest. *See* AE 292QQ at 29 ("While taking the word of Counsel as to the literal meaning of their pleadings [and] declarations, the Commission is concerned over the absence of any reference to intelligence related investigations or to investigation by entities *other than* the FBI." (Emphasis added.)). Besides falling far short of assuring the Military Judge, and counsel, that current defense team members are not the subject of an investigation by *some* agency, the declaration also does nothing to dispel the likelihood that even the FBI is continuing to investigate *former* defense team members for purposes of enlisting them as agents and securing their return to a

defense team. While such a scenario of blatant overreach may seem implausible to one unfamiliar with the Military Commission, it is stock in trade for the government in this case. *See*, *e.g.*, AE 292[5] Attachments B and C; AE 615A at 4.

The exceedingly small bore of the SRT's reply also fails to address the cumulative impact of the government's conduct in signaling to the defendants that the course of these proceedings will be dictated by the agencies that unlawfully tortured them and are seeking to kill them; and that their lawyers are powerless to defend them, or to keep their confidences.

Understandably, then, the Military Judge still needs the SRT to provide "a robust presentation" (or at least a minimally adequate one) before any potential conflicts can be dispelled. Because of the multifaceted burdens on counsel's representation that the government has created, however, a robust – as well as fair and accurate – presentation requires a robust investigation and opportunity for defense counsel to be heard. As discussed below, understanding the significance of the government's latest overreaching requires a familiarity with the long history of similar incursions into the defense teams. In turn, the SRT's ability, candidly and reliably, to acknowledge the cumulative burden of this continuing official behavior on defense counsel's ability to render conflict-free representation is questionable in light of the SRT's overstatement of the declaration and its current reliance on analyses and propositions that were expressly rejected by Judge Pohl.

4. <u>Burden of proof</u>:

The burden of proof is on the moving party, R.M.C. 905(c)(1)-(2). (See RC 3.8).

[5] Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused, 13 April 2014.

5. Facts:

a. The facts and arguments presented in AE 615 are incorporated here by reference as if fully set forth.

b. Khalid Shaikh Mohammad was taken into the custody of United States agents on or about March 1, 2003 in Rawalpindi, Pakistan. During the ensuing three and a half years he was held incommunicado in CIA Black Sites, without access to counsel, and subjected to torture, including simulated drownings and non-consensual human experimentation, in violation of domestic and international law. The goal of the torture was to instill a sense of helplessness and hopelessness in Mr. Mohammad and impress upon him that his United States government captors exerted complete power and control over him.

c. In 2006, Mr. Mohammad reportedly was transferred to the United States military facility at Guantanamo Bay, Cuba, where he was held incommunicado, without access to counsel for approximately two years.

d. In 2008, and again in 2012, Mr. Mohammad and his four co-defendants were referred for capital prosecution in the Military Commission in Guantanamo. Mr. Mohammad's co-defendants are all fellow Muslims who were also subjected to lengthy CIA incarceration and torture in Black Sites.

e. Since his arrival at Guantanamo Bay, Mr. Mohammad has been subjected to governmental interference with his right to effective assistance of counsel, and specifically his right to confidential communications with counsel. For nearly five and a half years after Mr. Mohammad was afforded appointed counsel, he and his attorneys were not permitted to discuss subjects that were at the heart of his guilt and penalty phase defense strategies. Thereafter,

elements of the Joint Task Force-Guantanamo conducted wholesale searches and seizures of his confidential legal materials;[6] the CIA surreptitiously wired the hearing room at the expeditionary legal center to create a "sound field" enabling agents to monitor confidential attorney-client communications;[7] the intelligence branch of the Joint Task Force-Guantanamo installed and maintained microphones, which were attached to recording devices, in the ceilings of the interview rooms where Mr. Mohammad was required to meet with his legal team.[8]

f. Mr. Mohammad and his co-defendants have been subjected to the repeated secret efforts of the government to interrogate and recruit members of their defense teams to act as government agents; in addition, the government has attempted to plant at least one operative on a defense team.[9] The government's efforts which have so far become known include:

- obtaining confidential defense materials by secretly interviewing Mr. Mohammad's assigned translator by using a ruse that the interview was part of the process to reauthorize the translator's security clearance. This was unmistakably part of an effort to infiltrate Mr. Mohammad's defense team to obtain protected information.[10]

[6] *See* 12 Testimony of CAPT Thomas Welsh, JTF-GTMO SJA, 12 February 2013, Unofficial/Unauthenticated Tr., pp. 1955-65; AE 032, Joint Defense Motion for Appropriate Relief to Protect Right to Counsel by Barring Invasion of Privileged Attorney-Client Communications, 11 May 2012; AE 168(AAA), Defense Motion to Compel Discovery Related to Convening Authority "Baseline Review" and Legal Mail Policy Communications, 4 June 2013; AE 401(WBA), Motion to Dismiss Because the United States Conduct of Continuous Abrogation of the Attorney-Client Relationship Has Irretrievably Damaged Mr. bin 'Atash's Ability to Work with Counsel, 15 January 2016.

