MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA	**D-___**
v.	**Defense Motion for Appropriate Relief**
KHALID SHEIKH MOHAMMED, **WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH,** **RAMZI BIN AL SHIBH,** **ALI ABDUL AZIZ ALI,** **MUSTAFA AHMED ADAM AL HAWSAWI**	Order Granting Access for Defense Expert Consultant (Dr. Amador) to Evaluate Mr. bin al Shibh and Communicate his Findings to Defense Counsel Dated: 25 June 2009

1. <u>Timeliness</u>: This motion is timely filed. *See* Commission Ruling, P-010, ¶ 5; R.M.C. 906(a).

2. <u>Relief Sought</u>: Mr. bin al Shibh, by and through detailed defense counsel, respectfully requests the Commission enter an order, as follows:

a. Permitting Dr. Xavier Amador, Ph.D., to meet and confer with Mr. bin al Shibh in Camp Platinum, Guantanamo Bay, Cuba or any such other facility where he may be located, for the purpose of conducting an examination or evaluation of his mental status; and

b. Permitting Dr. Amador to communicate to the defense team for Mr. bin al Shibh, the findings, opinions and conclusions resulting from all meetings and evaluations of Mr. bin al Shibh, as authorized from this or any previous order issued by the Commission or U.S. District Court, in accordance with the limitations and parameters set forth in Protective Order 7.

3. <u>Overview</u>: Upon order of the U.S. District Court, Dr. Amador met with and evaluated Mr. bin al Shibh in January 2009. As a result of his meeting with Mr. bin al Shibh, Dr. Amador formed an opinion relevant to Mr. bin al Shibh's competency. Because of the protective orders in place, however, Dr. Amador has been prohibited from sharing any of his findings or opinions from that evaluation with detailed defense counsel. This issue has not been "overcome by events," as the government represented to the Commission during the session on 19 January 2009, because detailed defense has not been permitted to consult with Dr. Amador in any capacity subsequent to his evaluation. This result renders meaningless the appointment of Dr. Amador as an expert consultant for the defense and, even worse, leads a capital defendant to suffer grave prejudice because his right to the assistance of competent counsel has been compromised. In a proper exercise of discretion, the Commission should modify its previous order and allow Dr. Amador to meet with Mr. bin al Shibh and communicate to defense counsel the findings from past and future meetings.

4. <u>Burden and Standard of Proof</u>: As the moving party, the defense bears the burden to prove that the access sought is necessary to ensure a fair adjudication of Mr. bin al Shibh's

competency to stand trial and/or waive his right to counsel. *See* R.M.C. 905(c)(2)(A). The burden of proof on any factual issue the resolution of which is necessary to decide whether the government can demonstrate an additional continuance is necessary shall be by a preponderance of the evidence. *See* R.M.C. 905(c)(1).

5. <u>Facts</u>:

a. By Order dated 26 October 2008, the Commission approved the appointment of Dr. Xavier F. Amador, Ph.D., to provide clinical and forensic psychological expert assistance to Mr. bin al Shibh in connection with any R.M.C. 909 hearings to be held in his case. The Commission directed, however, that "[t]he ordered employment does not extend to an order or authorization for Dr. Amador to meet with the accused in this case or conduct his own evaluation of the accused's mental capacity." Commission Ruling, D-017, 26 October 2008, ¶ 2.k.

b. On 9 January 2009, the defense filed a Motion for Appropriate Relief, requesting that Dr. Amador be granted the opportunity to meet with Mr. bin al Shibh for purposes of evaluating his competency to stand trial. *See* D-087. The government opposed the requested relief.

c. On 16 January 2009, the Honorable Emmet G. Sullivan, U.S. District Judge, District of Columbia, ordered that Dr. Amador be permitted to examine Mr. bin al Shibh "in the context of his *habeas* petition to commence a mental health evaluation of Petitioner forthwith … and that such evaluation include the opportunity for Dr. Amador to meet with and confer with Petitioner in Camp Platinum or in such other facility where Petitioner may be located." *See* Government Response, D-087, Attachment A.

d. On 16 January 2009, the government filed its Response to D-087 by stating, "[t]he defense motion has been overcome by events and the relief requested is no longer required." Citing the Order from Judge Sullivan, the government further stated, "it is the Prosecution's belief that this interview obviates the need for the relief requested by the Defense." *Id*., ¶ 3. Finally, the government reserved "the right to object to any testimony the Defense may seek to enter through Dr. Amador under the provisions of MCRE 302(d) during the pending RMC 909 hearing." *Id*.

e. Under the authority of the U.S. District Court, Dr. Amador met with Mr. bin al Shibh on three occasions, between 16-18 January 2009, to conduct an evaluation relevant to a *habeas corpus* petition in the case *Ramzi bin al Shibh v. George W. Bush* (06-cv-1725-EGS).

f. During the R.M.C. 803 session held on 19 January 2009, the defense offered for consideration by the Commission an email from Jean Lin, Civil Division, U.S. Department of Justice, to Mr. Rich Coughlin, Federal Public Defender of New Jersey (*habeas* counsel for Mr. bin al Shibh), stating that the U.S. Department of Justice takes the view that, "[w]hether the military defense counsel, the 706 Board, and the military commission have a need to know the results of Dr. Amador's evaluation is a matter to be litigated in the military commission before the military judge." *See* AE 119.

g. Also during the R.M.C. 803 session on 19 January, the parties discussed the defense motion (D-087). The prosecution stated its position on the matter, as follows:

CTC [MR. TRIVETT]: Yes, sir. We--we have taken the position that clearly he [Dr. Amador] has had access now. It shouldn't--so the issue of whether or not he should go in and speak to the accused has been overcome by events. He has, in fact, got to do that for purposes of competency.
…

MJ [COL HENLEY]: Is it the government's position that Dr. Amador cannot even examine Mr. Bin al Shibh for purposes of this military commission because he refused to answer or otherwise participate in the board's questions--this board's questions, this R.M.C. 706 evaluation?

