

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,
 AMMAR AL BALUCHI (ALI ABDUL AZIZ
 ALI),
 MUSTAFA AHMED ADAM AL HAWSAWI

AE152 (RBS)

Emergency Defense Motion

To Order the Cessation of External Use of
 Sounds and Vibrations to Interfere with Mr. Bin
 al Shibh's Confinement and with the Attorney-
 Client Relationship and to Allow Expert
 Inspection of his Cell, Substructure/Foundation,
 Surrounding Areas of the Cell, and the Cell
 Control Room

3 April 2013

1. **Timeliness:** This motion is timely filed.
2. **Relief sought:** Mr. Bin al Shibh moves this Military Commission to enter an order directing the Joint Task Force, Guantanamo Naval Station to cease the use of sounds and vibrations in Mr. Bin al Shibh's confinement facility and to allow the Defense to inspect Mr. Bin al Shibh's cell, cell walls, substructure/foundation, area surrounding his cell, and the control room for the cells within the confinement facility. The Defense also moves this Military Commission to allow experts, such as qualified engineers, audio experts, and other technical specialists, to assist the defense in investigating the confinement conditions.
3. **Burden of Proof:** The Defense has the burden of proof by a preponderance of the evidence. R.M.C. 905(c).
4. **Overview:** The Military Commission previously entered an order on February 19, 2013 under AE 108 which permits the visitation and inspection of Mr. Bin al Shibh's cell and other specific areas within his confinement facility by three members of the defense team. The order

also places certain restrictions on how the visit may be conducted. On January 18, 2013, Mr. Bin al Shibh filed AE 108B, a supplemental motion, with the Commission requesting an order to permit qualified engineers and other technical specialists to assist in the inspection of the confinement facilities. This supplement alleged Mr. Bin al Shibh has been consistently and intentionally subjected to cruel and abusive treatment through sounds introduced into his cell by JTF personnel. The Commission did not address this request in its order.

Mr. Bin al Shibh's conditions have become increasingly intolerable for him and are having a significant adverse impact on the attorney-client relationship.

5. Facts Relevant to Motion:

- a. Mr. Bin al Shibh was taken into United States custody on September [REDACTED] 2002. He has been held at Guantanamo Naval Station as a detainee continuously since September [REDACTED] 2006.
- b. On information and belief, during his detention at Guantanamo, Mr. Bin al Shibh has been subjected to various sounds and vibrations designed to disrupt his daily life and his sleep. This treatment continues to this day.
- c. These sounds and vibrations make it extremely difficult for Mr. Bin al Shibh to concentrate on issues critical to his defense. Moreover, because the sounds and vibrations interfere with Mr. Bin al Shibh's ability to sleep, Mr. Bin al Shibh is sleep deprived which further affects his ability to focus and concentrate, either in his cell or during attorney meetings.
- d. Mr. Bin al Shibh has, in fact, cancelled a number of meetings with various members of his defense team.
- e. Getting relief from this treatment has become Mr. Bin al Shibh's overriding

- concern and priority. As a result, this issue dominates attorney-client discussions.
- f. Upon information and belief, the detention facility was specifically designed and constructed to facilitate on-going abusive treatment.
 - g. Numerous complaints and requests for relief from this conduct by Mr. Bin al Shibh and his counsel to JTF personnel have resulted in routine denials that there is any problem or that he is being exposed to sounds or vibrations.
 - h. Recent proceedings before the Commission regarding the listening and monitoring devices in the courtroom and the detainee visitation rooms for attorney client meetings demonstrate the government is willing and able to use surreptitious electronic devices against detainees.

6. Discussion:

The Detainee Treatment Act prohibits the Government from inflicting cruel, inhuman, or degrading pretrial confinement conditions on Mr. Bin al Shibh. 42 U.S.C. § 2000dd(a).

"Cruel, inhuman, or degrading treatment" means the cruel, unusual, and inhumane treatment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States. 42 U.S.C. § 2000dd(d). This prohibited treatment includes sleep deprivation and alteration. *See Vance v. Rumsfeld*, 701 F.3d 193, 206 (7th Cir. 2012)(Wood, J. Concurring). The determination of when certain conduct becomes cruel and inhuman will depend on the facts and circumstances in each case.

Here, Mr. Bin al Shibh has experienced and continues to experience daily harassment in the form of sounds and vibrations which interrupt his concentration, sleep, and tranquility.

The Defense believes the facility is equipped to use such sounds and vibrations on detainees and that the JTF personnel intentionally create these sounds and vibrations to accomplish these results.