[7] *See* AE 133QQ, RULING, Emergency Defense Motion to Remove Sustained Barrier to Attorney-Client Communication and Prohibit Any Electronic Monitoring and Recording of Attorney-Client Communication in any Location, including Commission Proceedings, Holding Cells, and Meeting Facilities and to Abate Proceedings, 30 November 2016, at 7.

[8] *See* AE 133QQ at 9-10.

[9] *See* AE292, Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused, 13 April 2014.

[10] AE292, Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused, 13 April 2014.The secret and deceptive interview was not revealed to the members of the defense team nor to Mr. Mohammad until the military commission ordered past and present

- placing an operative on a co-defendant's team through which the government obtained substantial defense team material while investigating lead counsel.[11]

- Engineering the placement on a defense team an interpreter who turned out to have been employed by the CIA in a black site.[12]

- Relying on Mr. Mohammad's former DISO as a confidential informant, who provided the government with confidential attorney-client privileged information, **and thereafter urging that he be reassigned to the defense team** as a DISO on a temporary basis.[13]

- Interfering with another of Mr. Mohammad's linguists by inexplicably suspending his security clearance without explanation or cause for an extended period. [14]

g. The foregoing examples give the defense reason for concern, but no way of knowing, whether other attempts were made to infiltrate defense teams or recruit defense team members, and whether one or more such government efforts was successful.

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defense team members to "disclose said contact and/or communication to his or her respective Lead Defense Counsel immediately, irrespective of any non-disclosure agreements which may have been signed." AE 292C, Interim Order, Emergency Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's representation of Accused, 15 April 2014.

[11] AE292, *supra.*

[12] *See* AE 350(GOV) Government Unclassified Notice Of Classified Filing, 10 February 2015 Unofficial/Unauthenticated Transcript, 9 February 2015, at 8248-50

[13] AE 460 (GOV STC), Government Notice by Special Trial Counsel of Letter to Defense Requesting Defense Remediation of Material Obtained Outside of the Discovery Process, 19 October 2016.

[14] AE 406 (Mohammad), Defense Motion to Abate Proceedings Immediately until the Government Restores to the Assigned Defense Team Interpreter the Security Clearance Required to Serve as an Interpreter, 5 February 2016. In the context of multiple intrusions, plants, and government recruiting attempts, the protracted, unexplained nature of the interpreter's suspended clearance supports a reasonable inference that the government was attempting to place another agent on Mr. Mohammad's team, if counsel had not insisted on retaining the services of the trusted interpreter.

h. In addition to these and other intrusions into the defense, the government has repeatedly launched investigations and made baseless allegations of serious wrongdoing against defense counsel, in an unmistakable attempt to chill zealous defense representation and impede the defense function. These include false allegations of violating communication rules[15]; bogus assertions, which were later withdrawn, that the defense was unethically derelict for failing to prevent a CIA operative from being planted in the defense organization[16]; recklessly false allegations that defense counsel willfully disclosed classified information[17]; false allegations that the defense improperly intruded into protected government computer systems[18]; and threatening defense counsel with prosecution for discharging their duty to conduct essential case investigation.[19] *See* AE 525I.

i. The Declaration by Supervisory Special Agent John F. Stofer, ("Stofer Declaration") filed with the SRT's response, establishes that [redacted] AE 615D (GOV SRT), Attachment B [redacted]

j. [redacted]

[15] *See* AE 018Y, Government Emergency Motion for Interim Order and Clarification that the Commission's Order in AE018U Does Not Create a Means for Non-Privileged Communications to Circumvent the Joint Task Force Mail System, 28 February 2014.
[16] *See* AE350(GOV), Government Unclassified Notice Of Classified Filing, 10 February 2015.
[17] *See* AE 532 (GOV STC), NOTICE OF UNDER SEAL EX PARTE FILING BY SPECIAL TRIAL COUNSEL, 27 October 2017.
[18] AE 460 (GOV STC), Government Notice by Special Trial Counsel of Letter to Defense Requesting Defense Remediation of Material Obtained Outside of the Discovery Process, 19 October 2016.
[19] *See* AE 525I (KSM), Mr. Mohammad's Response to AE 525G (GOV) and Notice of Counsel's Inability to Provide Constitutionally Effective Assistance of Counsel, 26 January 2018.

k. The SRT does not dispute that over the course of two days, agents of the Army Counterintelligence, FBI and "another government agency" interrogated the defense team member for more than two and a half hours, and required him to submit to a polygraph examination.

l. The SRT does not dispute that 85-90% of the interrogation conducted by the FBI agents consisted of questions regarding the team member's knowledge about confidential team functions and communications, and extended to questions about other defense teams and other defendants.

m. The SRT also does not dispute that the agents informed the team member that they had interviewed other individuals who were familiar with his work on the team, or that the agents' questioning was predicated, in part, on their knowledge of confidential information regarding the defense team's practices. This aspect of the investigation alone raises concern for counsel, charged with protecting a client's confidences.