CTC [MR. TRIVETT]: It--it's clear, under the authority that was granted by the military judge and then contracted with through the convening authority, that Dr. Amador was only authorized to consult with the defense; and, specifically, and if he had any other desires, he could have made clear, he made very clear that he was not to meet with the accused. That we believe was tied directly to 302D and the circumvention. So if your question is whether or not it's proper for him to talk to the accused, I don't think there's anything wrong with him talking to the accused. There was a court order specifically, though, that limit him--limited him to not doing that. So our position was that the court order needed to be upheld.

MJ [COL HENLEY]: When you say "court," do you mean the district court or----

CTC [MR. TRIVETT]: The commission.

MJ [COL HENLEY]: Commission. Okay.

CTC [MR. TRIVETT]: Colonel Kohlmann's previous order.

MJ [COL HENLEY]: Do you oppose modification of that order for the purpose of allowing Dr. Amador to talk to Mr. Bin al Shibh?

CTC [MR. TRIVETT]: At this point, Dr. Amador has talked to Bin al--Mr. Bin al Shibh, which was why we had referenced the fact that you cannot un-ring that bell. He met with him over the last five and a half--for five and a half hours over the course of the last three days. So whether or not we object to him--we would still object to him presenting any testimony in the military commission context.

MJ [COL HENLEY]: Okay.

CTC [MR. TRIVETT]: So I believe that the answer is: He has already met; it's overcome by events.

Transcript, *United States v. Mohammed, et. al*., 19 January 2009, pgs. 962, 965-67.

h. On 7 April 2009, the prosecution sent a memorandum to the defense to inform that the protective orders in place still governed the conduct of the parties during the continuance, that Dr. Amador would need to be granted relief from the protective orders from the Military Judge should he desire to disclose information obtained from his interviews with Mr. bin al Shibh to *habeas* counsel, and the prosecution did not intend to oppose a request for such relief, so long as it was provided an adequate generalized proffer detailing the information Dr. Amador sought to disclose to *habeas* counsel. *See* Attachment A.

i. The defense filed a Special Request for Relief on 9 April 2009 requesting relief from Protective Order 7 for the limited purpose of allowing Dr. Amador to consult with *habeas* counsel and disclose information obtained during his interviews and discussions with several of the co-accused in Guantanamo in January 2009.[1] *See* D-107. The prosecution did not oppose the requested relief, provided the information disclosed directly related to the mental health of Mr. bin al Shibh. The Commission granted the requested relief on 14 April 2009.

6. <u>Discussion</u>:

a. Dr. Amador evaluated Mr. bin al Shibh in January 2009 and formed an initial opinion, based upon that evaluation, relevant to Mr. bin al Shibh's competency. The authority for Dr. Amador to meet with Mr. bin al Shibh came from the U.S. District Court Judge, not the Military Judge, in furtherance of the competency assessment pending before the District Court. The same issue – Mr. bin al Shibh's competency – is in question in both cases. However, as a result of the Commission's previous ruling in D-017 and the complex web of protective orders the government has established (in both the Military Commission and the U.S. District Court), detailed defense counsel have not been able to consult with Dr. Amador about the results of his meetings with Mr. bin al Shibh subsequent to January 2009. Thus, the issue of Dr. Amador's access to Mr. bin al Shibh for the Commission case, and detailed defense counsel's ability to gain the evidence garnered from his access, has not been "overcome by events," as the government represented to the Commission during the session on 19 January 2009. This result renders meaningless the appointment of Dr. Amador as a defense expert consultant in this Commission and, worse yet, leads a capital defendant to suffer grave prejudice because it compromises his right to the assistance of counsel. *See* U.S. Const. amend. VI; 10 U.S.C. § 949c(b); R.M.C. 502(d)(6).

b. On 1 July 2008, the Commission ordered an inquiry into the mental capacity of the accused, per R.M.C. 706. After receiving the report of that inquiry, the Commission noted,

> [s]ignificantly, the accused refused to cooperate in the mental examination ordered by the Commission. Notwithstanding, the refusal to cooperate by the accused, the Board determined, *inter alia*, that the accused has had a severe mental disease or defect in the recent past, and that it is likely that at the time of the Board, the accused continued to have a severe mental disease. Additionally, the Board determined that the accused's current condition has the potential to impair his ability to conduct or cooperate intelligently in his defense. Commission Ruling, D-017, 26 October 2008, 2.b.

