

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

**UNITED STATES OF AMERICA**

**v.**

**KHALID SHEIKH MOHAMMED,  
WALID MUHAMMAD SALIH MUBARAK  
BIN ‘ATTASH,  
RAMZI BIN AL SHIBH,  
ALI ABDUL AZIZ ALI,  
MUSTAFA AHMED ADAM AL  
HAWSAWI**

**Defense Motion  
For Appropriate Relief:**

Appointment of Defense Expert Consultant  
Dr. Xavier F. Amador, M.A., Ph.D.,

1 August 2008

1. **Timeliness:** This Motion is timely filed pursuant to the procedure afforded by the Rules for Military Commissions (R.M.C.). *See* R.M.C. 703(d); 905(b)(4).
2. **Relief Sought:** Detailed defense counsel for Mr. Ramzi bin al Shibh respectfully request the Commission to order the appointment and funding for Dr. Xavier F. Amador, Ph.D., to serve as a defense expert consultant in the field of clinical and forensic psychology.
3. **Overview:** To assist in its preparation for the R.M.C. 909 competency hearing in this capital case, the defense requested the convening authority approve the appointment of Dr. Amador to act as a defense expert consultant in the field of clinical and forensic psychology. In light of the nature of the medical and psychiatric evidence and issues to be addressed at the hearing that are well beyond the scope of defense counsel’s expertise, Dr. Amador would be of tremendous assistance to the defense as it prepares for the R.M.C. 909 competency hearing and as it prepares its defense on the merits. The failure to appoint Dr. Amador will result in a patently unfair proceeding. The convening authority twice denied the defense request. The defense comes now to the Commission seeking relief.

**4. Burden and Standard of Proof:** As the moving party, the defense bears the burden of establishing that it is entitled to the requested relief. *See* R.M.C. 905(c)(2)(A). “[T]he 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.” *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008); *citing United States v. Gunkle*, 55 M.J. 26, 31-32 (C.A.A.F. 2001). “[T]he burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence.” R.M.C. 905(c)(2).

**5. Facts:**

a. **4 June 2008:** the night prior to the arraignment, the defense learned, for the first time, that the government was aware of mental health issues concerning Mr. bin al Shibh. During an 802 conference in GTMO with the Military Judge and counsel, Mr. [REDACTED], Senior Security Advisor (SSA) to the Commissions, advised that JTF-GTMO provided notice of a potential safety concern with one of the five accused that would require the accused to be shackled at the feet. After the 802 conference, [REDACTED], U.S. Army, Officer in Charge of Security, informed counsel that the additional security precautions were required for Mr. bin al Shibh because he was being administered psychotropic medication.

b. The defense requested a meeting with Mr. bin al Shibh’s physician for the next morning and [REDACTED] stated he would pass along the request to JTF-GTMO. The physician was never named, nor made available to the defense. The name and dosage of the medication was also not provided to the defense at that time.

c. **5 June 2008:** Mr. bin al Shibh and his co-accused were arraigned. During the hearing, the Military Judge engaged in a colloquy with Mr. bin al Shibh regarding his rights to counsel. Mr. bin al Shibh stated openly that he desired to represent himself and that he has been seeking martyrdom for five years and that if it happened today, he would welcome it. After further discussion, the Military Judge stated that he could not find Mr. bin al Shibh competent to make a voluntary and understanding waiver of his rights to counsel, focusing specifically on the fact that Mr. bin al Shibh may have been influenced by the consumption of psychotropic medication.

d. During the arraignment, several of the detainees, including Mr. bin al Shibh, made general allegations of being tortured while in the custody of the United States government. The defense has not been provided any documents or

information from the government that pertains to Mr. bin al Shibh's conditions of confinement, specific interrogation techniques employed against him, and treatment during his time in CIA custody, September 2002 – September 2006. The defense is only privy to such information as it may be disclosed by Mr. bin al Shibh during client interviews, and such information is presumptively classified as TOP SECRET//SCI. *See* **PO 003**, ¶¶ 6.e., 24.

e. An analysis of what impact, if any, the alleged torture and ill treatment of Mr. bin al Shibh while in custody of the United States has had on his physical and/or mental health requires specialized education, training, knowledge, skill, and experience to adequately analyze and diagnose. *See Affidavit* of Dr. Vincent J. Iacopino, M.D., Ph.d., ¶¶ 15-18 (“Effective investigation and documentation of allegations of torture and ill treatment requires a thorough medical evaluation by a qualified, independent medical experts in accordance with international standards established by the Istanbul Protocol...Legal experts, including attorneys for the prosecution and the defense and adjudicators are not qualified to assess medical evidence of torture and ill treatment.”) [**Attachment A**].

f. **9 June 2008**: the Commission issued the Trial Schedule instructing that any motions “for unspecified relief with regard to Mr. Binalshibh [sic] involving R.M.C. 909 matters” are due on 13 June 2008. The Commission further ordered that a hearing will be held in GTMO on 10 July 2008 to resolve the issue regarding competency.

g. **10 June 2008**: the defense submitted a request to the government for all records and documents related to the physical and mental health of Mr. bin al Shibh. *See* Defense Motion, D-010, Attachment A.

h. **23 June 2008**: the defense received the government's written assurance that it will disclose all medical records of Mr. bin al Shibh to the defense and that it was arranging to have those records transported from GTMO and served on the defense. *See* Government Response to D-010, FN.1; ¶ 5.b.

i. **24 June 2008**: the government requested the Military Judge sign an order that JTF-GTMO shall provide to the Prosecution, for release to the defense, all medical records in its possession, including mental health records.

j. Also that day, the government provided to the defense a Medication Summary for Mr. bin al Shibh. [**Attachment B**]. This summary documents that Mr. bin al Shibh was taking [REDACTED] medications on the date of his arraignment, including: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[Attachment C]

k. **25 June 2008:** The Military Judge signed the Order requiring JTF-GTMO release medical records. [MJ 004]. Upon receipt of MJ 004, the defense informed the government that defense counsel were in GTMO and were willing to receive the medical records directly from JTF-GTMO. On that same day, LT Federico personally delivered a copy of the Judge's Order to [REDACTED], Staff Judge Advocate Office, JTF-GTMO, and made the same offer. [REDACTED] indicated she would consult with the prosecution about this offer.

l. Later that day, the government responded that the medical records must undergo a classification review before they can be released to the defense. LT Federico followed up with an email to trial counsels requesting the government expedite the classification review of medical records, noting that "each day of delay in getting us the records is yet another day that we are unable to begin even a cursory review or analysis as to the competency issue."

m. **1 July 2008:** the Commission entered an Order for the Inquiry into the Mental Capacity or Mental Responsibility of Mr. bin al Shibh ("706 Board"). [MJ 006]. The Commission also entered an Order in response to D-010 and D-011 wherein

the competency hearing for Mr. bin al Shibh was now docketed for 15 August 2008.