This is consistent with the Government taking similar covert actions, such as having the capability to listen to attorney-client conversations. *See* Motion AE 133D of Feb. 5, 2013. As a result, Mr. Bin al Shibh requests this court order the immediate cessation of any and all use of noises and/or vibrations within the detention facility for any purpose.

Moreover, to thoroughly evaluate this confinement condition, the Defense moves this Military Commission to allow an investigation into Mr. Bin al Shibh's cell, cell walls, substructure/foundation, area surrounding his cell, and the control room for the cells within the confinement facility. Furthermore, the Defense moves this Military Commission to allow experts, such as qualified engineers and other technical specialists, to assist the defense in inspecting and investigating these confinement conditions. *See also* AE 108B (RBS Sup).

Mr. Bin al Shibh is entitled to expert assistance for this issue because he can satisfy the test under *United States v. Lloyd*, 69 M.J. 95 (C.A.A.F. 2010). "An accused is entitled to expert assistance provided by the Government if he can demonstrate necessity." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010)(citation omitted). "The accused has the burden of establishing that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial." *Id.* at 99 (citations omitted). In order to satisfy the first prong of this test, the defense must satisfy a three-part analysis: (1) why the expert is necessary; (2) what the expert would accomplish for the accused; and (3) why defense counsel is unable to gather and present the evidence that the expert

would be able to develop. *Id.* at 99 (citing *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994)).

Addressing the first prong, defense counsel, paralegals, and ordinary investigators do not possess the requisite knowledge or expertise in the area of mechanical design, construction, and technology to be able to identify and assess the relevant design features (the specific design features and technology will be more fully developed through oral argument and testimony). In this case, defense counsel have reason to believe the relevant detention facility was designed and constructed in such a way as to facilitate on-going abusive treatment of the accused. Defense counsel also have reason to believe the above-mentioned features would only be detectable by individuals with specialized technical training (i.e., the features were designed to be covert). Consequently, expert assistance is absolutely necessary to identify and prevent on-going abuse, rebut aggravating evidence regarding behavior in confinement, formulate a mitigation strategy and develop grounds for clemency, determine whether there is a basis to assert an Eighth Amendment violation, and determine whether there is a basis to assert a due process violation based on past and present confinement conditions. Defense counsel cannot reasonably be expected to obtain the necessary engineering knowledge and skill to identify features that were intentionally designed to avoid detection. *Lloyd*, 69 M.J. at 99.

Addressing the second prong, a reasonable probability exists that denial of expert assistance would result in a fundamentally unfair trial. Without the expert assistance, Mr. Bin al Shibh may continue to suffer abuse in the detention facility in violation of his Eighth Amendment and due process rights. Moreover, he will be unable to counter any aggravating evidence regarding confinement presented by the prosecution.

To address these abusive confinement conditions and the effect on the Defense's ability to represent Mr. Bin al Shibh, the Defense moves this Military Commission to allow experts, such as qualified engineers and other technical specialists, to assist the defense in investigating the confinement conditions. The Prosecution does not agree with the relief requested.

7. Request for Oral argument: Oral argument is requested.

8. Request for Witnesses: None.

9. Certificate of Conference: The Defense conferred with the Prosecution and the Prosecution objects to the requested relief.

10. Attachments:

A: Certificate of Service

Respectfully submitted,

//s//
JAMES P. HARRINGTON
Learned Counsel for Mr. Bin al Shibh

//s//
KEVIN BOGUCKI, LCDR, USN
Defense Counsel for Mr. Bin al Shibh

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 3rd day of April 2013, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by electronic mail.

//s//
KEVIN BOGUCKI, LCDR, USN
Defense Counsel for Mr. Bin

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

**KHALID SHAIKH MOHAMMAD;
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MUSTAFA AHMED AL HAWSAWI**

AE 152A

Government Response

to Defense Emergency Motion to Order the
Cessation of External Use of Sounds and
Vibrations to Interfere with Mr.
Binalshibh's Confinement and With the
Attorney-Client Relationship and to Allow
Expert Inspection of His Cell,
Substructure/Foundation, Surrounding
Areas of the Cell, and the Cell Control
Room

17 April 2013

1. Timeliness

This Response is timely filed.

2. Relief Sought

The Prosecution respectfully requests that the Commission deny the Defense motion as there is no external use of sounds or vibrations being used to intentionally interfere with Mr. Binalshibh's confinement or with his attorney-client relationship.

