

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 615J(WBA)

Defense 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 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 Order of the Military Judge dated 11 January 2019. (AE 615B(ORD)).
2. **Reply**: In AE 615(WBA), Defense Counsel described the two-and-one-half hour interrogation of military paralegal SSG Brent Skeete—a long-time member of Mr. bin 'Atash's Defense Team—by special agents of the Federal Bureau of Investigation ("FBI"). (AE 615(WBA) at 15-16). That interrogation included extensive questioning about Mr. bin 'Atash, current members of Mr. bin 'Atash's Defense Team, conversations between Mr. bin 'Atash and defense team members, and conversations solely among defense team members. (AE 615(WBA) at 15). Indeed, the primary subject matter of the questioning was not SSG Skeete, but the "roles, responsibilities, personalities, duties, and interactions with each other and Mr. bin 'Atash" of the other members of the Defense Team currently representing Mr. bin 'Atash. (AE 615(WBA) at 20). After being informed of FBI intrusion and interrogation, and grasping the clear implication of an ongoing investigation involving the Defense Team, Defense Counsel averred that "Mr. bin 'Atash's Defense Team is 'labor[ing] under a cloud of suspicion' now," (AE 615(WBA) at 22, quoting AE 292JJJJ(ORD))

at 10). This “cloud of suspicion” means that, “Defense Counsel for Mr. bin ‘Atash—indeed, all members of the Defense Team—are currently burdened by conflict as a result of the ongoing FBI investigation.” (AE 615(WBA) at 2). Defense Counsel requested that the Military Judge conduct the necessary and mandated thorough inquiry. (AE 615(WBA) at 22-25).

Following an expedited briefing schedule set by the Military Judge, the Government, in the form of the Special Review Team (“SRT”), responded. (AE 615D(GOV SRT)). Attached to its pleading, the SRT submitted a declaration from John F. Stofer, a Supervisory Special Agent with the FBI. (AE 615D(GOV SRT), Attach. B).

[REDACTED]

[REDACTED] (AE 615D(GOV SRT), Attach. B)

[REDACTED]

[REDACTED]

[REDACTED] (AE 615D(GOV SRT), Attach. B) The SRT does not claim that the investigation is closed, leaving the clear implication the investigation is ongoing. Nevertheless, and without legal support, the SRT claims that there is no conflict of interest.

The SRT begins its argument by placing great emphasis on an assertion that SSG Skeete—the only person yet known to Defense Counsel as recently interrogated by the FBI—was no longer a member of Mr. bin ‘Atash’s Defense Team at the time of the FBI interrogation. See (AE 615D(GOV SRT) at 3 (arguing that SSG Skeete was interrogated “after he was no longer a member of the defense team”)). The SRT claims as fact that “SSG Skeete’s 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.” (AE 615D(GOV SRT) at 3, n.2). The SRT then asserts that because there is “no indication that any *current* counsel of record for Mr. bin ‘Attash nor any *current* known member of his defense

team is under investigation by the FBI,” (AE 615D(GOV SRT) at 3 (emphasis added)), there is “sufficient basis for the Commission to rule that Mr. bin ‘Atash’s counsel is not operating under a conflict of interest and no further inquiry is required.” (AE 515D(GOV SRT) at 9).

The SRT’s arguments fail for multiple reasons. First and foremost, the SRT never declares, pleads or avers that the investigation opened on [REDACTED] because of the [REDACTED] [REDACTED] is now closed. The FBI investigation is not over. It is ongoing and continuing. As long as this investigation remains open, the entire Defense Team is under threat and conflicted.

Second, the SRT misstates and misconstrues almost everything about SSG Skeete in its pleading. In doing so, the SRT concludes that if the FBI interrogates a “former” member of the Defense Team about events and matters concerning the Defense—matters that all occurred while the individual was an active member of the Defense Team—there is no threat to Defense Team. The SRT makes the astounding and legally unviable argument that no legal consequence could occur so long as the interrogation occurred “nearly two weeks after his [or her] detail with [Mr. bin ‘Atash’s] defense team ended.” (AE 615D(GOV SRT) at 3, n.2). That position has no basis in law and the SRT asserts no legal precedent for such a position.