[1] Habeas counsel for Mr. bin al Shibh reciprocated this request by filing for identical relief before the U.S. District Court. That request remains pending.

c. While the Commission did not state its basis for failing to authorize Dr. Amador "to meet with the accused in this case or conduct his own evaluation of the accused's mental capacity" in October 2008, it appears that it may have relied on the adversarial fairness principle embodied in Military Commission Rule of Evidence (M.C.R.E.) 302(d), which states, "[t]he military judge may prohibit an accused who refuses to cooperate in a mental examination authorized under R.M.C. 706 from presenting any expert medical testimony as to any issue that would have been the subject of the mental examination." By its plain terms, however, M.C.R.E. 302(d) does not preclude a defense expert from meeting with the accused or conducting a psychological evaluation, where the accused has refused to meet with the 706 Board. Indeed, the provision does not even preclude the defense from introducing testimony from such a defense expert. Rather, it grants the Commission discretion to prohibit the introduction of such testimony, in appropriate circumstances. The Commission's bar on Dr. Amador's meeting with Mr. bin al Shibh and evaluating his competence is not mandated by the rule, a fact recognized by the Military Judge on 19 January 2009. *See* Transcript, *United States v. Mohammed, et.al*., pg. 966 ("Do you oppose modification of that order for the purpose of allowing Dr. Amador to talk to Mr. Bin al Shibh?").

d. In a proper exercise of discretion, the Commission should modify its previous order and allow Dr. Amador to meet with Mr. bin al Shibh and communicate to defense counsel the findings from past and future evaluations. Of particular note is that, at present, the defense is not requesting that Dr. Amador testify on this matter, as it does not, and cannot, know the substance of what his testimony even would be without being able to confer with him on his opinions. Rather, the defense is merely trying to "conduct some measure of its own investigation beyond the four corners of" the 706 Report. Commission Ruling, D-042, 30 October 2008, ¶ 2.i.

e. Additionally, the Commission should consider the unique circumstances of this particular case when exercising its discretion as to whether to permit the defense expert to evaluate the accused. *See* Commission Ruling, D-017, 26 October 2008, ¶ 2.e ("The Commission's review of the discovery material associated with the issue of the accused mental capacity and the report of the Board conducted per R.M.C. 706 demonstrate that the mental capacity determination in this case will involve analysis of an unusual and relatively complex set of factual circumstances and medical factors."). [redacted] He was previously determined to be an "enemy combatant" by the U.S. military. The 706 Board was comprised of two uniformed military officers – CAPT [redacted], MC, USN, and Maj [redacted], MC, USAF. Mr. bin al Shibh's refusal to meet with the Board was communicated to them by and through a uniformed service member at the Staff Judge Advocate office, JTF-GTMO. Thereafter, CAPT [redacted] requested, and was granted, permission to go with Maj. [redacted] to Camp Platinum to talk with Mr. bin al Shibh. The authorization, however, came with several preconditions that significantly limited CAPT [redacted]'s ability to speak with Mr. bin al Shibh about this matter.[2] The ultimate reasons for Mr. bin al Shibh's refusal to meet with the 706 Board are unknown, and the circumstances (particularly in light of the specific nature of the diagnosis that has been made of Mr. bin al Shibh's mental condition) do not support an invocation of the adversarial fairness principle to deny the defense from utilizing its appointed expert.

f. Previously, the government raised national security concerns relating to protective

[2] If the Commission deems it necessary to receive evidence on this particular matter, the defense will seek production of CAPT [redacted] to testify before the Commission.

orders in the Commission and *habeas* proceedings. As shown in the Commission's ruling on D-017, these concerns can be easily resolved by granting the relief sought, allowing Dr. Amador to communicate his findings with his respective teams of counsel, within the parameters of the applicable protective orders. The respective protective orders should not present a bar to the relief sought, rather, they provide binding guidance to the defense on the necessary precautions to be employed.

7. Request for Oral Argument: As it is entitled, the defense respectfully requests oral argument. *See* R.M.C. 905(h). Specifically, the defense requests the opportunity to present evidence, as needed, and argue this motion during the hearing scheduled for 16 July 2009.

8. Request for Witnesses: None.

9. Conference with Opposing Counsel: Pursuant to Military Commissions Rules of Court, Rule 3.3, the defense conferred with the prosecution on 22 June 2009. The prosecution opposes the requested relief.

10. Attachments:

A. Prosecution Memorandum for the Defense Counsel ICO *United States v. Mohammed, et. al.* (Ramzi bin al Shibh), dated 7 April 2009 (1 pg.)

Respectfully submitted,

By: _____
CDR SUZANNE LACHELIER, JAGC, USNR
Detailed Defense Counsel for
Mr. Ramzi bin al Shibh

By: _____
LT RICHARD FEDERICO, JAGC, USN
Detailed Defense Counsel for
Mr. Ramzi bin al Shibh

ATTACHMENT A

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

OFFICE OF THE CHIEF PROSECUTOR

7 April 2009

MEMORANDUM FOR THE DEFENSE COUNSEL IN UNITED STATES v. MOHAMMED, ET AL (RAMZI BIN AL SHIBH)

Subj: Status of the Protective Orders in United States v. Mohammed, et al.