n. The Stofer Declaration reflects that by some unspecified date in December 2018, the Supervisory Special Agent had been assigned to the SRT to assist with the litigation of "legal issues" that were [redacted] in the Military Commission [redacted] AE 615D (GOV SRT), Attachment B [redacted]

o. The Stofer Declaration does not represent that the Supervisory Special Agent has any personal or detailed knowledge of the nature and scope [redacted] including the name of the agents who interrogated the team member, how many members of other teams they interrogated, whether they entered identifying case information into the FBI's Central Records System (CRS), why the extensive questions about team practices asked of the team

member would have been relevant to the [redacted] or the identity of the person or persons upon whose information those extensive questions were based.[20]

p. The Stofer Declaration does not provide any foundation for his conclusion that the negative results of searching the CRS database means "the FBI is not aware" of any current FBI investigation of a defense team member. AE 615D (GOV SRT), Attachment B at ¶ 12. The declaration does not reflect any knowledge of the protocols for entering and updating case investigation information in the database, whether information relating to active investigations is stored in the CRS, or whether the CRS is the customary repository for information gathered in the course of a multi-agency investigation.

q. The Stofer Declaration does not indicate that the Supervisory Special Agent, or anyone else with authority to do so, searched or requested a search of similar databases maintained by Army Counterintelligence and/or any "other" government agency.

r. The Stofer Declaration establishe [redacted] for all defense counsel and defense team members in this case based on information provided to the SRT by the Department of Defense ("DoD") Washington Headquarters Services Office of Special Security (WHS OSS) and transmitted to the FBI by the SRT. AE 615D (GOV SRT), Attachment B [redacted] Counsel for Mr. Mohammad are not aware of any member of his team authorizing the release of personal information by the WHS OSS to the FBI or any other agency.

s. Neither the Stofer Declaration nor anything in AE 615D (GOV SRT) reveals the manner and format in which the personal information of defense team members was transmitted

[20] On January 22, 2019, Mr. Mohammad served STC with a request for discovery seeking this and other information. See Attachment B.

to the SRT and the FBI, who at WHS OSS authorized the disclosure of such information, how it was handled by the FBI upon receipt, or whether it is currently stored in any FBI databases.

t. Neither the Stofer Declaration nor anything in AE 615D (GOV SRT) reflects that the SRT conducted any rudimentary inquiry to determine the particulars of the multi-agency investigation and interrogation of the bin 'Attash team member, to include whether the Army Counterintelligence or "another government agency" such as the CIA is continuing to investigate defense teams and team members in this case; the identities of the other individuals who were interviewed or interrogated by the FBI agents; whether such contacts included agents of the Army Counterintelligence and/or "another government agency" such as the CIA; and whether any such contacts had resulted in the recruitment of current or former defense team members to act as government agents.

6. Law and Argument:

A. Mr. Mohammad Should be Afforded an Opportunity to be Heard During Any Further Presentation of Information by the SRT

The defense respectfully submits that there is no good reason for the Military Judge's *sua sponte* decision to conduct an *ex parte* hearing on Thursday, 24 January 2019. *See* AE 615H at 2-3. *Ex parte* proceedings are typically conducted at the request of a party, and justified by an articulated need to protect confidential, sensitive or classified information from disclosure. *See*, *e.g.*, *Ellsberg v. Mitchell*, 709 F.2d 51, 63-64 (D.C. Cir. 1983). To defense counsel's knowledge, since the filing of AE 615D, the SRT has not filed any public or *ex parte* pleading indicating the existence of pertinent information that requires the protection of an *ex parte* filing. Rather, the SRT provided the Military Judge with all the "additional facts" that he apparently believed needed to be presented "ex parte and in camera," *before* the filing AE 615D, and suggested that

such information alone was adequate to dispel any conflict.[21] AE 615D at 8; *see* AE613A (GOVSRT) Under Seal, *Ex Parte*, In Camera.

In light of the SRT's submission of all facts and information that he presumably believed to be responsive to the expedited briefing order,[22] it is not clear what the Military Judge now anticipates will be proffered as part of a "robust presentation." AE 615H at 2. The presentation, however, need not be made *ex parte.* If the SRT wishes to present other "additional facts" of a sensitive nature, and/or the Military Judge has questions that might elicit similar information, any legitimate governmental interests can be adequately protected by providing the SRT with an opportunity to discuss those particular matters *ex parte*. To the extent the remainder of presentation may be conducted in the presence of Mr. Mohammad and his counsel, they will be apprised of the Military Judge's particular concerns and able to share relevant information in their possession that can inform an assessment of the conflicts.

"'The fundamental requisite of due process of law is the opportunity to be heard.'" *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). "The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted). *A fortiori*, the right to be heard is equally fundamental in a capital case, where the right to be heard is rendered a nullity if a defendant's right to the assistance of counsel is compromised. *Powell v. Alabama*, 287 U.S. 45, 68 – 69 (1932). Mr. Mohammad therefore

[21] The necessity for the Order in 615H, compelling an ex parte presentation of facts by the SRT, indicates that even with the assertions in AE 615D, the substance of the SRT's previous ex parte communications were insufficient.
[22] *See* AE 615B ORDER, Expedited Briefing Schedule and Deferral of Ruling on Motion to Suspend Briefing Deadlines 11 January 2019

should have an opportunity, through counsel, to be heard in response to the presentation given by the SRT, which may substantially affect his right to unconflicted counsel.