Finally, the SRT makes the specious claim that it “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(GOV SRT) at 3, n.3). The claim is specious because the legal precedent and authority resides in this very case: it is the AE 292 series. The SRT knows about the AE292 series; it represented the interests of the United States in the AE 292 series. Maybe not surprisingly, there is notable overlap between the signatories to the most recent SRT pleading and those attorneys who Judge Pohl conspicuously called out in the AE 292 series as “not providing the Commission

with the entirety of their knowledge” and offering suspect assurances that later proved untrue or inaccurate. (AE 292QQ(ORD) at 28). The SRT’s argument should be rejected.

- a. **There is an open and ongoing [REDACTED] that implicates and threatens Mr. bin ‘Atash’s Defense Team.**

In April 2014, Defense Counsel advised the Military Judge of a “potential conflict of interest between their loyalty to their clients and their interest in demonstrating their innocence to FBI investigators.” (AE 292 at 7). Mirroring the instant matter, in June 2014, the SRT responded “that there can be no conflict of interest burdening defense counsel because the Federal Bureau of Investigation (FBI) Preliminary Investigation at issue, which was focused on one non-attorney member of Mr. Ramzi Bin al Shihb’s team, is now closed, and the FBI is not investigating any defense counsel of record (or indeed any defense team member) in this case.” (AE 292R(GOV Sup) at 1). That representation proved inaccurate. The FBI investigation continued and the scope of persons “focused on” greatly expanded beyond the “one non-attorney member” of the Defense Team.

Now, nearly five years later, the FBI has again intruded into a 9/11 capital defense team. At least, this time, the SRT concedes that there is a [REDACTED] [REDACTED] And, at least now, the SRT does not deny that the investigation is ongoing and open; at no point in its pleading does the SRT aver that the investigation is “now closed.” But, mirroring the AE 292 Response, the SRT—despite the continuing, ongoing investigation—makes the identical argument it did in June 2014: Judge, please find that there is no conflict of interest.

The Military Judge should be mindful of the events of 2014 and 2015—namely, the FBI investigation in 2014, which the SRT first claimed was closed. That “closed” investigation of a non-attorney developed and morphed into an investigation of other Defense Team members

including Learned Counsel, Mr. Harrington. Ultimately, the United States Attorney for the Northern District of Illinois considered prosecuting Mr. Harrington; that prosecution was eventually declined. Judge Pohl correctly ascertained, despite the SRT representations to the contrary, that a thorough inquiry was necessary. (AE 292QQ(AMEND ORD) at 32). No less should occur here, where there is no dispute that an investigation is ongoing and not closed.

Inexplicably, the SRT makes much of its assertion that there can be no conflict of interest because there is “no indication that any *current* counsel of record for Mr. bin ‘Atash nor any *current* known member of his defense team is under investigation by the FBI,” (AE 615D(GOV SRT) at 3 (emphasis added)). The SRT’s careful parsing leaves many questions unanswered, but even assuming it may be true today, the threat to current team members remains. If the events of 2014 teach anything, it is that open investigations develop and morph. Defense Counsel for Mr. Bin al Shihb were not the subjects of the 2014 FBI investigation when it commenced—per the SRT and supported by a Supervisory Special Agent from the FBI, the investigation was “focused on one non-attorney member of Mr. Ramzi Bin al Shihb’s team.” (AE 292R(GOV Sup) at 1). The investigation ended with Defense Counsel, particularly Mr. Harrington, in the Government’s crosshairs. Having learned the lessons of 2014, Defense Counsel for Mr. bin ‘Atash do not accept the representations of the SRT. The Commission would be wise to follow the same course.

Regardless of the SRT’s historical lack of candor, Defense Counsel for Mr. bin ‘Atash have sufficient facts to counter the SRT’s narrative even assuming good faith. In AE 615(WBA), Defense Counsel detail the nature and focus of the questions put to SSG Skeete by the FBI Special Agents on 20 December. (AE 615(WBA) at 15-16). The bulk of the interrogation focused on the *current* members of Mr. bin ‘Atash’s Defense Team: Cheryl Bormann, William Montross, and Edwin Perry. The FBI special agents were focused on the operation of the team *currently*: who

Mr. bin 'Atash met with, who he trusted, what guards he liked. The SRT does not dispute that these questions about *current* Defense members—and *current* Defense matters—was pursued by the FBI. Given the extensive nature of the questioning, it is simply incredible that *current* Defense Team members are not subjects of the investigation. Maybe none of undersigned counsel's names appear in an unspecified FBI database, but clearly Ms. Bormann, Mr. Montross and Mr. Perry were on the minds of the agents interrogating SSG Skeete. This Commission must conduct the necessary inquiry.