CDR Lachelier,

It has been brought to the Prosecution's attention that your expert consultant, Dr. Xavier Amador, would like to disclose certain information he learned from other accused, during the January sessions of the commission, to Mr. Bin al Shibh's habeas counsel. Although the Prosecution has not been advised of the exact nature of what Dr. Amador would like to disclose, it is assumed that this information is relevant to your client's mental health. It has also been made known to us that Dr. Amador has not yet communicated this information as he feels such information is restricted by the current protective orders of the military commission.

The protective orders in place in *United States v. Mohammed, et al* continue to govern the parties during the continuance, and Dr. Amador's conversations with other detainees during the commission sessions would fall squarely within those protective orders. Any such communications between Dr. Amador and habeas counsel for the accused would require a request by you to the Military Judge for relief from the protective order.

Providing the Prosecution gets an adequate generalized proffer detailing the nature of the information Dr. Amador seeks to disclose, and it generally relates to the accused's mental health, the Prosecution does not intend to oppose relief from the protective orders for such communications from Dr. Amador to habeas counsel regarding his assessment and diagnosis of Mr. Bin al Shibh.

Please call me if you have any questions or need clarification on the current status of the protective orders. I may be reached at [redacted]

Sincerely,

Clay Trivett

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UNITED STATES OF AMERICA	)	**D-115**
	)	
	)	**PROSECUTION RESPONSE TO THE DEFENSE MOTION FOR AN ORDER GRANTING ACCESS TO EVALUATE MR. BIN AL SHIBH AND COMMUNICATE HIS FINDINGS TO DEFENSE COUNSEL**
v.	)	
	)	
KHALID SHEIKH MOHAMMED	)	
WALID MUHAMMAD SALIH MUBARAK BIN ATTASH	)	
RAMZI BINALSHIBH	)	
ALI ABDUL AZIZ ALI	)	
MUSTAFA AHMED ADAM AL HAWSAWI	)	**2 July 2009**

1. **Timeliness:** This response is filed within the deadline set forth by the Military Judge in his order dated 11 June 2009.

2. **Relief Requested:**

a. The Prosecution has no objection to Dr. Amador sharing information he learned during his January 2009 interview with Defense counsel. The Prosecution objects to having to fund any additional interviews of the accused by Dr. Amador at this time.

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.

ii. On 11 September 2009, the 706 Board personnel attempted to meet with the accused to interview him pursuant to the 1 July 2008 order of the Military Judge. The accused refused to meet with the two doctors[1].

iii. On 26 October 2008, the Commission granted a Defense Motion for Appointment of Defense Expert Consultant (Dr. Xavier F. Amador) authorizing Dr. Amador as an expert assistant to the Defense for the RMC 909 hearing. The ordered employment specifically did not extend to an order or authorization for Dr. Amador to meet with the accused in this

[1] The RMC 706 Board met only briefly with the accused at his cell door and the accused refused to be interviewed. *See* RMC 706 Board report.

case or conduct his own evaluation of the accused's mental capacity. See Ruling, D-017.

iv. In January 2009, pursuant to an order by Judge Sullivan of the Federal Court of the District of Columbia in the accused's habeas proceeding, Dr. Amador met with the accused for a mental health evaluation over a series of three days for approximately five and one-half hours total.

v. On 29 June 2009, habeas counsel for Ramzi bin al Shibh filed a motion for relief from Judge Sullivan's protective order to allow Dr. Amador to communicate his findings to detailed defense counsel from his interview with the accused, and the government did not oppose that relief. As of the date of this filing, Judge Sullivan has not yet acted on this request.

4. **Discussion**:

a. The Prosecution has no objection to Dr. Amador sharing information he learned during his January 2009 interview with detailed defense counsel. On 1 July 2009 Judge Emmitt Sullivan issued an order allowing Dr. Amador to communicate his findings from his evaluation of the accused to the detailed defense counsel. *See Attachment D*. The issue of Dr. Amador requesting relief from the protective order in his habeas case, an issue for habeas counsel in that case, and not one with which the Prosecution had any involvement.

b. In support of its motion for access, the Defense cites to undersigned counsel's statements on the record wherein he declared that the issue of Dr. Amador seeking access to the accused was "overcome by events." This statement is as true today as it was in January; Dr. Amador was granted access to the accused for purposes of evaluating the accused's mental competency. It is also true that Dr. Amador fell under a protective order in the habeas case at the time of that evaluation, and that no party sought relief to release Dr. Amador from that protective order until 29 June of this year so that he could share what he learned about the accused with detailed defense counsel. This delay can in no way be attributed to the Prosecution; who does not represent either party in the habeas litigation.

c. The Defense also claims that the 7 April 2009 Prosecution memorandum to the Defense stated that Dr. Amador would need to be granted relief from the protective order from the Military Judge to disclose information obtained from interviews with Mr. Bin al Shibh to habeas counsel (See Defense attachment A). This is inaccurate. The 7 April 2009 Prosecution memorandum to the Defense only sought to ensure the Dr. Amador was aware that information that he gleaned from discussions with *other* accused (not Mr Bin al Shibh) whom he spoke to (and had access to only as a result of his military commissions involvement in the courtroom during the military commission sessions), would fall under the protective orders that governed this military commission. See Defense Attachment A ("Dr Amador's conversations *with other detainees* during the commission sessions would fall squarely within those protective orders"). The