As discussed below, the perspective of counsel who have been subjected to an ongoing course of government intrusions into the defense camp will be of crucial assistance to the Military Judge in understanding the chilling significance of the most recent multi-government agency actions in this case.

B. The Purported Absence of an FBI Full Investigation of Current Defense Team Members Is Not Sufficient to Dispel the Potential Conflicts Raised by the Apparent Existence of Investigations Being Conducted by Other Government Intelligence and/or Law Enforcement Agencies

On this record, the SRT's proffered legal authority and analysis are woefully inadequate to dispel the potential conflict of interests raised by the undisputed evidence of yet another government attempt to investigate the defense and invade confidential defense functions. To begin with, the linchpin of the SRT's argument – that Supervisory Special Agent Stofer's declaration categorically states that he "is not aware of any ongoing investigation of counsel" or other defense team members (AE 615D at 8) – is belied by the declaration itself. At most, Supervisory Special Agent Stofer is unaware of any *FBI* investigation. The SRT offers nothing, and there is nothing in the record, to conclude that the other agencies involved in the bin 'Attash defense team member's interrogation are not investigating or making similar attempts to gather confidential information from other defense teams. Thus, even if the potential conflict could be dispelled by showing "there is no investigation of counsel at all," (*id*. at 5) the SRT does not make that showing.

The SRT also erroneously suggests that a *criminal* investigation is necessary to give rise to a conflict, and goes so far as to contend that "[w]here an attorney is under investigation for a different offense or by a different prosecuting authority, courts have generally found no conflict

of interest." AE 615D (GOV SRT) at 4. The SRT apparently forgets that the Military Judge viewed precisely this proposition "with a more jaundiced eye when examined in terms of national security interests in a capital criminal trial." AE 292QQ (AMENDED ORD) at 27. Rather, the Military Judge explained – and the SRT should know – that in these proceedings, "the idea of conflict" must be viewed "in a broader scope" that accounts for "the ability of the FBI, DoD and others to carry on national security investigations, possibly resulting in a *range of punitive actions*, from the revocation of a security clearance and loss of a job, to criminal prosecution." *Id*. at 24 (emphasis added).[23] Again, nothing in AE 615D (GOV SRT) offers any assurances that the Army Counterintelligence or "another," unnamed government agency is not investigating defense counsel's clearance status. Counsel familiar with the WHS OSS are painfully aware that it has its finger on a hair trigger when it comes to authorizing investigations and actions that jeopardize security clearances. *See* AE 532 series.[24]

In AE 615D, the government's statement of the law applicable to this sort of conflict – conflict not between two clients, but between the client and the attorney's self-interest, is potentially misleading.

> 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
> AE 615D, p.3.

This suggests some sort of conjunctive test: the offense must be "the same or related" *and* by the same authority. It is of a piece with the government's effort to narrow the focus of any inquiry, and has no authoritative support. *See, e.g., United States v. Levy*, 25 F.3d 146, 156 (2d

[23] The Military Judge's analysis was also consistent with case law in non-national-security cases, which recognizes that conflicts arise when counsel is the subject of an investigation leading to criminal *or* disciplinary sanctions. *See*, *e.g.*, *Mathis v. Hood*, 937 F.2d 790, 795 (2d Cir. 1991) (attorney's exposure to disciplinary sanctions created "'obvious' and actual conflict of interest.").
[24] AE 532 (GOV SRT) - Notice of Under Seal *Ex Parte* Filing, 27 October 2017

Cir. 1994) ("Attorney's prosecution on *unrelated* criminal charges by the same office prosecuting Levy presents further conflict concerns. [Counsel] may have believed he had an interest in tempering his defense of Levy in order to curry favor with the prosecution, perhaps fearing that a spirited defense of Levy would prompt the Government to pursue the case against [him] with greater vigor.") (Emphasis supplied.) The events prompting an investigation, the withdrawal of a security clearance, or the questioning of a defense team member may be fortuitous and "unrelated", although Mr. Mohammad notes that the questioning of the team included hours of inquiry into defense team matters, including seeking information about the teams of Mr. bin'Atash's co-defendants, specifically Mr. Mohammad.

As to the "same authority" aspect, although the government's pleading does not directly assert it as a ground for denial, here, the government agencies, the FBI and another unnamed government agency, perhaps the CIA, are the agencies actively cooperating with the capital prosecutors and permanently involved in the cover up and minimizing of Mr. Mohammad's torture. The agencies investigating defense teams and seeking to plant or recruit defense team members are the "same authorit[ies]" who seek Mr. Mohammad's execution. So although the SRT makes assurances of a set of undisclosed protocols to '"wall off" ' the capital prosecutors from the FBI, AE615D at 9, the mingling of prosecutors and authorities investigating defense counsel is quite sufficient to cause the conflict of interest counsel observe here. And to merit the kind of "painstaking" colloquy by the military judge, informed by facts known to both sides, that might insulate a waiver of conflict-free counsel. *See United States v. Saccoccia*, 58 F.3d 754, 772 (1st Cir. 1995) (waiver upheld where appellant insisted upon his counsel "despite the district court's painstaking explanation of his right to conflict-free counsel", "notwithstanding the court's entreaty to reconsider" the waiver).

