

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHEIKH MOHAMMED, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL-AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>D-078</p> <p>Defense Motion to Compel Discovery-Names of Psychiatric Technicians and Corpsmen Mentioned in JTF-GTMO Medical Records</p> <p>Order</p>
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1. Ramzi Bin Al Shihb was captured by Pakistani Forces in Karachi, Pakistan on or about 11 September 2002 and transferred to Guantanamo Bay, Cuba on or about September 2006, where he remains under the control of Joint Task Force-Guantanamo Bay personnel. Charges were sworn on 15 April 2008 and referred to trial by military commission on 9 May 2008. The accused was arraigned on 5 June 2008. On 1 July 2008, the Military Commission ordered a board convened pursuant to Rule for Military Commission (RMC) 706¹ to inquire into the present mental

¹ If there is reason to believe that an accused lacked mental responsibility for any offense or lacks the capacity to stand trial, the military judge may order an inquiry into the mental condition of the accused. See RMC 706(a). When a mental examination is ordered, the board shall make separate and distinct findings as to each of the following questions: (A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (B) What is the clinical psychiatric diagnosis? (C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct? (D) Is the accused presently suffering

capacity of the accused and scheduled an incompetence determination hearing² for 21 January 2009. Two government delays have continued the hearing to begin no earlier than 21 September 2009. The defense now moves this Commission to compel the government to disclose contact information for all psychiatric technicians and medical corpsmen who assisted any physician in treating the accused since the accused's arrival to Guantanamo Bay in September 2006. The government opposes the motion. Under the circumstances, the Military Commission finds good cause to order relief, though not the particular remedy sought by the defense.

2. In several filings submitted to the Military Commission, the prosecution asserts it has provided defense counsel with copies of all medical and mental health records pertaining to the accused since his arrival at Guantanamo Bay in September 2006, amounting to hundreds of documents. The government has also provided defense counsel access to at least ten physicians

from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense? RMC 706(c)(2).

²No person may be brought to trial by military commission if that person is mentally incompetent. Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent

identified in those medical and mental health records for follow up interview. The defense now moves this Commission to compel the government to disclose contact information for each psychiatric technician and medical corpsman who worked for any physician who treated the accused. The defense asserts that follow up interviews are necessary as the physicians relied upon the technician's observations of and daily contact with the accused in preparing the written reports. The government responds that any information the technicians may provide is already contained in the medical and mental health records previously given to defense and any further inquiry regarding past observations and impressions of the accused beyond those contained in the documentary record is not relevant to an assessment of the accused's present mental competency.

3. The Military Commission finds that, if a physician relied upon a technician to prepare his or her written report of the accused, some follow up interview would be helpful to the defense in preparing for the incompetence determination hearing, including exploring a particular technician or corpsman's recollection of behavior, demeanor and actions of the accused

that he is unable to understand the nature of the proceedings or to conduct

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not reflected in the written reports and expanding on representations attributed to them by the physician.

4. In resolving this pretrial discovery issue, it is not necessary for the Military Commission to consider whether such testimony would be admissible at trial as an accused is entitled at this stage of the proceedings to a reasonable opportunity to obtain evidence helpful to him.³ However, the Commission recognizes it must also strike the appropriate balance between this basic discovery right and materiality of the information to the sole issue currently before the military commission - the mental competency of the accused.

5. Therefore, NLT 15 August 2009, the prosecution will facilitate access by defense counsel to those psychiatric technicians and/or medical corpsmen used by any physician in preparing medical and mental health reports of the accused since 21 September 2008, one year before the scheduled RMC 909 hearing. Consistent with paragraph 3(2) of the Military

or cooperate intelligently in the defense of the case. RMC 909(e).

³See generally *United States v. Yunis*, 867 F.2d 617 (D.C. Cir 1989) (accused entitled to production of evidence if helpful to a fair resolution of the case).

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Commission's 16 September 2008 ruling in D-023, the actual names and current duty locations of these persons can be protected.

6. The Military Commission directs that a copy of this order be served upon the prosecution and all defense counsel of record, and that it be provided to the Clerk of Court for public release. The Military Commission further directs the Clerk of Court to have this order translated into Arabic and served upon each of the above named accused. The underlying defense motion and government response will also be provided to the Clerk of Court for public release, after appropriate redactions for privacy and security considerations.

So Ordered this 24th Day of July 2009:

/s/
Stephen R. Henley
Colonel, U.S. Army
Military Judge