Prosecution never sought to limit, or have governed by the protective order of the military commission, any information that Dr. Amador tried to share with habeas counsel that he gathered from the interview he had with the accused pursuant to the order of Judge Sullivan. In fact, the entire point of the memorandum was to clarify, for Dr. Amador, that the Prosecution would not object to him sharing information from the other accused regarding Mr. Bin al Shibh's mental health, but only that he needed to get relief from the protective order in order to do so. This was done specifically to facilitate the sharing of information with the habeas counsel to expedite resolution of the competency matters, and was in no way an attempt to limit the sharing of information he had with habeas counsel.

d. While the Prosecution does not object to Dr. Amador sharing information he learned from the accused with detailed defense counsel during his January 2009 meeting with Mr. Bin al Shibh, the Prosecution would object to, and should not be required to fund, any additional attempts by Dr. Amador to speak with and evaluate Mr. Bin al Shibh for purposes of evaluating his competency, unless and until the accused agrees to meet with the RMC 706 Board personnel, and only then if the Defense could assert some need for further evaluation based on the results of the RMC 706 Board's interview of the accused.

e. The Military Judge's ruling in D-017 only authorized Dr. Amador as an expert assistant for review of evidence, consultation with the detailed defense counsel, and travel by Dr. Amador to Guantanamo Bay to provide assistance to detailed defense counsel at the RMC 909 hearing.[2] The ordered employment specifically did not extend to an order or authorization for Dr. Amador to meet with the accused in this case or conduct his own evaluation of the accused's mental capacity. See Ruling D-017. In order to protect the "adversarial fairness principle" which the Defense recognizes is embodied in MCRE 302(d) (*See Defense Motion* at 5), the Military Judge's limited ruling that limited Dr. Amador's role was the correct ruling, and should not now be disturbed.

f. Military Commission Rule of Evidence 302(d) specifies that a military judge may prohibit an accused who refuses to cooperate in a mental health examination authorized under RMC 706 from presenting any expert medical testimony as to any issue that would have been the subject of the mental examination. See MCRE 302(d). The clear reasoning behind this rule is to prohibit the Defense from circumventing the statutorily-created competency determination process by limiting access only to its own expert so that he or she may render an opinion. It is clear that, notwithstanding the provisions of MCRE 302(d), and the Defense claims in its motion, the Defense is contemplating calling Dr. Amador as a witness in the RMC 909 hearing. *See Defense Request to the Convening Authority for Additional Funding of Dr. Amador* (Attachment A).

g. Despite the Defense entreaties for the commission to consider the "unique circumstances" of this case and grant access for Dr. Amador to interview the accused, the military commission should have the benefit of a neutral and accurate evaluation of the

[2] The Convening Authority has approved additional funding for these services. See Attachment B

accused's current mental competency at the RMC 909 hearing. Dr. Amador, if allowed to testify, is far from a neutral evaluator. As of three years ago, Dr Amador had testified on issues of competency and mental illness nine different times, five of which were in capital murder cases, and all of which were for the Defense. See Testimony of Dr. Xavier Amador, United States v. Moussaoui, pgs 3957-3958 (Attachment B). In the Moussaoui case alone, Dr. Amador filed three separate reports, on three different occasions, all challenging Mr. Moussaoui's competency to stand trial, and all of which were rejected by the judge presiding over the case. See Testimony of Dr. Xavier Amador, United States v. Moussaoui, pgs 3958-3965 (Attachment C).

h. It is important to note that the Prosecution has no mental expert aligned with it who will have interviewed the accused, and who would be able to rebut any of Dr. Amador's testimony on his personal observations. The Prosecution has relied on the neutral process set forth by RMC 706 at this point to its detriment. Despite its requests, the Prosecution still does not have access to the RMC 706 Board's "long report" nor can the Prosecution discuss the findings with the two board personnel to prepare for the RMC 909 hearing. This is despite the fact that the "long report" would not have any substantive statements of the accused, as the accused refused to meet with the doctors. As it currently stands, the Prosecution will require several days following the direct testimony of the RMC 706 Board personnel to be able to review what we are told is a 23 page expert report and adequately prepare for cross examination.

i. The Prosecution is already at a great disadvantage in being able to adequately prepare for the RMC 909 hearing, and further access by the Defense expert to the accused, when neither the RMC 706 Board or an expert aligned with the government has interviewed the accused, would be patently unfair. The Military Judge should protect the sanctity of the RMC 706 Board, and the sound policy that is the foundation of MCRE 302(d), by ensuring that Dr. Amador not be granted further access to the accused, and evidence not be heard from Dr. Amador during the RMC 909 hearing.

5. **Conclusion:** While the Prosecution has no objection to Dr. Amador sharing information he learned during his January 2009 interview with Defense counsel, the Defense motion requesting further access to evaluate Mr Bin al Shibh should be denied.

6. **Oral Argument:** The Prosecution does not request oral argument.

7. **Witnesses:** None

8. **Attachments:**

a. Defense Request to the Convening Authority for additional funding for Dr. Amador.
b. Testimony of Dr. Xavier Amador, United States v Moussaoui, pgs 3957-3958.
c. Testimony of Dr. Xavier Amador, United States v Moussaoui, pgs 3958-3965

d. Order by Judge Sullivan releasing Dr. Amador from the protective order governing the habeas case.

