

**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 615M (RBS)

Mr. Bin al Shibh's Motion for Appropriate
Relief

24 January 2019

- 1. Timeliness:** This Motion is timely filed.
- 2. Relief Sought:** Mr. Bin al Shibh requests that the military judge not conduct *ex parte* hearings with the Special Review Team (SRT) concerning the matters underlying AE 615. In the alternative, if any *ex parte* hearing is held, Mr. Bin al Shibh requests that it be transcribed in its entirety, to include all discussion from initial contact, and that a complete record be provided to the Defense as soon as possible.
- 3. Burden of Proof:** The Defense bears the burden of proving it is entitled to the requested relief.
- 4. Facts:** On 9 January 2019, Mr. bin 'Attash filed a motion to conduct a thorough inquiry into actual or potential attorney conflict of interest and to cancel proceedings until an inquiry has been completed. *See* AE 615 (WBA). Citing a declaration by former team paralegal SSG Brent Skeete that he was questioned by the Federal Bureau of Investigation (FBI) about attorneys on

the bin ‘Attash team and about the defense team’s relationship to its client, among other issues, Counsel for Mr. bin ‘Attash argued that the defense team was under investigation by the FBI and that the military judge must conduct a thorough inquiry and abate all other proceedings. On 11 January 2019, the Commission ordered expedited briefing on the issue raised by Mr. bin ‘Attash. *See* AE 615B (ORD). The SRT filed its response on 17 January 2019, arguing that no current member of any defense team is currently under investigation by the FBI and that there could therefore be no conflict of interest, but also admitting that the

See AE 615D (GOV SRT)

On 22 January 2019, the military judge issued AE 615H (INT ORD), ordering at least one member of the SRT to appear *ex parte* before the military judge at 1300 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. The Interim Order also provided that the *ex parte* hearing would be in a secure space controlled by the Office of Court Administration and that a “transcript and any exhibits received by the Commission as part of the *ex parte* presentation will be maintained under seal.” *Id.* at 2.

On 23 January 2019, Mr. Bin al Shibh filed a Reply to AE 615D (GOV SRT) arguing for a robust inquiry into the matter underlying AE 615 and also objecting to any *ex parte* hearing. AE 615G (RBS) at 3, fn.2. On the same day, Mr. Mohammad filed a notice of objections to the *ex parte* hearing. *See* AE 615K (KSM) Mr. Mohammad’s Notice of Objection to *Ex Parte* Hearing Required by AE 615H INTERIM ORDER. On 24 January 2019, Mr. al Hawsawi also

submitted an objection to the hearing for filing. *See* AE 615L (HAW). Mr. al Hawsawi's Objection to Military Judge's Order (AE 615H) for Ex Parte Hearing with Government Special Review Team, and Motion for Hearing with the Defense.

5. Law and Argument:

While the military judge correctly acknowledged in AE 615H (INT ORD) the need for the provision of more information by the SRT in order to determine if any of the defense teams is operating under a conflict, Mr. Bin al Shibh objects to the *ex parte* hearing ordered under the same authorities cited by Mr. Mohammad and Mr. al Hawsawi. *See* AE 615K (KSM); AE 615L (HAW). Mr. Bin al Shibh is not aware of any party requesting an *ex parte* hearing. Additionally, if there is no pending investigation against any of the members of any team, as the government alleges, then there should not be any need to proceed *ex parte*.

Mr. Bin al Shibh has been through this process before. His defense team was subjected to a preliminary investigation and a full investigation. Even during the first six months of the eighteen month "investigation," with the SRT representing to Judge Pohl that there was no conflict of interest for Mr. Bin al Shibh, and repeatedly filing *ex parte* pleadings over defense objection informing this Commission of the progress of the investigation, Judge Pohl abated the proceedings and directed that conflict counsel be appointed for Mr. Bin al Shibh. *See* AE 312C (ORD); AE 292H (ORD). When the SRT apparently advised Judge Pohl that there was an actual criminal investigation, Judge's Pohl's rejection of the SRT's earlier representations of no conflict of interest proved correct. Only after Judge Pohl received final declarations that the criminal and security clearance "investigations" were complete and STR's assurances that no actions would be taken

against anyone on Mr. Bin al Shibh's defense team did he terminate the conflict of interest abatement and permit the proceedings to go forward. AE 292JJJJ (ORD) at 12-13. He also ordered the SRT to turn over discovery of the full investigations to counsel. *Id.* Because the material was presented *ex parte* during the "investigations," Mr. Bin al Shibh could not raise relevant arguments and objections to the Government's egregious conduct relevant to the conflict of interest and other issues, which the discovery disclosed. The fact that the Commission again finds itself in the same position due to the conduct of the Government gives the military judge all the more reason to provide the Defense an opportunity to be heard on this issue.

The Government has established a pattern of behavior that indicates it will infiltrate defense teams and invade attorney-client privilege without prior information to the court, in direct violation of the Commission's standing orders. Precluding the Defense from being privy to the information regarding the investigation of their own defense teams prevents a purely adversarial and robust development of the facts necessary for the court to make a determination of whether the defense attorneys have a conflict of interest and undermines the accused's right to counsel. Moreover, the attorneys themselves have an ethical obligation to determine whether they are impaired by a conflict of interest that requires them to ask to withdraw from their representation.

In light of the similarities between the Government's actions in AE 292 and AE 615, including involvement of the SRT and FBI, Mr. Bin al Shibh also objects to any *ex parte* hearing being conducted without the ability to *voir dire* the military judge on his prior contacts with people involved in the issues underlying AE 292 while working at the Department of Justice. *See*

AE 595G (RUL) (denying Mr. Bin al Shibh's request for *ex parte voir dire* on matters related to AE 292).

If the military judge holds any *ex parte* hearing with the SRT, the judge must ensure that any and all conversations with the Government from the inception of contact are conducted in the presence of a court reporter and fully transcribed. Mr. Bin al Shibh requests access to the transcripts and any filings that are part of the *ex parte* hearing, whether under seal or not.

6. Oral Argument: None requested.

7. Conference: The SRT's position is that the Commission's Interim Order in AE 615H is entirely appropriate.

8. 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 24 January 2019, I electronically filed AE 615M (RBS) Motion for Appropriate Relief with the Trial Judiciary, and served a copy of it on all counsel of record by e-mail.

//s//

JAMES P. HARRINGTON
Learned Counsel