- b. **The SRT's insistence that there can be no conflict of interest because SSG Skeete was not a member of the Defense Team at the time of the FBI interrogation is unsupported and without legal significance.**

At this point, Defense Counsel have no understanding of nor insight into the FBI's interest in Defense-related information known to SSG Skeete. Perhaps SSG Skeete is a witness to the events that [REDACTED] (AE 615D(GOV SRT), Attach. B [REDACTED] Maybe he is a target or a suspect. Perhaps he unwillingly provided assistance to another more culpable party or perhaps the FBI started with the most geographically remote Defense Team member first and will now use the information gleaned to pursue the next person of interest. All Defense Counsel know, right now, is that SSG Skeete was asked many questions about this Defense Team of which he was a long-time member. The SRT posits that this should give Defense Counsel no fear, because, at it takes great pain to note, the FBI never interrogated SSG Skeete until "after he was no longer a member of the defense team." (AE 615D(GOV SRT) at 3). It is unclear why the SRT believes that this allegation has any relevance.¹ At any rate, it provides no solace.

¹ Undersigned Defense Counsel do not concede that SSG Skeete was no longer a member of the Defense Team at the time he was interrogated by the FBI. However, regardless of SSG Skeete's formal status on

The SRT and Undersigned Counsel agree that SSG Skeete was interrogated by the FBI on 20 December 2018. For the SRT, though, that date is all that matters. It claims that once SSG Skeete is no longer an active member of the Defense Team, there is no basis for the current Defense Team members to fear the FBI intrusion. That is wrong. Even if the SRT is correct—that SSG Skeete was no longer a current member of the Defense Team as of 7 December 2018—the events precipitating the FBI investigation occurred before that date [REDACTED]

[REDACTED] We know the events precipitating the investigation occurred [REDACTED] because Supervisory Special Agent Stofer so declared. Special Agent Stofer averred that [REDACTED] [REDACTED] AE 615D(GOV SRT), Attach. B at 2). On or before [REDACTED] SSG Skeete was indisputably a member of Mr. bin ‘Atash’s Defense Team. Whatever the status of SSG Skeete right now is of little consequence; what really matters is SSG Skeete’s status at the time of the events in question. Indisputably, when the events now under investigation occurred, SSG Skeete was a colleague, partner, collaborator, and member of this Defense Team. Everyone on the Defense Team is potentially implicated.

Moreover, the SRT has never claimed that the subject matter of the FBI interrogation was some random event and not the Defense Team and their client Mr. bin ‘Atash. The FBI Special Agents were not asking questions about an unrelated matter that occurred on or before [REDACTED]

[REDACTED] Instead, almost every question asked of SSG Skeete by the FBI special agents concerned Mr. bin ‘Atash or the Defense Team. The SRT does not dispute that 85% to 90% of SSG Skeete’s interrogation was centered on Defense Team members, Defense Team actions and

that date—whether a current or former team member—what did not change was the duty of loyalty, confidentiality, and privilege owed by SSG Skeete (and any past and current member of the Defense Team) to Mr. bin ‘Atash. The SRT fails to recognize this mandatory ethical and professional obligation owed by all to the client in perpetuity.

Mr. bin ‘Atash. Instead, the SRT simply urges that SSG Skeete’s present status eviscerates any fear by Defense Counsel. That unsupported urging defies reality.