n. **2 July 2008:** the defense submitted a Memorandum for the Convening Authority requesting the appointment of Dr. Xavier F. Amador, M.A., Ph.D., to the defense team. [Attachment D]. In addition to detailing his qualifications, necessity of appointment, and estimated funding requirements, the defense also enclosed a copy of his *curriculum vitae*. [Attachment E].

o. **11 July 2008:** the defense sent an email to the Convening Authority asking that a response to its request be provided as soon as possible. [Attachment F]

p. **16 July 2008:** the government provided to defense redacted<sup>1</sup> copies of DoD medical records of Mr. bin al Shibh detailing in 503 pages the medical care, diagnosis, and treatment provided to him during the time he has been in custody of JTF-GTMO from September 2006 until present. The records document that Mr. bin al Shibh has

[REDACTED]

A select summary is as follows, primarily documenting the notes and findings of treating physicians, name and rank unknown: [Attachment G]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

q. **18 July 2008:** the defense submitted a Memorandum to the convening authority that was a supplement to its request for the appointment of Dr. Amador. [Attachment H]. Included within this memorandum was a specific acknowledgement that [REDACTED], Security Specialist, DoD Office of General Counsel, Office of Military Commission, verified that Dr. Amador has a valid [REDACTED] security clearance.

r. Later that day, the defense received an email from [REDACTED], Office of the Convening Authority, that stated, “You should have received this letter already. If not, here is a copy for your records.” [Attachment I]. The email included an attached letter from the convening authority, dated 11 July 2008, denying the defense request for appointment of Dr. Amador. [Attachment J].

s. Immediately upon receipt of the denial letter, the defense sent an email to [REDACTED] [REDACTED] stating that it had not received the letter of denial until 18 July. It further requested that the convening authority consider the supplement filed earlier that day and that a response to the supplement be provided no later than 1600 EST, Monday, 21 July 2008. [Attachment K]

t. **21 July 2008:** the government provided notice that: “the prosecution will file an *ex parte, in camera* motion under MCRE 505(e) requesting the Military Judge review and approve summaries of classified documents containing medical information regarding Ramzi Bin al Shibh to be provided to the defense. The

motion and accompanying documents will be presented to the Military Judge at [REDACTED]. Colonel Kohlmann has authorized prosecution assets to deliver the materials to him but directed that no oral presentations to him will be allowed. Per Colonel Kohlmann's direction, all communications to the Military Judge, including but not limited to the request and justification for the request, will be made in writing. The prosecution will provide the summaries to the defense once approved."

u. **22 July 2008:** the convening authority again denied the defense request for the appointment of Dr. Amador. [**Attachment L**].

v. **24 July 2008:** the Military Judge informed the parties: "that on 22 July 2008 I conducted an *in camera* review of classified material containing medical information regarding Mr. Bin al Shibh. I also reviewed the proposed summaries and/or redacted versions of the classified material. I determined that the proposed summaries and redacted material were not a sufficient alternative to the ordered discovery of the material in question. I directed that the material be returned to the prosecution with instructions on how the summaries could be augmented in order to become a sufficient alternative to full disclosure of the material in question."

w. **25 July 2009:** The government filed a Special Request for Relief wherein in sought a modification to the Commission's Order of 1 July to extend the deadlines for the reports of the "706 Board."

x. **29 July 2008:** The Military Judge granted the government's Special Request for Relief and modified the trial schedule. The RMC 909 competency hearing is now docketed for 11 September 2008.

y. As of the date of this filing, the government has not yet provided to the defense any information, documents, or records concerning medical care, treatment, or diagnosis during the time while Mr. bin al Shibh was in the custody of the CIA, September 2002 – September 2006.

## **6. Law and Argument:**

### **I. THE COMMISSION SHOULD APPLY THE LAW AS APPLICABLE TO U.S. MILITARY COURTS-MARTIAL TO FIND THE DEFENSE HAS MADE AN ADEQUATE SHOWING OF NECESSITY THAT DR. AMADOR BE APPOINTED AND FUNDED AS A DEFENSE EXPERT CONSULTANT**

a. "Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense." 10 U.S.C. § 949j(a). On 2 July 2008, the defense sought approval from the convening authority to appoint and fund Dr. Xavier F.

Amador, M.A., Ph.D., to be an expert consultant in clinical and forensic psychology. As discussed, *infra*, the defense sought the appointment of Dr. Amador so that it could have the opportunity to obtain evidence on the issue of whether Mr. bin al Shibh is competent to make a knowing and voluntary waiver of his right to counsel, is competent to stand trial, and/or determine whether he suffers from a diminished capacity. *See* R.M.C. 506(c); R.M.C. 909(a); *Faretta v. California*, 422 U.S. 806 (1975); *Dusky v. United States*, 362 U.S. 402 (1960)(per curiam). The request was submitted to the convening authority one-day after the Military Judge ordered the “706 Board.”

b. The defense was notified that the convening authority initially denied the defense request on 18 July 2008. After consideration of supplemental matters submitted that same day, the convening authority again denied the request on 22 July 2008. The basis for both denials was that the convening authority determined that the defense did not demonstrate necessity for the appointment of an expert. *See Attachments J, L.*<sup>3</sup> “A request denied by the convening authority may be renewed before the military judge, who shall determine whether the testimony of the expert is relevant and necessary.” R.M.C.

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<sup>3</sup> The defense respectfully requests the Commission give no weight to the determination and findings of the convening authority. This is especially important because it cannot be ignored that the convening authority is the former Chief Judge of the U.S. Court of Appeals for the Armed Forces and thus it is foreseeable that a military judge may give more weight to her findings and conclusions than typically afforded to a convening authority. Further, the defense also must note that the convening authority has in the past offered emphatic dissents and demonstrated open hostility to majority opinions requiring appointment of experts for the defense. *See United States v. Warner*, 62 M.J. 114, 123 (C.A.A.F. 2005)(Crawford, J., dissenting) (“I must respectfully, but emphatically dissent.”), at 128 (“The result is a retrospective rule that will alter the landscape of every court-martial now on appeal or yet to be tried, that involves either a Government expert consultant or expert witness.”), at 130 (“Setting aside for the moment the majority’s reinventing of Article 46 and R.C.M. 703...), at 132 (“[t]he majority’s gymnastic pronouncements...”), at 133 (“In *United States v. McAllister*, 55 M.J. 270, 281-82 (C.A.A.F. 2001)(Crawford, C.J., dissenting), I dissented from the Court’s relegation to a mere formality of the defense burden to establish necessity for a particular expertise.”), at 134 (“Our Constitution contains its own wise restraint on ‘cumulative and problematic’ effects – separation of powers doctrine. Will the military society respect a judicial system that ignores that doctrine as well as prevailing legal standards and decisions? And will the American public have confidence that the intent of Congress in promulgating the UCMJ is being respected? I fear not.”); *United States v. Kruetzer*, 61 M.J. 293, 306 (C.A.A.F. 2005) (Crawford, J., dissenting) (“I respectfully dissent from the majority’s expansion of *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53, 105 S.Ct. 1087 (1985), by finding in the U.S. Constitution a right of an accused to a death penalty mitigation specialist on the defense team, without the accused first demonstrating the need for such an expert.”).