Submitted by:

By: //s//____
Clayton Trivett, Jr.
Prosecutor

ATTACHMENT A

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

17 June 2009

MEMORANDUM FOR THE CONVENING AUTHORITY

SUBJECT: Defense Request for Approval of Additional Hours for Appointed Expert Consultant, Dr. Xavier F. Amador, Ph.D., ICO *United States v. Khalid Sheikh Mohammed, et. al*. (Mr. Ramzi bin al Shibh)

Ref: (a) Commission Ruling, P-010, dated 11 June 2009

1. Defense counsel for Mr. Ramzi bin al Shibh respectfully requests that the Convening Authority approve additional hours and funding to use and compensate Dr. Xavier F. Amador, Ph.D., as an expert consultant in the field of clinical and forensic psychology. Specifically, the defense requests an additional 100 hours be authorized, with a breakdown as follows:

a. 10 hours for additional records review and consultation in Washington D.C.;

b. 40 hours for evaluation of Mr. bin al Shibh in Guantanamo Bay, Cuba;

c. 10 hours for preparation for testimony with defense counsel;

d. 40 hours for attendance at the R.M.C. 909 competency hearing scheduled for 21-25 September 2009 in Guantanamo Bay, Cuba

Background

2. On 26 October 2008, the Commission ordered the government to make Dr. Amador available to defense counsel for Mr. Ramzi bin al Shibh. On 5 November 2008, the Convening Authority approved travel expenses and ordinary witness fees for travel to and from Washington, D.C., and expert fees for preparation at the rate of $350 per hour for up to 40 hours. The Convening Authority also approved travel expenses and ordinary witness fees for travel to and from Guantanamo Bay, Cuba, for the R.M.C. 909 hearing, and expert fees for preparation and testimony at the rate of $350.00 per hour for 16 hours. On 8 January 2009, the defense requested 100 additional hours be approved, with the Convening Authority approving 32 additional hours.

3. Dr. Amador was present in Guantanamo in January 2009 to assist the defense in preparation for the competency hearing scheduled by the Military Judge. The hearing did not address any substantive issues or take evidence related to competency before being halted by the government filing for a 120-day continuance of the proceedings. However, Dr. Amador was able to observe the accused in the courtroom and meet with him for three days.[1]

[1] These meetings were by order of the Honorable Emmet G. Sullivan, District Judge, who ordered that Dr. Amador conduct a mental health evaluation of Mr. bin al Shibh as relevant to a civil habeas corpus proceeding in the matter of *Ramzi bin al Shibh v. George W. Bush*, 06-cv-1725-egs.

4. On 11 March 2009, the defense certified the hours and invoices submitted by Dr. Amador for payment for services rendered. These invoices document that Dr. Amador has exhausted all time previously approved for consultation and preparation.

Reasons why additional hours and funding for Dr. Amador are necessary:

5. Pursuant to reference (a), there is a hearing scheduled for 21-25 September 2009 to determine whether Mr. bin al Shibh is competent to stand trial and/or waive his right to counsel. It is foreseeable that *at least* twelve physicians and/or mental health experts will be called as witnesses during this proceeding. As previously stated, detailed defense counsel lack the knowledge, education, training, and experience to conduct a mental health evaluation, to formulate a full and final assessment regarding competency, and/or to adequately prepare to examine all of the expert witnesses. These duties are fundamental to providing Mr. bin al Shibh an adequate defense and can only be ethically and competently performed by the defense with the learned consultation with Dr. Amador.

6. The defense should soon receive additional discovery from the prosecution relevant to a competency analysis, including medical records. Since these records are likely to be classified or otherwise protected as sensitive information, the handling and review of this information is limited to him being present in a SCIF in Washington D.C.

7. Based upon statements made by the prosecution at the hearing on 19 January 2009, it appears likely that the government will not object to Dr. Amador conducting an evaluation of Mr. bin al Shibh by additional meetings with him prior to the hearing in September.[2] Also, Dr. Amador will require additional time to consult with defense counsel about the interviews he conducted of Mr. bin al Shibh in January 2009 for the *habeas* proceeding.

8. Finally, the number of hours requested reflect the highly unique and complex issues before the Commission in this case. The delay in the competency hearing that necessitates additional hours be authorized was sought by the government, not the defense. Also, Mr. bin al Shibh faces the death penalty and has been repeatedly diagnosed by government physicians, including the 706 Board appointed by the Commission, as suffering from a psychotic disorder. The Commission must ensure that a mentally ill man is not seeking the court's assistance in ending his life. The defense must ensure that it is fully prepared to ethically carry out its statutory duties to adjudicate competency and it cannot do this without the assistance of Dr. Amador.

9. The Commission has ordered that the defense file all motions related to discovery or other matters relevant to preparation for the competency hearing by 1200EST on 25 June 2009. As such, the defense respectfully requests that you respond no later than 1630 EST, Friday, 19 June so that the defense will have adequate time to draft pleadings related to this issue, should the request not be approved. If you find that additional hours are required but that the number of hours requested is excessive, the defense respectfully requests that you provide the number of hours that you will approve. Finally, in the event this request is denied, the defense respectfully

[2] If this matter becomes contested between the parties, it will be resolved at the hearing scheduled for 16 July 2009.