3. Burden of proof

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

4. Overview

The Defense, who has the burden on this motion, can cite to no evidence that the Government is intentionally using external sounds and vibrations to interfere with Mr. Binalshibh's confinement, through covert devices or otherwise. As such, the Military Judge should deny the motion for an order of cessation of external use of sounds and vibrations, as the evidence will not establish that the Government is intentionally causing any such sounds or

vibrations. Put simply, the Government should not be ordered to stop doing that which it is not doing. The Prosecution denies, unequivocally, that the Government is intentionally using external sounds and vibrations to interfere with Mr. Binalshibh's confinement in any way, notwithstanding that fact that the Prosecution does not bear the burden of proving a negative.

5. Law and Argument

Per its policy regarding Defense expert consultant requests, the Prosecution is unaware of all of the expert consultant requests that have been made by the Defense to the Military Judge in this case. However, in 108J, the Military Judge's Order already allows for three properly-cleared members of the Defense team to be given access to their accused's current cell while the accused is present, any adjoining cells, the cell block area in which their accused is currently held, any cells or cell block areas within the current confinement facility where the client has previously been held, and any recreational area, media room, medical facility, or other area to which the accused currently has access. *See* Order, AE 108J. On information and belief, the Defense for Mr. Binalshibh has not yet inspected the facility. Who the Defense determines is on the Defense Team is up to the Defense. As such, with the obvious exception of the substructure/foundation¹ and control room area which it now seeks access to, the Defense already has access to much of the remaining portions of the confinement facility that it seeks in this motion.

The Defense also moves this Military Commission to allow experts, such as qualified engineers, audio experts, and other technical specialists, to assist the Defense in investigating the confinement conditions. The Prosecution is unaware of whether the Defense has already obtained the services of properly cleared engineers, audio experts, or other technical specialists, as the Defense motion seems to request only that such experts be allowed to search the facility. However, the United States Government clearly should not be required to fund such experts on this issue when the

¹ It is not clear if the Defense is requesting that JTF GTMO expose any part (if it exists) of the confinement facility that may currently be underground with this request by moving the surrounding dirt. The Prosecution opposes such a request, and opposes any inspection of the control room. On information and belief, the confinement facility is built utilizing slab construction for its foundation.

Government affirmatively has stated that it is not using external sounds and vibrations to interfere with Mr. Binalshibh's confinement. As such, the Defense cannot establish the necessity of the expert pursuant to *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010).

As an initial matter, the Defense has not yet visited the facility, so the claim that the Defense counsel are incapable themselves to do this part of the investigation is speculative. Secondly, since there are no devices being used to intentionally create sounds or vibrations in Mr. Binalshibh's cell, the Defense will not be able to establish that the denial of these expert witnesses would result in a fundamentally unfair trial. Because no such device exists, the Accused will be in no way prejudiced from the denial of the experts. If the Defense has already obtained such services, and one or more of those experts is one or more of the three cleared individuals on the Defense Team, the Military Judge's Order would seemingly allow for those individuals to inspect the facility in a manner consistent with that order. The Prosecution objects to any further inspection of the facility other than that already ordered in AE 108J.

The Defense claims, on information and belief, that during his detention at Guantanamo, Mr. Binalshibh has been subjected to various sounds and vibrations designed to disrupt his daily life and his sleep, and that this treatment continues to this day. *See* Defense Motion at 2-4. The Defense should be required to inform this Commission what its good faith basis is for making such statements.

6. Oral Argument

To the extent the Commission grants the Defense request for oral argument, the Prosecution requests the opportunity to be heard on this issue.

7. Witnesses and Evidence

None.

8. Additional Information

None.

9. Attachments

A. Certificate of Service, dated 17 April 2013.

Respectfully submitted,

//s//

Clay Trivett
Deputy Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 17th day of April 2013, I filed AE 152A, the **Government Response** to Defense Emergency Motion to Order the Cessation of External Use of Sounds and Vibrations to Interfere with Mr. Binalshibh's Confinement and With the Attorney-Client Relationship and to Allow Expert Inspection of His Cell, Substructure/Foundation, Surrounding Areas of the Cell, and the Cell Control Room with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//

Clay Trivett
Deputy Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

MILITARY COMMISSIONS TRIAL JUDICIARY
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MUSTAFA AHMED ADAM AL HAWSAWI

AE152B (RBS)

Defense Reply

To Government Response to Defense
Emergency Motion To Order the Cessation of
External Use of Sounds and Vibrations to
Interfere with Mr. Bin al Shibh's Confinement
and with the Attorney-Client Relationship and
to Allow Expert Inspection of his Cell,
Substructure/Foundation, Surrounding Areas of
the Cell, and the Cell Control Room

24 April 2013

1. **Timeliness:** This reply is timely filed.