703(d). Of note is that the rule relied upon by the convening authority, on its face, applies primarily to employment of expert *witnesses*, rather than *consultants*.

c. There is no corollary procedure applied in U.S. Federal District Courts to provide for the employment of defense expert consultants because the very notion of a “convening authority” is unique to the military justice system, both in courts-martial and commissions. To implement the M.C.A., the Commission should look towards the judicial construction and application of the procedural rules to military courts-martial, as prescribed by the Uniform Code of Military Justice (U.C.M.J.). *See* M.C.A., Part I (Preamble), ¶ 1(e); *quoting* 10 U.S.C. § 949a(a) (“Such rules ‘shall, so far as the Secretary considers practicable or consistent with military or intelligence activities, apply the principles of law and the rules of evidence’ for trials by general courts-martial, so long as the rules and procedures are not contrary or inconsistent with the M.C.A.); *But see* M.C.A., Part I (Preamble), ¶ 1(b) (“While the M.C.A. is consistent with the U.C.M.J. in many respects, neither the U.C.M.J. itself nor ‘[t]he judicial construction and application of that chapter’ is binding on trials by military commissions.” (10 U.S.C. § 949b(c))).

d. In military courts-martial, “service members are entitled to investigative or other expert assistance when necessary for an adequate defense.” *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008); *quoting United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986); *accord United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005). “[T]he 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.*; *citing United States v. Gunkle*, 55 M.J. 26, 31-32 (C.A.A.F. 2001).

**II. DR. AMADOR WOULD BE OF ASSISTANCE TO THE DEFENSE**

a. To establish that an expert would be of assistance, the accused “must show (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop.” *Id.*; quoting *Bresnahan*, 62 M.J. at 143.

**b. Why the expert assistance is needed.**

1. Department of Defense (DoD) physician(s) determined that Mr. bin al Shibh suffers from [REDACTED]. The physician(s) diagnosed that he has a

[REDACTED].

As a result of [REDACTED], Mr. bin al Shibh [REDACTED].

Additionally, Mr. bin al Shibh [REDACTED]. On

several occasions, DoD physician(s) determined that Mr. bin al Shibh [REDACTED].

[REDACTED]

[REDACTED]

[REDACTED] **See Attachment G.**

2. Mr. bin al Shibh’s legal competency is at issue. During the arraignment, Mr. bin al Shibh sought to waive his right to counsel and represent himself, *pro se*. The Military Judge refused to accept his waiver due to the fact that he was taking psychotropic medication. This fact was confirmed by the government on 24 June 2008 in the “Medication Summary” provided to the defense documenting that he was taking,

among other medications, [REDACTED]. See **Attachment B**. On 1 July 2008, the Military Judge, *sua sponte*, Ordered a 706 Board be conducted. See **MJ 006**.

3. Conducting a full and thorough investigation, review, and analysis of the competency and mental capacity of Mr. bin al Shibh is not a matter of trial strategy – it is the ethical obligation of defense counsels as attorneys.<sup>4</sup> The defense is ethically required to determine whether Mr. bin al Shibh suffers from any diminished capacity to make adequately considered decisions in connection with representation. See MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.2(a) (2002) (“a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued.”); Rule 1.2, *Comment* 4 (“In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.”); Rule 1.14(a) (“When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”). The assistance of Dr. Amador is critical to a determination as to whether Mr. bin al Shibh suffers from a diminished capacity.

4. The defense is entitled to an expert consultant that it can communicate with under cover of privilege. See M.C.R.E. 502(a), 502(b)(3). “One important role of expert consultants is to help counsel develop evidence.” *United States v. Warner*, 62 M.J. 114, 118 (C.A.A.F. 2005)(Crawford, J., dissenting). Defense counsel must be fully informed, with the complete confidence in the services of a defense consultant, of the ramifications of Mr. bin al Shibh’s mental condition. Moreover, the

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<sup>4</sup> Detailed defense counsels are licensed to practice law in California and Virginia (CDR Lachelier) and Indiana (LT Federico). Mr. Durkin is licensed to practice law in Illinois, Indiana, and California. The ABA’s Model Rules cited herein have been implemented in each state, without meaningful variation.

defense must be prepared to understand, and possibly challenge, the evaluation and findings of the inquiry of the 706 Board ordered by the Commission. It is well established that the defense is entitled to an independent mental health professional of its own choosing. *See Id.* at 118 (“Another important function of defense experts is to test and challenge the Government's case.”); *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985) (holding that the Constitution requires the defendant have access to a competent psychiatrist to conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense); *Smith v. McCormick*, 914 F.2d 1153, 1157 (9th Cir. 1989) (right to psychiatric assistance is not satisfied by appointing a “neutral” psychiatrist, but requires “the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate—including to decide, with the psychiatrist's assistance, not to present to the court particular claims of mental impairment”); *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985) (error to deny defense request for expert on grounds that there was no need for second opinion beyond that of government's expert: “when an accused makes a clear showing ... that his mental condition will be a significant factor at trial, the judge has a clear duty upon request to appoint a psychiatric expert to assist in the defense of the case; [t]he essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution”); *Buttrum v. Black*, 721 F.Supp. 1268, 1312 (N.D. Ga. 1989), *aff'd*, 908 F.2d 695 (11th Cir. 1990), *reh. denied*, 916 F.2d 719 (11th Cir. 1990) (trial court “failed to provide the scope of psychiatric assistance contemplated by *Ake*”; *Buttrum* was not provided with a psychiatrist to work closely with the defense, conduct an independent examination, testify if necessary, prepare for the sentencing phase, and respond to state testimony regarding future dangerousness); *Van White v. State*, 990 P.2d 253 (Okla. Crim

App. 1999) (relying in part on *Ake*, court held that attorney-client privilege applied to expert appointed by court to aid in defense, and privilege is maintained whether or not the expert testifies); *DeFreece v. State*, 848 S.W.2d 150 (Tex. Crim. App. 1993), *cert. denied*, 114 S.Ct. 284 (1993) (court's appointed psychiatrist was inadequate pursuant to *Ake* because an indigent defendant who makes the requisite threshold showing is entitled to a partisan, not merely neutral, expert, and is also entitled to a psychiatric expert to assist with his defense, not just for examination purposes; ability to subpoena expert not enough); *Anderson v. Virginia*, 421 S.E.2d 900 (Va. Ct. App. 1992), *reh. en banc granted*, 436 S.E.2d 625 (Va.Ct.App. 1993)(en banc) (error to deny the defendant a psychologist of her own choosing where trial court appointed a private psychologist of the state's choosing, and mental state was hotly contested and crucial to sentencing).