SUBJECT: Defense Request for Approval of Additional Hours for Appointed Expert Consultant, Dr. Xavier F. Amador, Ph.D., ICO *United States v. Khalid Sheikh Mohammed, et. al*. (Mr. Ramzi bin al Shibh)

requests a written response that details the reasons for the denial. Should you require further information, please contact LT Federico at [redacted].

Respectfully Submitted,

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

Office of the Chief Defense Counsel
Office of the Military Commissions
1600 Defense Pentagon, Rm. 3B688
Washington, D.C. 20301

Cc:
Mr. Clay Trivett, Trial Counsel
Dr. Amador

ATTACHMENT B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,	.	Criminal No. 1:01cr455
	.	
vs.	.	Alexandria, Virginia
	.	April 18, 2006
ZACARIAS MOUSSAOUI,	.	1:25 p.m.
a/k/a Shaqil, a/k/a	.	
Abu Khalid al Sahrawi,	.	
	.	
Defendant.	.	SEALED
	.	
. . . . .	.	

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

VOLUME XXI-A

APPEARANCES:

FOR THE GOVERNMENT:
ROBERT A. SPENCER, AUSA
DAVID J. NOVAK, AUSA
DAVID RASKIN, AUSA
United States Attorney's Office
2100 Jamieson Avenue
Alexandria, VA 22314

FOR THE DEFENDANT:
GERALD THOMAS ZERKIN
KENNETH P. TROCCOLI
ANNE M. CHAPMAN
Assistant Federal Public Defenders
Office of the Federal Public Defender
1650 King Street
Alexandria, VA 22314

COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

APPEARANCES: (Cont'd.)

FOR THE DEFENDANT: EDWARD B. MAC MAHON, JR., ESQ.
P.O. Box 903
107 East Washington Street
Middleburg, VA 20118
and
ALAN H. YAMAMOTO, ESQ.
643 South Washington Street
Alexandria, VA 22314-3032

COURT REPORTERS: ANNELIESE J. THOMSON, RDR, CRR
NORMAN B. LINNELL, CRR
U.S. District Court
401 Courthouse Square
Alexandria, VA 22314
(703)299-8595

A F T E R N O O N S E S S I O N

(Defendant and Jury in.)

THE COURT: All right, Mr. Novak, have you got your papers?

MR. NOVAK: I think, you know, I think I am organized, but we will see how it goes.

XAVIER F. AMADOR, PH.D., DEFENDANT'S WITNESS,
PREVIOUSLY AFFIRMED, RESUMED
CROSS-EXAMINATION (Cont'd.)

BY MR. NOVAK:

Q. Dr. Amador, good afternoon. How are you?

A. Good afternoon, Mr. Novak. I am fine, thank you.

Q. Dr. Amador, do you want to tell the jury what it means to forensic psychologist.

A. What it means to be a forensic psychologist?

Q. Or what is forensic psychology?

A. There -- there's a couple ways to answer that question. People get certified in forensic psychology because they want to have the special certificate indicating that they have taken course work and/or sought the certificate.

Then there is working in a forensic setting, as I am doing, obviously, in this setting as a psychologist.

Q. But specifically forensic psychology is what?

A. Essentially the interface between psychology and the law, and the application of psychology in legal contexts.

Q. And how many times have you been qualified as an expert in forensic psychology?
A. I've never been -- there's never been an attempt to qualify me as an expert in forensic psychology. So the answer would no.
Q. Okay.
A. Never.
Q. Okay. You said how many capital murder cases then did you testify in?
A. This is the ninth time I have testified. I am going to guess four -- give or take two, I am going to guess five times. Four times.
Q. Nine times total you have testified; is that right?
A. Yes.
Q. Five times in capital murder cases?
A. Roughly, yes.
Q. Okay. And all those times, you have testified for the defense; is that right?
A. Yes.
Q. And on all those occasions, have you identified the murderer as -- it's always been in the penalty phase, is that right, like this is?
A. Yes.
Q. Okay. When is it that you have -- you've testified at competency hearings as well?
A. Yes.

Q. Okay. And on all those occasions, have you identified the murderer as being schizophrenic?
A. Well somebody is not a murderer when you're pretrial in a competency evaluation.
Q. Okay.
A. They are defendants.
Q. Those who have been charged and are alleged to be murderers?
A. Yeah. No, I've found people competent far more often. I have actually totaled this up, I don't have it with me, but of the last time I totaled it, which was two months ago, of about 30 cases I have worked on, I find people competent in the overwhelming majority of those cases. I have only found people incompetent four times.
Q. And how many were schizophrenic?
A. In which cases are you asking me about?
Q. The ones that you have testified.
A. Can I take a moment to write this down, or do you want me to really-- You didn't want ballparks. I can give you a ballpark.
Q. Well, the world is not going to collapse if you're one case away. So, I mean, half the cases?
A. No, but you may come back with some questions. Let me just do a quick note if I could, please. Would that be all right?
Q. Write it down, go ahead. Do what you want to do.
A. I'm going to roughly say about two-thirds in the ones that I have actually testified in.

ATTACHMENT C

Q. Okay. And on all those occasions, have you identified the murderer as being schizophrenic?
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Q. Write it down, go ahead. Do what you want to do.
A. I'm going to roughly say about two-thirds in the ones that I have actually testified in.