As the list of intrusions above should demonstrate by its length alone, the consequences for Mr. Mohammad are the same if the government is investigating defense team members for a "related" alleged offense – as was the case in the AE292 investigation of lead counsel – or is fortuitously seeking to turn an unrelated matter into an opportunity for developing a defense team member informant. Either way, the client's confidences are not secure, his confidence in his counsel's unconflicted allegiance and loyalty are shadowed, and he is given even more reason to distrust the system that will adjudicate his right to live.

The SRT suggests that there is no potential conflict because the person interrogated in this case is not a lawyer and was no longer a member of the bin 'Attash defense team at the time of the interrogation: "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." AE 615D at 3 and n.3. The SRT apparently has forgotten, again, the holding of the Military Judge, in *this case*, that the defendants "are entitled to the undivided loyalty of their counsel, and *by extension*, of the *paralegals and other support members* of the Defense Team who fall under the umbrella of privilege as a *critical component of their right to assistance of counsel*." AE 292QQ (Amended Order) at 22-23 (emphasis added).

In any event, as the government must acknowledge, there is no question that there is great potential for harm when counsel is herself or himself under a threat. *See* AE 615D at 4, citing *Thompkins v. Cohen*, 965 F.2d 330, 332 (7th Cir. 1992) (when a defendant's counsel is under criminal investigation it "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"), and *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"). *Accord*: *United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir.1984). Additional formulations of the harm that concerns us from other courts include *United States v. Levy*, 25 F.3d 146, 155 (2d Cir.1994)(attorney's prosecution on unrelated criminal charges was an actual conflict, as the attorney "may have believed he had an interest in tempering his defense of [the defendant] in order to curry favor with the prosecution, perhaps fearing that a spirited defense of [the defendant] would prompt the Government to pursue the case against [him] with greater vigor."); *United States v. Lowry*, 971 F.2d 55, 61 (7th Cir. 1992) (possibility that "as a result of the pressure of being investigated, [the attorney] would either refrain from aggressive cross-examination during the trial in order that he might gain the favor of his potential prosecutors, or that he would be unduly hostile toward them, losing objectivity, and thus harm Lowry's rapport with the jury).

Similarly, *Solina v. United States*, 709 F.2d 160 (2d Cir. 1983) addresses the effect of fear in compromising counsel's representation in a criminal case. Solina's conviction was reversed because he was represented by a man who had not passed the bar and was not licensed to practice. In reversing, the Second Circuit made it quite clear that there was little trial error to find, and little that a qualified member of the bar counsel could have done to mount a defense: "[T]he evidence . . . was also hopelessly overwhelming . . . . There is simply nothing to suggest that a licensed lawyer for Solina could have arrived at a plea bargain, provided a single juror with a rational basis for having a reasonable doubt, induced the judge to impose a lesser sentence, or prevailed upon appeal, and everything to indicate that he could not." *Id*. at 165. Rather, it was the criminal nature of the (non-)lawyer's actions, and the consequent fear, that disables his representation and requires per se rule of reversal. The putative lawyer cannot be

wholly free from fear of what might happen if a vigorous defense should lead the prosecutor or the trial judge to inquire into his background and discover his lack of credentials. Yet a criminal defendant is entitled to be represented by someone free from such constraints. *Id*. at 164.

Fear of government reprisal is exactly what the government's actions in this case have produced: a well-founded fear that behavior undertaken in defense of the client may result in an investigation, loss of security clearance, damage to reputation, and even loss of liberty for the lawyer.

The government's citations to cases in which there was no evidence of an investigation might be sufficient if the interrogation of the defense team member here had occurred in a vacuum, or was the first such worrisome event – but it is only the latest in a string of outrageous efforts by the government to obtain unfair advantage. The SRT's reliance on *Lafuente v. United States*, 617 F.3d 944, 947 (7th Cir. 2010) for the proposition that there can be no conflict if counsel is not being investigated, or is "unaware" of the investigation, is thus misplaced. *See* AE 615D at 7. All the defense teams in this case are aware of the attempts to recruit team members, are aware of the previous investigations of counsel, and remain concerned with each new incident that there are or have been ongoing investigations of their teams, and ongoing efforts to breach privilege.

C. The SRT's Pleading and Declaration Do Not Dispel the Conflicts Raised by the Inability of Counsel to Ensure the Confidentiality of Attorney-Client Communications That Are Essential to Providing Effective Assistance in a Death Penalty Case.

Even if the Stofer Declaration were adequate to foreclose the possibility of *any* current investigation of counsel, (which it is not) the SRT has not disclosed any legitimate explanation to justify the concerted, multi-agency attempt to obtain wide-ranging information about the inner workings of all defense teams. The nature and scope of the bin 'Attash team member's

interrogation, particularly considered in light of government agents' pattern of similar contacts with defense team members, trigger counsel's constitutional, professional and ethical obligations to refrain from litigating this case until they can obtain reasonable assurances regarding the confidentiality of defense team deliberations and functions.