5. Dr. Amador is ideally qualified to be a defense consultant on this matter because he is a clinical and forensic psychologist who has impeccable credentials and substantial experience. He has consulted in approximately forty death penalty cases in U.S. federal court and eleven state courts, military cases (e.g. *United States v. Pfc Lynndie England, USA*), and terrorism/national security cases (e.g. *United States v. Zacarias Moussaou; United States v. Ted Kazcynski*). See **Attachment D**, ¶ 2. Dr. Amador has been extensively published in the specific mental illnesses diagnosed for Mr. bin al Shibh and those specifically addressed by DoD physician(s) in the medical records from JTF-GTMO (e.g. [REDACTED]). See **Attachments E, G**. Finally, DoD Office of General Counsel has confirmed that Dr. Amador already has a valid [REDACTED] security clearance. See **Attachment H**, ¶ 4. Dr. Amador is therefore uniquely situated to assist the defense with the matters presented in Mr. bin al Shibh's case.



c. **What the expert assistance would accomplish.**

1. Effective investigation and documentation of mental illness, potentially resulting from allegations of torture and ill treatment, requires a thorough medical evaluation by a qualified, independent medical expert in accordance with international standards established in the Istanbul Protocol. *See Attachment A*, ¶ 15; *see also United Nations Manual on the Effective Investigation and Documentation of Torture and Cruel, Inhumane, or Degrading Treatment or Punishment*. The “Istanbul Protocol” standards of evaluation are applicable to the present case because DoD medical records from JTF-GTMO clearly state that Mr. bin al Shibh [REDACTED] [REDACTED] [REDACTED]. *See Attachment G* (Records of 8 Oct 06, 19 Nov 06). Dr. Amador is properly qualified to conduct such an investigation.

2. After completion of his full and thorough investigation and evaluation, Dr. Amador would thereafter be able to assist the defense to fulfill its ethical obligations by determining competency and mental capacity. The defense can then proceed with briefing the Commission on its position and argument regarding Mr. bin al Shibh’s competency, prior to the R.M.C. 909 hearing. As the Commission notes, the findings of the 706 Board are not dispositive to the question of competency. *See Order* (“Motions for Special Relief D-010, D-011), dated 1 July 2008, ¶ 6 (“RMC 909 contemplates that the results of an inquiry pursuant to RMC 706 is reasonably *a part of* the hearing conducted by the Military Judge.”)(emphasis added); *see also* R.M.C. 909(d).

3. Dr. Amador *may* also be required to be a witness at the R.M.C. 909 competency hearing – a role the defense counsels are ethically precluded from taking.

*See* MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.7(a). “The mental capacity of the accused is an interlocutory question of fact.” R.M.C. 909(e)(1). In such a hearing, it is virtually certain the Commission will require the testimony of experts to determine the fact at issue. *See* M.C.R.E. 701. The defense counsels shall “have reasonable opportunity to obtain expert witnesses.” M.C.R.E. 706(a). “Even if the defense-requested expert consultant would not have become an expert witness, he would have assisted the defense in evaluating, identifying, and developing evidence.” *Warner*, 62 M.J. at 118.

d. **Why the defense counsels are unable to gather and present the evidence that Dr. Amador would be able to develop.**

1. The rules require that only a physician or clinical psychologist may conduct an inquiry into the mental capacity of the accused. *See* R.M.C. 706(c)(1). No current member of the defense team is a physician or clinical psychologist. It is self-evident that defense counsels lack the education, training, knowledge, and experience to conduct a highly complex psychoanalysis and thereafter formulate medical opinions. *See Attachment A*, ¶ 17 (“Legal experts, including attorneys for the prosecution and the defense and adjudicators are not qualified to assess medical evidence of torture and ill treatment.”). Further, the advice of an independent mental health professional cannot be obtained through independent study or preparation. The defense has been provided the medical records from JTF-GTMO, however, it cannot reasonably be expected to fully comprehend them without the assistance of an expert consultant. Nor can defense counsels be expected to adequately evaluate and respond to any findings of the 706 board without the assistance of a mental health professional.

2. Even if the Commission does not find that torture and ill treatment *may* have contributed to Mr. bin al Shibh’s mental illness, it must still acknowledge and appreciate the complexity of a mental health analysis of a person who has been in pre-trial confinement and extreme isolation for almost six years. Numerous studies have concluded that extended periods of detention in such conditions can cause significant psychiatric harm and the absence of social and environmental stimulation has been found to lead to a range of mental health problems, ranging from insomnia and confusion to hallucinations and psychosis. *See* HUMAN RIGHTS WATCH, “Locked Up Alone: Detention Conditions and Mental Health at Guantanamo,” (June 2008), page 20; Peter Scharff Smith, “The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature,” *Crime and Justice*, vol. 24 (2006); Lorna Rhodes, “Pathological Effects of the Super maximum Prison,” *American Journal of Public Health*, vol. 95, no. 10 (2005); Brief of Amici Curiae Professors and Practitioners of Psychology and Psychiatry, *Wilkinson v. Austin*, 545 U.S. 209 (2005); Jesenia Pizarro and Vanja Stenius, “Supermax Prisons: Their Rise, Current Practices and Effect on Inmates,” *Prison Journal*, vol. 84 (2004); Craig Haney, “Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement,” *Crime and Delinquency*, vol. 49, no. 1 (2003); INTERNATIONAL PSYCHOLOGICAL TRAUMA SYMPOSIUM, “Statement on the use and effects of solitary confinement,” Istanbul (December 9, 2007). The defense counsel is unable to analyze intelligently and adequately respond to these potential effects, whereas Dr. Amador is appropriately qualified to do so.

3. The appointment of an independent, civilian expert consultant is particularly crucial under these circumstances. Mr. bin al Shibh has [REDACTED]. *See* [REDACTED].

**Attachment G** (Records of 8 Sep 06, 3 Nov 06, 2 Mar 07, 6 Mar 07, 20 Mar 07, 25 Apr 07, 29 Jan 08, 12 Feb 08, 1 Mar 08, 23 Apr 08, 12 May 08). [REDACTED]

unexpected when one acknowledges that it is uniformed military members that have the daily duty of holding him in custody, and it was uniformed military members that labeled Mr. bin al Shibh to be an “enemy combatant” on 9 August 2007.