2. **Discussion:**

Mr. Bin al Shibh requests this Military Commission (1) order the immediate cessation of any and all use of noises and/or vibrations within the detention facility for any purpose, and (2) allow experts to assist the defense in investigating the confinement conditions.

The Joint Task Force, Guantanamo Naval Station is creating pre-trial confinement conditions that ultimately interfere with the attorney-client relationship between Mr. Bin al Shibh and his Defense Team. On information and belief, these pre-trial confinement conditions include subjecting Mr. Bin al Shibh to various sounds and vibrations in his cell during his detention at Guantanamo Naval Station since September 6, 2006. These conditions disrupt his daily life; specifically, sleep. "[S]leep undoubtedly counts as one of life's basic needs." *Harper v. Showers*, 174 F.3d 716, 720 (5th Cir. 1999). Confinement conditions designed to prevent sleep may violate the Eighth Amendment. *Id.* Here, the sounds and vibrations in Mr. Bin al Shibh's

cell are designed to prevent sleep and create sleep deprivation, which violates the Eighth Amendment.

These sounds and vibrations have affected the attorney-client relationship. Although a defendant may not have a right to a meaningful relationship with his attorney, a defendant has an interest in his relationship with his attorney. *Morris v. Slappy*, 461 U.S. 1, 20-21 (1983)(Brennan, J. and Marshall, J, concurring.). “Counsel is provided to assist the defendant in presenting his defense, but in order to do so effectively the attorney must work closely with the defendant in formulating defense strategy.” *Id.* Crucial defense strategy decisions require consultation with the defendant and “[t]hese decisions can be best made, and counsel’s duties most effectively discharged, if the attorney and the defendant have a relationship characterized by trust and confidence.” *Id.*

Here, Mr. Bin al Shibh’s trust and confidence in the Defense Team is affected because his confinement conditions dominate discussions and interfere with the attorney-client relationship. Because of the Defense Team’s inability to stop the sounds and vibrations, Mr. Bin al Shibh has cancelled meetings with members of the Defense Team. When he does meet with the Team, at times, Mr. Bin al Shibh’s sleep deprivation prevents him from focusing and concentrating on defense strategy. Mr. Bin al Shibh focuses on getting relief from these sounds and vibrations because of their deleterious effects on him. Crucial defense strategy decisions cannot be made without resolving Mr. Bin al Shibh’s confinement conditions. Mr. Bin al Shibh requests this Military Commission order the cessation of all noises and vibrations in the detention facility. And Mr. Bin al Shibh requests this Military Commission allow experts to assist in investigating the confinement conditions.

The Government's Response does not counter Mr. Bin al Shibh's motion. In its Response, the Government denies that it is intentionally creating sounds or vibrations that interfere with Mr. Bin al Shibh's confinement. *See* AE 152A. This Response is based upon information provided by those who are responsible for the conditions complained of. They have a vested interest in denying the behavior. The Defense Team needs the experts to investigate the cause of the sounds and vibrations. Moreover, the Government alleges that "[w]ho the Defense determines is on the Defense Team is up to the Defense" and suggests that the Defense can get experts to inspect confinement conditions as part of the three-member team under the Military Commission's Order AE 108J. AE 152A at 2. This is a hollow argument considering, later in its Response, the Government argues against funding any such experts. AE 152A at 2-3. In addition, the visits ordered by the Commission relate to other reasons and purposes than those sought in this motion. There are restrictions in the order permitting the defense visit that are contrary to the relief sought in here.

Additionally, the Government asserts that "[t]he Defense should be required to inform this Commission what its good faith basis is for making such statements;" the good faith basis is the reporting of Mr. Bin al Shibh's daily personal experiences.

Mr. Bin al Shibh requests this Military Commission (1) order the immediate cessation of any and all use of noises and vibrations within the detention facility for any purpose, and (2) allow experts to assist the defense in investigating the confinement conditions.

3. Attachments:

A: Certificate of Service

Respectfully submitted,

//s//
JAMES P. HARRINGTON
Learned Counsel for Mr. Bin al Shibh

//s//
KEVIN BOGUCKI, LCDR, USN
Defense Counsel for Mr. Bin al Shibh

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 24th day of April 2013, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by electronic mail.

//s//

KEVIN BOGUCKI, LCDR, USN
Defense Counsel for Mr. Bin al Shibh