The ability to engage in meaningful consultation with counsel during the pre-trial, preparatory stages of a capital prosecution is both essential to effective assistance of counsel and a core right accorded the defendant under the Sixth and Eighth Amendments. *Powell v. Alabama*, 287 U.S. 45 (1932). Government interference that impermissibly restricts such meaningful communication results in the denial of the assistance of counsel and constitutes reversible error per se. *Strickland v. Washington*, 466 U.S. 668, 690 (1984), *Geders v. United States*, 425 U.S. 80, 91 (1976). The requisite, meaningful attorney-client consultation cannot be conducted under circumstances that give client and counsel reason to believe the government is privy to their communications. *See Fisher v. United States*, 425 U.S. 391 (1976)[25] Rather, "the essence of the Sixth Amendment right is . . . privacy of communication with counsel." *United States v. Rosner*, 485 F.2d 1213, 1224 (CA2 1973), cert. denied, 417 U.S. 950, 94 S.Ct. 3080, 41 L.Ed.2d 672 (1974). *See*, *also Upjohn v. United States*, 449 US 383, 389 (1981) (enforcement of attorney client privilege recognizes that "sound legal advice or advocacy depends upon the lawyer's being fully informed by the client."). The government's deliberate interception of lawyer-client communications or the use of a "defense assistant" to act as a "Government agent"

[25] "Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged. . . . As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Id*. at 403.

to gain "access to the planning of the defense" constitutes "government intrusion of the grossest kind." *Hoffa v. United States*, 385 U.S. 293, 306 (1966).

Accordingly, as is true of counsel's duty to protect all of a client's fundamental rights and interests, counsel has a duty to make all reasonable efforts to prevent the "unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client." See ABA Model Rule of Professional Conduct 1.6(c). Likewise, counsel cannot willingly acquiesce to the government's unwarranted disclosure of or access to protected case information without violating the ethical and constitutional duty to proceed with the "thoroughness and preparation" necessary to "provide competent representation." Model Rule 1.1; *see Powell*, 287 U.S. at 68 – 69.

Counsel is not at liberty to forsake this obligation for the convenience of the tribunal or to serve the interests of the prosecution by proceeding under circumstances that have compromised the defendant's right to effective assistance. Contrary to the SRT's contention, the prohibition against conflicts of interest, and the duty of a court to investigate the potential for such conflicts, is not limited to instances of counsel's representation of multiple codefendants in the same case. See AE 615D at 6. Rather the prohibition applies whenever "'counsel has *actively represented* conflicting interests.'" *Mickens v. Taylor*, 535 U.S. 162, 174 (2002) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980)) (Court's emphasis).

Under the current circumstances, if the Military Judge were to require counsel to proceed without first conducting an inquiry adequate to ensure the government has not intruded into defense functions and is not privy to confidential information, counsel would face a conflict between their obligation to obey the tribunal's orders and the duty to safeguard their client's right to effective assistance.

D. The Existence and Impact of the Conflicts Are Exacerbated by the Ongoing Effects of the Government's Torture of Mr. Mohammad.

The potential conflicts of interest arising from the ongoing investigation and apparent recruitment of team members, and the resulting fear and harm the government's actions engender, must be assessed in light of the nature and ongoing effects of the torture inflicted upon Mr. Mohammad by agents of the U.S. government.

It is not disputed that Mr. Mohammad suffered extreme torture at the hands of the United States and its agents. Mr. Mohammad was subjected to the drowning procedure euphemistically called waterboarding "at least" 183 times by agents of the United States. On one day he was subjected to 15 separate sessions. The torture was acknowledged to be a form of mock executions, "a series of near drownings.'" Senate Select Committee on Intelligence Study of the Central Intelligence Agency's Detention and Interrogation Program (hereafter the "SSCI Report") at 86. Government agents inflicted beatings that resulted in head injuries, hanged Mr. Mohammad by restraints from the ceiling, forced him into stress position, deprived him of sleep for extended periods and subjected him to non-consensual human experimentation. He received too little food, too little water, and was anally raped with objects, in a form of assault euphemistically called "rectal rehydration." Government agents kidnapped two of Mr. Mohammad's small children and explicitly threatened him with their lives and well-being. *See* SSCI at 82-96.

The goal of this brutal and barbaric mistreatment was "total control over the detainee." SSCI at 82. "One of the goals . . . of the interrogation was to induce a psychological state of 'helplessness.'" MEMORANDUM OPINION, *Salim v Mitchell*, Case 2:15-cv-00286-JLQ, ECF No. 239 (08/07/17) at 9. The waterboard was "a tool of regression and control." SSCI at 84. The psychologists who devised the experimental torture program for the CIA, and implemented

it by torturing Mr. Mohammad and interrogating him during his torture, sought "to remind him that there are differing consequences for cooperating or not cooperating" SSCI at 66.

The effect of the government's actions now, in seeking to recruit team members, induce them to violate confidentiality, or turn them against their client, must be evaluated in the context of similar years-long conduct that demonstrates to Mr. Mohammad that he cannot help himself, that nothing he does will be availing, and that the agents who tortured him then still control things at Guantanamo -- and him.