### **III. THE DENIAL OF DR. AMADOR WOULD RESULT IN A FUNDAMENTALLY UNFAIR TRIAL**

a. Mr. bin al Shibh is facing the death penalty. “Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of the qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.” *Woodson v. North Carolina*, 428 U.S. 280, 304-305 (1976). “It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case.” *Powell v. State of Ala.*, 287 U.S. 45, 59 (1932). The defense is merely asking to be provided the tools, in the form of an expert, to acquaint itself with the facts of the case, so as to afford Mr. bin al Shibh an adequate defense. Further, the Constitution *requires* that the defense be permitted to present material relevant to a determination of competency. *See Ford v. Wainwright*, 477 U.S. 399, 426 (1986) (holding Florida’s competency review before execution unconstitutional for its lack of due process because it did not allow for the presentation of evidence to the cross examination of witnesses).

b. As this is a capital case, defense counsels would not be able to effectively represent Mr. bin al Shibh, and fulfill their ethical obligations to fully explore the

competency issue, without the assistance of an expert. In this context, the request for Dr. Amador is analogous to the duty of defense counsels to investigate and present evidence in mitigation. *See Wiggins v. Smith*, 539 U.S. 510 (2003) (Scalia, J., dissenting) (holding that counsel’s failure to investigate the accused’s background and to present mitigating evidence violated the accused’s Sixth Amendment right to effective assistance of counsel); *see also Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869 (1982) (noting that the consideration of the offender’s life history is a “part of the process of inflicting the penalty of death.”); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954 (1978) (invalidating Ohio law that did not permit consideration of aspects of a defendant’s background). This legal authority defining the defense duty to seek mitigation and other defense evidence affecting the merits, with the assistance of a mitigation specialist, has been held to be directly applicable under military law. *See United States v. Kruetzer*, 61 M.J. 293, 298 (C.A.A.F. 2005) (Crawford, J., dissenting) (“Where such a request [for mitigation expert] is erroneously denied, that ruling implicates the right to present a defense, compulsory process, and due process conferred by the Constitution...”).

c. The right to appropriate, independent mental health experts is explicit in the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, which establish the required standard of care for capital representation. *See ABA REVISED GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES*, 31 Hofstra Law Review 913, 1029 (Summer 2003) (hereinafter “ABA Guidelines”); *see also Wiggins v. Smith*, 123 S. Ct. 2527 (2003) (the Court has “long looked” to the ABA Guidelines as “well-established norms” for performance of counsel in capital cases); *Rompilla v. Beard*, 545 U.S. 374 (2005). Indeed, the ABA Guideline approach removes the government from the

equation wherever possible, by instructing responsible agencies to construct a “Legal Representation Plan” that funds defense experts for indigent defendants through the public defenders office or through some other governmental agency, independent of the prosecutors. *See Id.* at 952, ABA Guideline 4.1 (“The Defense Team and Supporting Services”: B. The Legal Representation Plan should provide for counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings... [c]ounsel should have the right to have such services provided by persons independent of the government.).

7. **Request for Oral Argument:** In order to facilitate an expeditious adjudication of this Motion, the defense does not request oral argument and concurs that the Commission may issue its ruling based solely upon the written pleadings.

8. **Witness Request:** None.

9. **Conference with Opposing Counsel:** Pursuant to Military Commissions Rules of Court, Rule 3.3, on 31 July 2008, the defense conferred with the prosecution regarding its requested relief. The prosecution opposes the defense requested relief.

10. **Attachments:**

- A. *Affidavit* of Dr. Vincent J. Iacopino, M.D., Ph.d.
- B. Medication Summary (FOUO)
- C. *Affidavit* of Dr. Pablo Stewart, M.D.
- D. Memorandum for the Convening Authority, Subj: Request for Appointment of Expert Consultant Dr. Xavier F. Amador, M.A., Ph.D., to Defense Team ICO *United States v. Mohammed, et. al.* (Ramzi bin al Shibh), dated 2 July 2008
- E. Curriculum Vitae of Dr. Amador
- F. Email of LT Federico to Convening Authority, dated 11 July 2008

- G. DoD Medical Records of Mr. bin al Shibh
- H. Memorandum for the Convening Authority, Subj: Supplement to Request for Appointment of Expert Consultant Dr. Xavier F. Amador, M.A., Ph.D., to Defense Team ICO *United States v. Mohammed, et. al.* (Ramzi bin al Shibh), dated 18 July 2008
- I. Email from [REDACTED] to LT Federico, dated 18 July 2008
- J. Memorandum for Defense, Subj: Denial of Request for Expert Consultant, dated 11 July 2008
- K. Email from LT Federico to [REDACTED], dated 18 July 2008
- L. Memorandum for the Defense, Subj: Denial of Supplemental Request for Expert Consultant, dated 22 July 2008.

Respectfully submitted,

By: //s// *Richard E.N. Federico*  
CDR Suzanne M. Lachelier, JAGC, USNR  
LT Richard E.N. Federico, JAGC, USN  
*Detailed Defense Counsels for*  
*Mr. Ramzi bin al Shibh*

Office of the Chief Defense Counsel  
Office of the Military Commissions

[REDACTED]

Mr. Thomas A. Durkin  
*Civilian Counsel of Record for*  
*Mr. Ramzi bin al Shibh*

[REDACTED]

**Edmonds, Matthew SSG USSOUTHCOM JTFGTMO**

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**From:** Polley, James, Mr, DoD OGC [polleyj@dodgc.osd.mil]

**Sent:** [REDACTED]

**Subject:** USSOUTHCOM JTFGTMO  
FW: US v. Mohammed, et. al. - D-017 PROSECUTION SPECIAL REQUEST FOR RELIEF  
TO DEFENSE MOTION FOR APPROPRIATE RELIEF

**Signed By:** [REDACTED]

Colonel Kohlmann has directed that the following Order in regard to D-017 be forwarded to counsel in US v Mohammed et al. and to other interested persons.

[REDACTED]

-----0  
[REDACTED]

Mr. [REDACTED]: Please forward this message to the appropriate persons.  
\*\*\*\*\*

- All,
1. The Commission has reviewed the Defense motion in D-017 and the response and reply thereto.
  2. The Government response to D-017 was due to the Commission on 8 August 2008. Instead of requesting an enlargement of time in which to file a reply, or providing a response that would fully inform the Commission with regard to the Government position concerning the issue at hand, the Government requested permission to defer its response until after completion of the ordered RMC 706 inquiry.
  3. The RMC 706 inquiry is clearly a significant part of a RMC 909 mental



capacity determination. The defense is correct however, that even if the RMC 706 board determines that Mr. Bin Al Shibh is not presently suffering from a mental disease of defect rendering him unable to understand the nature of the proceedings against him or to conduct or cooperate intelligently in the defense, the defense may still seek to challenge the findings of the board and argue that Mr. Bin Al Shibh does not have the capacity to make a determination concerning a pro se election.

4. The Commission understands that the issue set forth in D-017 could be moot in the event that the RMC 706 board determines that Mr. Bin Al Shibh is presently suffering from a mental disease of defect rendering him unable to understand the nature of the proceedings against him or to conduct or cooperate intelligently in the defense. The Commission does not find, however, that the interests of justice are well served by putting off litigation of the expert assistance motion until such time as the RMC 706 determinations are completed.

5. It is also important to note that on 22 July 2008 the Commission determined that the proposed summaries concerning classified medical information with regard to Mr. Bin Al Shibh were not a sufficient alternative to the ordered discovery of the material in question. The Commission directed that the material be returned to the prosecution with specific instructions on how the summaries could be augmented in order to become a sufficient alternative to full disclosure of the material in question. The Commission has heard nothing since that time with regard to completion of this aspect of the discovery process. Discovery in this area must precede completion of the RMC 706 report and resolution of the mental capacity issue in accordance with RMC 909 with regard to Mr. Bin Al Shibh.