When SSG Skeete formally transitioned from a current member of Mr. bin ‘Atash’s Defense Team to a former member on 16 January 2019, he was no longer under the direct supervision and authority of Mr. bin ‘Atash’s Defense Counsel.² But, on and before [REDACTED] SSG Skeete was directly supervised by undersigned defense counsel. Attorneys are held responsible for the actions of their agents and subordinates. Therefore, any interrogation of any member of the Defense team—whether former or current—that involves a matter that occurred when that person was an active team member—particularly an event precipitating investigation of [REDACTED]—implicates the entire team. It is impossible for the team, and particularly the defense attorneys—not to be threatened. It simply does not matter if SSG Skeete was interviewed days, weeks, months, or years after leaving the Defense Team. What matters is that the alleged conduct giving rise to the “threat to national security” occurred while SSG Skeete was under the direct authority of the undersigned counsel. And, on or before [REDACTED] was a time when SSG Skeete was embedded in every aspect of Mr. bin ‘Atash’s representation.

c. The SRT’s representations have consistently been less than forthright.

The SRT claims that it “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(GOV SRT) at 3, n.3). That disingenuous statement is shocking. In the AE 292 series itself, the SRT at first

² Although, SSG Skeete’s new orders began 16 January 2019, he is still bound by the mandates of attorney-client privilege to keep as confidential all matters related to the representation of Mr. bin ‘Atash. See ABA Model Rules of Professional Conduct, Rule 1.6: Confidentiality of Information and Rule 5.3: Responsibilities Regarding Nonlawyer Assistance.

represented that the investigation only “focused on one non-attorney member of Mr. Ramzi Bin al Shibh’s team.” (AE 292R(GOV Sup) at 1). The Military Judge, despite this representation, rejected the SRT argument and conducted the necessary thorough inquiry into Defense Counsel’s conflict of interest, specifically stating that “the Commission cannot, with any fidelity, assure Mr. bin al Shibh, that a conflict did not, and does not now, exist.” (AE 292QQ(AMEND ORD) at 32). This is the law of the case.

Repeatedly throughout the AE 292 series, the SRT and its representations were deemed less than honest and forthright by the Military Judge. The Commissions “views . . . with a jaundiced eye” the legal representations of the SRT. (AE 292QQ(AMEND ORD) at 27). The parsing of SRT assertions “does not provide the Commission with the confidence necessary to make a definitive finding as to whether a conflict-of-interest exists.” (AE 292QQ(AMEND ORD) at 28). The SRT, and its proffered declarations, “are not providing the Commission with the entirety of their knowledge.” (AE 292QQ(AMEND ORD) at 28). Indeed, given the ultimate developments in the AE 292 series, namely, the referring of “allegations [against Defense Counsel] to the U.S. Department of Justice (DOJ) for a potential criminal investigation,” (AE 292JJJJ(ORD) at 6), the Commission was well served to reject the SRT’s protestations not to conduct the necessary thorough inquiry into Defense Counsel’s conflict of interest. As the Military Judge succinctly noted, “[I]t is evident that the concerns of the Commission at that time were not unwarranted.” (AE 292JJJJ(ORD) at 7).

Unfortunately, the SRT was not deterred by a judicial record laced with findings of lack of candor. The instant SRT pleading, AE 615D(GOV SRT), is replete with the exact arguments and the same legal assertions already rejected by this Commission. In 2014, the SRT “asserted ‘[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 292QQ(AMEND ORD) at 27). The Commission rejected that argument, finding that the “Commission views this with a more jaundiced eye when examined in terms of national security interests in a capital criminal trial.” Five years later, the same argument is cut-and-pasted into the present pleading. (AE 615D(GOV SRT) at 4 (“Where an attorney is under investigation for a different offense or by a different prosecuting authority, courts have generally found no conflict of interest.”). The same slippery language, parsed to suggest that Defense Counsel have no basis to fear anything, dominates the pleading. Mirroring the SRT pleadings in 2014, the SRT points to the absence of a defense counsel’s name in an unspecified database. The SRT and Supervisory Special Agent Stofer wholly ignore that the near-entirety of SSG Skeete’s interrogation focused on the very individuals who presently constitute the Defense Team. This Military Judge would be well-counseled to view the SRT’s representations with the same skepticism as did the former.

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 23 January 2019, I filed by email with the Trial Judiciary, AE 615J(WBA), Defense 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 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 a copy on all counsel of record.

/s/

CHERYL T. BORMANN
Learned Counsel