When juxtaposed with counsel's obligation to form a professional working relationship with the client, based on trust, the harm of the torture and the harm of the on-again, off-again government investigation of counsel and team members is particularly damaging to Mr. Mohammad's rights to a fair trial and a reliable sentencing hearing. Counsel for Mr. Mohammad are ethically and professionally compelled to provide high quality capital representation, adhering to standards prescribed in the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913(2003) (hereinafter "ABA Guidelines"). Counsel are required to begin to establish a relationship of trust with the client. ABA Guidelines, 31 Hofstra L. Rev. at 1007. Adherence to the professional standards in GUIDELINE 10.5—"RELATIONSHIP WITH THE CLIENT" is critical.[26]

[26] A. Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.
B. 1. Barring exceptional circumstances, an interview of the client should be conducted within 24 hours of initial counsel's entry into the case.
2. Promptly upon entry into the case, initial counsel should communicate in an appropriate manner with both the client and the government regarding the protection of the client's rights against self-incrimination, to the effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards.
3. Counsel at all stages of the case should re-advise the client and the government regarding these matters as appropriate.

Thus, counsel for Mr. Mohammad have an obligation to establish a relationship of trust, with someone whom agents of the United States government subjected to brutal torture, assured he would always be in their control, and continue to hold in their custody at present. The establishment of the relationship of mutual trust and respect, which is necessary to afford Mr. Mohammad effective assistance, is now strained by the knowledge that some of his team members may have secretly spoken to the FBI or other governmental agencies. Counsel's duty to communicate with the client about "preservation of the attorney-client privilege and similar safeguards" is undermined when that privilege evaporates, when, as in the current incident, a team member or former team member is interrogated about the workings of his team and other co-defendant's teams, based apparently on insider information about the team.

The duty to establish a relationship of trust is ongoing throughout the case. "[C]ounsel must consciously work to establish the special rapport with the client that will be necessary for a productive professional relationship over an extended period of stress." ABA Guidelines, 31 Hofstra L. Rev. at 925–26 (2003). The government's investigation of counsel and team members is destructive of that "productive professional relationship" in ways that are particularly difficult for a tortured person to overcome. The psychological and physical effects of torture often require extensive assistance of professionals in order to regain the ability to trust or to restore confidence in judgment, and a modicum of faith in humanity. Of course, the defendants

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C. Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as:
1. the progress of and prospects for the factual investigation, and what assistance the client might provide to it;
2. current or potential legal issues;
3. the development of a defense theory;
4. presentation of the defense case;
5. potential agreed-upon dispositions of the case;
6. litigation deadlines and the projected schedule of case-related events; and
7. relevant aspects of the client's relationship with correctional, parole or other governmental agents (e.g., prison medical providers or state psychiatrists).

have not had that medical attention. Defense team members have worked to establish trust and maintain it, but that is ruptured each and every time the government demonstrates that it has the ability to intrude on that relations with impunity.

The "painstaking" assessment of the potential conflict cannot be adequate or complete in this case unless the consequences of the torture and the disruption to this attorney client relationship are included. The right to be heard and right to effective assistance of counsel "lose most of their substance if the Government can with impunity place a secret agent in a lawyer's office to inspect the confidential papers of the defendant and his advisers, to listen to their conversations, and to participate in their counsels of defense. Conduct of that sort on the part of our Government is no doubt extremely rare. But if it does occur a conviction tainted by it cannot stand." *Caldwell v. United States*, 205 F.2d 879, 881 (D.C. Cir. 1953).

The Military Judge should abate all other proceedings and afford Mr. Mohammad an open, thorough and reliable inquiry to determine the existence and extent of the potential conflicts of interest at issue here, including the extent of the government's ongoing intrusion into the defense camp.

7. Oral Argument:

Mr. Mohammad requests oral argument and the opportunity to be present during any further presentations by the SRT.

8. Witness and Evidence:

None.

9. List of Attachments:

A. Certificate of Service.

B. Request for Discovery No. DR-098-MOH, dated 22 January 2019.

Respectfully submitted,

//s//
DAVID Z. NEVIN
Learned Counsel

//s//
GARY D. SOWARDS
Defense Counsel

//s//
DEREK A. POTEET
LtCol, U.S. Marine Corps
Defense Counsel

//s//
RITA J. RADOSTITZ
Defense Counsel

Counsel for Mr. Mohammad

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 23rd day of January 2019, I electronically filed AE 615I (KSM), Mr. Mohammad's Reply to 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 Inquirywith the Chief Clerk of the Military Commissions Trial Judiciary and served the foregoing on all counsel of record by electronic mail.

//s//
DAVID Z. NEVIN
Learned Counsel

ATTACHMENT B

REQUEST FOR DISCOVERY TO SPECIAL TRIAL COUNSEL, ICO United States v. Khalid Shaikh Mohammad, from undersigned counsel for Mr. Khalid Shaikh Mohammad.

Date: January 22, 2019

Subject: Request for Discovery No. DR-098-MOH.

1. Definitions.

In this request for discovery, the following definitions apply:

"Document" means any recorded information, regardless of the nature of the medium or the method or circumstances of recording within the possession or under the control of the Government.