6. In the event the defense motion for expert assistance in the field of clinical and forensic psychology is granted, the assistance should be available reasonably in advance of the RMC 909 hearing. Accordingly, the Commission should endeavor to resolve D-017 as soon as possible.

7. The Government is directed to provide a full response to D-017 to the Commission and opposing counsel no later than 1700 EST on 13 August 2008. The Government is also advised that any alternative arguments to outright denial of the defense motion, such as one that the Commission's ruling be delayed until after receipt of the RMC 706 report, or one concerning appointment of an adequate substitute for the requested individual, should be included in its response. This sort of comprehensive response will facilitate the process of moving this case forward in a more timely and appropriate manner.

8. The prosecution is directed to ensure personal service of a copy (and Arabic translation thereof) of this message on the pro se parties as soon as possible. The prosecution will advise the Military Judge concerning the completion of service.

V/R,

Ralph H. Kohlmann  
Colonel, U.S. Marine Corps  
Military Judge

-----Original Message-----

From: Lachelier, Suzanne, CDR, DoD OGC [REDACTED]  
Sent: [REDACTED] 5 [REDACTED]

[REDACTED]

[REDACTED]

al. - D-017 PROSECUTION SPECIAL REQUEST FOR RELIEF TO DEFENSE MOTION FOR APPROPRIATE RELIEF

Sir,  
Please find attached the Defense Response to the Prosecution Special Request for Relief relating to D-017, Defense Motion for Appointment of Expert.  
V/R

S.M. Lachelier  
CDR, JAGC, USN

unsel

[REDACTED]

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[REDACTED]



RELIEF TO DEFENSE MOTION FOR APPROPRIATE RELIEF

Sir: Attached please find the subject special request for relief.

v/r

Dale J. Cox

Master Sergeant, U.S. Marine Corps

Chief Paralegal

Office of the Chief Prosecutor

Office of Military Commissions



UNITED STATES OF AMERICA	)	D-017
	)	
	)	PROSECUTION RESPONSE TO THE
	)	DEFENSE MOTION FOR
	)	APPOINTMENT OF DEFENSE EXPERT
	)	CONSULTANT DR. XAVIER F.
	)	AMADOR, M.A., Ph.D.
v.	)	
	)	
	)	
KHALID SHEIKH MOHAMMED	)	
WALID MUHAMMAD SALIH	)	
MUBARAK BIN ATTASH	)	
RAMZI BINALSHIBH	)	
ALI ABDUL AZIZ ALI	)	
MUSTAFA AHMED ADAM AL	)	
HAWSAWI	)	13 August 2008

1. **Timeliness:** This response is filed within the deadline set forth by the Military Judge in his order dated 11 August 2008.
  
2. **Relief Requested:** The Prosecution respectfully requests that the Commission deny the Defense request for the appointment of Dr. Amador as being unnecessary. The 706 Board is competent to render any opinion necessary for the military judge to determine whether the accused is competent to stand trial and whether he is capable of making a knowing, voluntary and intelligent waiver of his right to counsel. The Defense will have the opportunity to consult with the 706 Board regarding their findings.
  
3. **Facts:**
  - i. On 1 July 2008 the Military Judge ordered a board be convened pursuant to RMC 706 to inquire into the mental capacity of the accused. The Military Judge ordered that the board consist of two or more persons who are physicians or

clinical psychologists. At least one member of the Board will be either a psychiatrist or a clinical psychologist.

- ii. The Military Judge further ordered that the 706 Board, in its evaluation, make separate and distinct findings as to each of the following questions:
  - (A) Is the accused presently suffering from a mental disease or defect? If so, what is the clinical psychiatric diagnosis?
  
  - (B) Does the accused have the present ability to consult with his lawyers with a reasonable degree of cognitive understanding and does he have a rational as well as a factual understanding of the proceedings against him. If so, does the accused have sufficient mental capacity to understand the nature of the proceedings against him (trial by commission) and to conduct or cooperate intelligently in the defense?
  
- iii. Finally, the Military judge ordered that, under no circumstances will the full report, matters considered by the Board during it's inquiry, or any statements made by the accused to the board (or evidence derived there from) be disclosed to anyone other than Cdr. Suzanne Lachelier, JAGC, USNR and/or Lt. Richard Federico, JAGC, USN, without express written authorization from the military judge or the defense counsel.

- iv. On 2 July 2008, the Defense requested the Convening Authority provide funding for Dr. Amador, as an expert consultant in the field of clinical and forensic psychology, claiming that the military judge's order "is limited in scope" and that the inquiry will not entail a comprehensive evaluation of the accused that will permit defense counsel better to understand all the breadth of any mental health issues present. *See* Defense Request pg 3, para vi. The Defense has not requested that the Military Judge expand the scope of his order.
  
- v. In a memorandum dated 11 July 2008, the Convening Authority denied the defense request for Dr. Amador, citing the following reason: "As you know, on July 1, 2008, the military judge ordered a mental health evaluation of Mr. Bin al Shibh under R.M.C. 706. The evaluation will be conducted by a board of two or more persons who are physicians or clinical psychologists, at least one of whom must be a psychiatrist or clinical psychologist. The full report is privileged and you are to be furnished a copy by August 8, 2008. Under the circumstances, I find you have not demonstrated the necessity for an expert consultant as required under R.M.C. 703(d). Therefore, your request is denied." *See* Attachment A.
  
- vi. On 18 July 2008, the Defense made a supplemental request to the Convening Authority, adding certain medical records that had recently been discovered to the Defense.

vii. On 22 July 2008 the Convening Authority denied this supplemental request citing the following reason: “The pending sanity board will provide an independent mental health evaluation of the accused by qualified experts who will furnish a complete, privileged report to you. Therefore, after careful consideration of the additional matters you submitted, I find you have not demonstrated the necessity for the appointment of an expert consultant as required under R.M.C. 703(d). Your request is denied.” *See* Attachment B.

**4. Overview:**

a. The Convening Authority was correct in denying the Defense funding for the services of Dr. Amador, because the Defense simply cannot establish the necessity of his services. The Defense is not entitled under the law to have the government fund Dr. Amador, as the 706 Board is adequate for the determination as to his mental capacity and will be available to the defense for consultation.

The Defense request should also be considered premature, as the 706 Board determinations, whatever they may be, may render moot the need for extensive government expenditures<sup>1</sup> as it relates to Ramzi bin al Shibh’s mental health. Due to this contingency, the Prosecution respectfully requests that the Military Judge delay his ruling on this motion until the parties receive their 706 Reports and the parties have the opportunity to analyze the conclusions therein.

b. Until such time as the 706 Board Report is received, and its contents analyzed by the parties, the Defense cannot articulate a necessity for Dr. Amador.

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<sup>1</sup> The Defense seeks \$21,000 plus travel expenses for Dr. Amador

If after such time the Defense has some other basis to argue for the necessity of Dr. Amador (i.e. to challenge the findings of the 706 Board, or to contest some other issue deemed relevant by the Military Judge to the determination of the accused's mental capacity), the Prosecution respectfully requests that it be allowed to respond regarding the necessity of the services at that time, and also be provided the opportunity to seek an adequate substitute from within the United States government to provide further assistance to the accused if an expert is deemed to be necessary. If the Defense feels like the Military Judge's current order, which details the inquiry for the 706 Board, is inadequate to address its concerns, it is free to move this commission to expand the 706 Board's inquiry.

5. **Argument:**

a. The accused is not entitled to Dr. Amador as a government-funded witness, as the medical professionals assigned to the 706 Board will provide adequate assistance to the Defense and ensures the accused receives a fundamentally fair trial. While the accused is entitled to investigative or other expert assistance when necessary for an adequate defense, the mere possibility of assistance is not sufficient to prevail on the request. *See United States v Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2007) quoting *United States v. Bresnahan*, 62 M.J. at 143. Instead, 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. citing United States v Gunkle*, 55 M.J. at 31-32; *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994).



b. To establish the first prong set forth in *Freeman*, the accused "must show (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop." *Id. quoting Bresnahan*, 62 M.J. at 143. As the 706 Board will be performing a psychological evaluation of the accused, the Defense cannot make a showing as to the "necessity" of Dr. Amador; nor does the Defense even proffer why the 706 Board would be inadequate.

c. Because the Defense has not and cannot challenge the 706 Board's adequacy on this issue, it has failed to establish *any* of the three factors in the first prong in *Freeman* that would necessitate funding Dr. Amador. Since the Defense cannot establish the necessity of Dr. Amador, it goes without saying that the Defense also cannot show how denial of Dr. Amador would result in a fundamentally unfair trial.

d. While the accused may be entitled to a qualified psychiatrist when his mental capacity is fairly at issue, the entitlement "is one of access to a competent professional and is not the right to select a particular professional." *See United States v. Fontenot*, 26 M.J. 559, 562 (A.C.M.R. 1988); (*Rev'd on other grounds*, 29 M.J. 253 (C.M.A. 1989)); *citing Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985). The government is not required to appoint a psychiatrist specifically for the accused nor is it required to provide one who will agree with the accused's position. *See Id. citing United States v. Davis*, 22 M.J. 829, 833 (N.M.C.M.R. 1986), affirmed, 24 M.J. 222 (C.M.A. 1987). The Defense has access to competent medical professionals through its ability to

communicate with members of the 706 board and, as such, are not entitled to Dr. Amador at significant government expense.

e. The Defense claim<sup>2</sup> that it is “well established” that the defense is entitled to an independent mental health professional of its own choosing misstates the law. *See Defense Brief* at 6 (II) (b)(4) citing *United States v Warner*, 62 MJ 114, 118 (C.A.A.F 2005) (for the proposition that “it is well established that the defense is entitled to an independent mental health professional of its own choosing”). Quite the contrary, *Warner* cites the exact opposite proposition: “Of course, neither the convening authority nor the military judge was required to provide the defense with the particular expert it requested. But because expert assistance was necessary for the defense, the Government could deny the requested expert only if it provided an “adequate substitute.” *Id.*

f. In distinguishing federal and state cases<sup>3</sup> cited by the Defense, it is important to note that the certified professionals conducting the 706 inquiry are not “Prosecution experts” for which the defense is entitled to its own experts to rebut the Prosecution’s “case.” The 706 Board is a neutral body. In fact, while the Prosecution is prohibited by order of the Military Judge to communicate with the 706 Board on their findings, the Defense counsel will not only receive the full report of the board, but may also inquire

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<sup>2</sup> The Defense also notes that the rule relied upon by the Convening Authority in its denial applies primarily to expert witnesses, rather than consultants. However, C.A.A.F has specifically held that while Article 46, (the UCMJ Article underlying the RCM counterpart to RMC 703) deals with the “opportunity to obtain witnesses and other evidence” it is also applicable to defense requests for expert consultants. *See United States v. Warner*, 62 M.J. 114, 118 (C.A.A.F. 2005).

<sup>3</sup> It is also important to note that 706 Boards are unique to the military, and the absence of such a procedure in state and federal practice may necessitate the appointment of defense experts in those venues that would be inapplicable to military practice.

into matters considered by the Board during its inquiry, statements made by the accused to the board, and evidence derived there from. *See* Military Judge's 1 July 2008 order.

g. The Convening Authority was correct in its refusal to fund Dr. Amador, and the Military Judge should not order funding for his services. The Defense will have access to the commission-ordered psychological evaluation, and although the board was ordered for a limited purpose, the underlying evaluation should be comprehensive. The Defense will receive the full evaluation, and the full report is privileged. Where the military judge has already ordered a psychological evaluation and a full, privileged report for the defense, the Defense can make no claim for the further need to fund Dr. Amador.

h. The medical records the Defense attaches to its motion do nothing other than reveal reasons consistent with why the Military Judge ordered the 706 Board, but adds nothing to the basis for the Defense request or a demonstration of the necessity of Dr. Amador. The 706 Board will provide an independent mental health evaluation of the accused by qualified experts who will provide a complete, privileged report to the defense counsel.

i. Supporting the Convening Authority's refusal to authorize funding for Dr. Amador, United States Military Courts have consistently held that 706 Board determinations are all the psychological assistance an accused is entitled to. *See United States v. Mustafa*, 22 M.J. 165, 169 (C.M.A. 1986). "The only effect of the military judge's "ruling was to overrule appellant's request for the services of a particular

psychiatrist." See *United States v. Fontenot*, 26 M.J. 559, 561-562 (A.C.M.R. 1988); (*Rev'd on other grounds*, 29 M.J. 253 (C.M.A. 1989); quoting *Mustafa* at 169. "Thus the appellant had received, through the evaluation by several impartial psychiatrists, the assistance to which he was entitled.... He failed to make any showing that the assistance provided was inadequate or that the services of the civilian psychiatrist were necessary. As this court has recently noted, "[a]bsent a showing of necessity, there is no requirement for the government to provide [an] expert." *Id. quoting United States v. Kinsler*, 24 M.J. 855, 856 (A.C.M.R. 1987).

j. In *Mustafa*, the Court of Military Appeals addressed the specific issue of the adequacy of a 706 Board as sufficient witnesses to assist him in his defense:

Due process of law requires, as a minimum, "that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial," the accused must have "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 1097, 84 L. Ed. 2d 53 (1985)...

R.C.M. 706, Manual for Courts-Martial, United States, 1984<sup>4</sup>, provides for a board of medical officers, who shall at the request of either the trial counsel, defense counsel, investigating officer, or the commanding officer considering the disposition of the charges, conduct an inquiry into the mental status of the accused. The clear import of paragraph 121 is that the accused shall have access to a board of officers who will make the requisite psychiatric evaluation. Such an evaluation of this appellant was conducted by a board of three certified psychiatrists.