"Government" includes all components of or persons acting on behalf of the United States Government, including but not limited to the Office of the Chief Prosecutor, the Central Intelligence Agency, and the Federal Bureau of Investigation.

"Information" means any knowledge that can be communicated or documentary material, regardless of its physical, electronic, or virtual form or characteristics.

The word "produce" means to convey the document or information to the defense without alteration or redaction, to include alteration of any electronically stored information associated with the document. To the extent that responsive documents or information are subject to the classified information, government information, or other applicable privilege, the word "produce" means to provide a privilege log of any withheld information or documents, along with the facts disclosed in the responsive documents that are not protected by the applicable privilege, and documents attached and/or incorporated into the responsive documents that are not otherwise exempt.

As to a person, "identify" means to state the person's full name, current address, current phone number, and current email address.

2. Background.

This Request for Discovery incorporates by reference as if fully set forth, and refers throughout to, the declaration of SSG Brent Skeete, dated December 26, 2018 (AE 615,[1] Attachment B), which describes events occurring on December 20 and 21, 2018. These events included SSG Skeete's harassment by apparent government agents (including surveillance and pursuit), searches of his person and possessions, and his involuntary detention, interrogation, and

[1] 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, 9 January 2019.

forced submission to a polygraph examination. The Investigation sought to probe deeply into the functioning of the Walid bin Attash defense team, the actions of "other defense teams and the other defendants," AE 615, Attach. B, para. 32, and seemed to be supported by confidential information obtained from other person(s) on the bin Attash defense team in violation of the attorney client privilege and the requirement for confidentiality of case information, *see id.,* para. 25.

3. Information requested.

Provide any and all "information" or "documents" in any form which relate in any way to the investigation, pursuit, search, detention, interrogation or polygraph examination of SSG Skeete as described in AE 615, Attachment B, including but not limited to the following:

a. Any FD-302, memorandum of interview, report, summary, report of polygraph examination, or similar materials which document, memorialize, or otherwise relate in any way to i.) the investigation, pursuit, search, detention, interrogation or polygraph examination of SSG Skeete, or ii.) any person who provided information regarding the bin Attash team and/or other defense teams in the 9-11 Military Commissions case, *see* AE 615, Attach. B, paragraphs 25 and 32.

b. Any memoranda, emails, or other materials which authorized, or purported to authorize, the investigation, pursuit, search, detention, interrogation or polygraph examination of SSG Skeete.

c. Any "information" or "documents," without limitation, including but not limited to rough notes, emails, cables, or internal memoranda, which reflect or describe: i.) the reason(s) for conducting the investigation, pursuit, search, detention, interrogation or polygraph examination of SSG Skeete; ii.) the topics or areas of inquiry to be discussed during any contact with SSG Skeete, and/or iii.) specific questions anticipated to be addressed to SSG Skeete.

d. Any materials, such as internal memoranda, emails, time records, log notes or the like, which document, memorialize, or otherwise relate in any way to any meetings of persons for the purposes of planning or preparing for, or otherwise discussing or memorializing the investigation, pursuit, search, detention, interrogation or polygraph examination of SSG Skeete.

e. Audio, video, or photographic recordings in any form of the pursuit, search, detention, interrogation or polygraph examination of SSG Skeete.

f. Contemporaneous notes in any form, including transcriptions or summaries thereof, made by any person during and/or related to the investigation, pursuit, search, detention, interrogation or polygraph examination of SSG Skeete.

g. Any document, form, agreement or directive shown to, discussed with or signed by SSG Skeete.

h. "Identify" any and all persons:

i. who participated in the investigation, pursuit, search, detention, interrogation or polygraph examination of SSG Skeete;

ii. who authorized, directed, ordered, approved, or were otherwise aware of the investigation, pursuit, search, detention, interrogation or polygraph examination of SSG Skeete;

iii. who facilitated in any way the investigation, pursuit, search, detention, interrogation or polygraph examination of SSG Skeete, such as by approving the expenditure of funds or arranging travel for government agents.

iv. who provided information to the Government regarding the bin Attash team and/or other defense teams in the 9-11 Military Commissions case, *see* AE 615, Attach. B, paragraphs 25 and 32.

3. Reasons for request.

This request is made pursuant to R.M.C. 701(c)(1) because the material requested is: "within the possession, custody, or control of the Government" and its existence is "known or by the exercise of due diligence may become known to [Special] trial counsel," and because it is "material to the preparation of the defense …"; and/or pursuant to R.M.C. 701(e) because it negates or reduces the degree of Mr. Mohammad's guilt, reduces his punishment, or reasonably may be viewed as mitigation evidence at sentencing.

This request is also made because a failure to provide the requested materials would deny Mr. Mohammad due process of law, the effective assistance of counsel, a fair trial, the opportunity to present a complete defense, and the right to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth and Eighth Amendments to the United States Constitution and similar provisions of the Military Commissions Act of 2009.

This request is continuing, meaning that if at any time the government discovers additional material responsive to this request, it shall promptly notify Mr. Mohammad or the military judge as to the existence of the material. R.M.C. 701(a)(5), 701(i).

Respectfully submitted,

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