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<sup>4</sup> Although there have been several revisions to the Manual for Courts-Martial since 1984, the Prosecution is not aware of any substantive changes to the rules governing 706 Boards.

At trial, appellant made a motion for the military judge to order an additional examination by either a board of officers, which included a forensic psychiatrist, or an evaluation by a single psychiatrist who was certified not only as a psychiatrist but also as a forensic psychiatrist. As a third alternative, appellant requested the services of a civilian forensic psychologist. The military judge denied the motion, holding "that the accused has no right to determine the composition of a psychiatric board" and that "there has been no showing of inadequacy of the evaluation."

We have carefully reviewed the record of trial and conclude that the military judge ruled correctly. There is no showing in the record that the sanity of appellant at the time of the offense was a significant factor at trial or that appellant was denied access to competent psychiatrists for the purpose of presenting an insanity defense. The only effect of the military judge's ruling was to overrule appellant's request for the services of a particular psychiatrist.

United States v. Mustafa, 22 M.J. 165, 169 (C.M.A. 1986).

k. In comparing the composition of a 706 Board to the requirements set forth by the Supreme Court in *Ake*<sup>5</sup>, the Navy-Marine Court of Military Review held that the military system "passes muster." See United States v. Davis, 22 M.J. 829, 832-833 (N-M.C.M.R. 1986:

The paragraph 121 inquiry board was a neutral body not under the control of the convening authority or law enforcement officials, but rather was composed of medical personnel, conducted its proceedings at a medical facility, followed medical procedures, and provided medical opinions. The requirement for multiple members and the broad powers contributed to a comprehensive, objective inquiry. We do not interpret Justice Marshall's exhortation to "assure the defendant access" to a psychiatrist as requiring that the Government (1) appoint a psychiatrist especially for the appellant or (2) guarantee her a psychiatrist who agrees with her position, in the context of his caveats that a defendant has no right to a psychiatrist of his "personal liking" or to funds for hiring "his own" psychiatrist. Instead, we are persuaded that Justice Marshall's goal was the availability of impartial psychiatric advice to the defense as a safeguard against (1) "stacking

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<sup>5</sup> The Prosecution in no way intimates that the accused enjoys constitutional rights before this military commission. The Prosecution's position is set forth in its response to D-014, the Defense motion to dismiss based on outrageous government conduct, and will not be reiterated herein.

the deck" against an indigent defendant by a psychiatrist in league with the prosecution or (2) denying an indigent the means to produce enough evidence of a sanity defense to shift the burden of disproving it to the Government. In the military context, however, the first situation was forestalled by the neutral character of the paragraph 121 inquiry board...

*United States v. Davis*, 22 M.J. 829, 832-833 (N-M.C.M.R. 1986)

1. It is clear from the above-cited case-law that the accused is not entitled to a psychologist of his own choosing. Furthermore, any claim that the Defense would be entitled, as a matter of right, to a private defense consultant to challenge any determination the 706 Board may make, would render superfluous all of the above-cited case law holding to the contrary.

6. **Conclusion:**

a. The Convening Authority was correct in denying the Defense the services of Dr. Amador, because the Defense simply cannot establish the necessity of his services, and the Military Judge should find the same. The Defense is not entitled under the law to have the government fund Dr. Amador, as the 706 Board professionals are available and competent to determine the accused's mental capacity and will be available to the defense for consultation. The Defense request is also premature, as 706 Board determinations, whatever they may be, may render moot the need for extensive government expenditures as it relates to Ramzi bin al Shibh's mental health.<sup>6</sup> Due to this contingency, the Prosecution respectfully requests that the Military Judge delay his ruling on this motion until the parties receive their 706 Reports and the parties have the opportunity to analyze its conclusions.

b. Until such time as the 706 Report is received, and its contents analyzed by the parties, the Defense cannot articulate the necessity of the Dr. Amador. If after such

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<sup>6</sup> The Defense seeks \$21,000 plus travel expenses for Dr. Amador

time the Defense has some other basis for the need of Dr. Amador (i.e. to challenge the findings of the 706 Board, or to contest some other issue deemed relevant by the Military Judge to the determination of the accused's mental capacity), the Prosecution respectfully requests that it be allowed to respond regarding the necessity and be provided the opportunity to seek an adequate substitute from within the United States government to provide further assistance to the accused. If the Defense feels like the Military Judge's current order, which details the inquiry for the 706 Board, is inadequate to address its concerns, the Defense is free to move this commission to expand the 706 Board's inquiry. In no way would the Defense be entitled to Dr. Amador as a matter of right should the 706 Board return a conclusion that is not to the Defense's liking.

7. **Oral Argument:** The Prosecution does not request oral argument.
8. **Witnesses:** None.
9. **Additional Information:** None.
10. **Attachments:**
  - a. Convening Authority memorandum to the Defense request denying funding for Dr. Amador.
  - b. Convening Authority memorandum to the Defense supplemental request denying funding for Dr. Amador.

11. **Submitted by:**

Robert L. Swann  
Prosecutor  
U.S. Department of Defense

Edward Ryan  
Prosecutor  
U.S. Department of Justice

By:  //s//   
Clayton Trivett, Jr.  
Prosecutor  
U.S. Department of Defense

Jeffrey D. Groharing  
Major, U.S. Marine Corps  
Prosecutor

Thomas P. Swanton  
Prosecutor  
U.S. Department of Justice



[REDACTED]

[REDACTED]

**Subject:** RE: U.S. v Mohammed, et al-Pros Response to D-017-Defense Request for Appointment of Dr. Amador (Ramzi bin al Shibh)

**Signed By:** [REDACTED]

Sir:

The defense does not intend to file a substantive Reply to the Government's Response to D-017. Rather, the defense respectfully requests the Commission issue a ruling on D-017 as soon as possible. A prompt ruling to this Motion is critical for the following reasons:

1. Time is very much of the essence as the R.M.C. 909 competency hearing remains scheduled for Thursday, 11 September 2008. As the Commission noted, if the motion is granted, the assistance of Dr. Amador should be available reasonably in advance of the R.M.C. 909 hearing.

2. The defense team will be traveling to GTMO on Tuesday, 19 August. In the exercise of due diligence, the defense made tentative arrangements for Dr. Amador to travel to GTMO with defense counsels. A prompt resolution to D-017 will allow the defense the time to finalize logistical arrangements for Dr. Amador, should the Motion be granted. This includes: a final "read on" for special access program(s) which has tentatively been scheduled for Monday, 18 August, invitational travel orders to authorize him to travel on a government flight, funding for the travel, request to the CSG for lodging, request to JTF-GTMO for a badge, etc. Should the Motion be denied, the defense will likewise require adequate time to cancel all tentative logistical arrangements.

Very Respectfully,

Richard E.N. Federico  
Lieutenant, JAG Corps, U.S. Navy  
Defense Attorney

[REDACTED]

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[REDACTED]

[REDACTED]

Attached please find the Prosecution's response to D-017 as well as the two attachments referenced therein.

v/r

Clay Trivett