Q. Okay. Now, you have been working on this case, you said, for four years; is that right?
A. Yes.
Q. You have worked hand in hand with the defense team during those four years; is that right?
A. Not every week and month. There was a long segment when Mr. Moussaoui was granted status pro se to represent himself that I would go months without any contact whatsoever.
Q. You've spent a large part of the last four years working on this case; is that right?
A. Yes, sir.
Q. And by the way, you've never interviewed anybody from the prosecution side; is that right?
A. No, sir.
Q. You've interviewed-- You have talked about how you've interviewed Mr. Dunham and Mr. Zerkin. You've never-- You never called me up and said, "Hey, Mr. Novak, what do you think?" have you?
A. No.
Q. You've never called my colleague, Mr. Spencer, who has been here since day one, and never asked him what he thinks about Mr. Moussaoui, have you?
A. No, sir. I didn't -- I didn't think that was reasonable.
Q. You know as a matter of fact that Mr. Spencer and myself have actually met with Mr. Moussaoui at the jail in February; is that

right?
A. Yes.
Q. Okay. And do you know how long that, that interview was or that meeting was with Mr. Moussaoui?
A. You would have to fresh my memory. I am not sure.
Q. You, of course, want to get as much information from people that have actually had contact with Mr. Moussaoui to get their opinions about his thought processes and their interaction with him; is that right?
A. Yes.
Q. But you've never called you us; is that right?
A. That's correct.
Q. Now, you-- You are the person that brought in Dr. First into this case; is that right?
A. No.
Q. Okay. How did, how did Dr. First get involved in this case?
A. The attorneys asked me for a referral of somebody to look at the writings. I recommended two people, Dr. Andreasen and Dr. First.
Q. Okay. And they both -- both of them looked at the, based upon your recommendations, they both looked at the writings; is that right?
A. Based on my recommendations?
Q. Well, you are the one-- You gave a recommendation to defense counsel --

A. Oh, yes.
Q. -- saying these are two guys -- two people you ought to bring in and talk to them; is that right?
A. Yes, yes. I thought, I thought you were suggesting I was making recommendations to the doctors. No.
Q. No, no, no.
A. Okay.
Q. Now, you worked, you worked with Dr. First up in Columbia; is that right?
A. No.
Q. Okay. Do you have a professional relationship with him?
A. No.
Q. Well--
A. Well, no, in one case, I have once, a couple years ago.
Q. All right. But you, you worked at Columbia; is that right?
A. Yes.
Q. You were an associate professor up there at one point before you quit?
A. Yes.
Q. Okay. And Dr. First works at Columbia, too; is that right?
A. That's correct.
Q. Okay. And could you explain what NAMI is, N-A-M-I?
A. National Alliance on Mental Illness. NAMI was started by family members of people with mental illness. I'm actually a family member, I have a brother with schizophrenia, and had

benefited from NAMI's advocacy for people with mental illness in their families years ago. I had been very involved. I give a lot of talks at NAMIs. I talk a lot about one of the books I mentioned, I'm Not Sick, I Don't Need Help, the science, the research around the problem of poor insight.

NAMI does a number of different things. We have educational programs. When I was director of research, education, and practice, we were disseminating family to family, it's a free program that's taught around the country to family members to teach them about mental illness, address some of the myths about mental illness, for example.

NAMI also does--

Q. Was-- I am sorry, I didn't mean to interrupt.

A. I wasn't sure if you wanted a full -- I'm almost done.

Q. Do what you have got to do.

A. Well, you asked me to describe NAMI. So the other thing that NAMI -- I'm very proud to be involved with NAMI. There's a lot of stigma around mental illness, and one the things that they do is teach people about the biological bases of these disorders, that these are no fault brain disorders, make sure that the general public understands the science, make sure that leaders in Congress, we have had NAMI involved in President Bush's Commission on Mental Health, NAMI's been involved in a number of advocacy -- advocacies for legislation, for example, mental health parity, things of that kind.

Q. Okay. And Dr. First, by the way, he is part of NAMI as well; is that right? He is affiliated with NAMI?
A. I don't have a clue.
Q. Okay. What if his name is on the list --
A. I know Dr. Patterson is.
Q. What is that?
A. I know Dr. Patterson is a member.
Q. Okay. All right.
A. Just because I happened to look at his CV, and I noticed that.
THE COURT: All right, gentlemen, you have to at least take a breath so that you're not talking over each other.
MR. NOVAK: Sorry, Your Honor.
THE COURT: Otherwise, we can't get the record straight.
THE WITNESS: All right.
BY MR. NOVAK:
Q. Dr. Amador, let me ask you this: The first time that there was a challenge to Mr. Moussaoui's competency by his attorneys was after he had announced that he was wanted to go pro se; is that right?
A. Yes.
Q. All right. And that was the first time that you became involved creating a report in support of that competency finding, is that -- the finding that he was incompetent; is that right?
A. I didn't prepare a report with any particular outcome in

mind. I started preparing a report to evaluate his competency, whether he was or was not competent.

Q. Sure. I'm not saying that you had an outcome in mind, but your work was affiliated with defense counsel's motion to challenge his competency; is that right?

A. They used my opinion to challenge his competency, and my opinion at that time was that I had concern that he might not be competent and that he might be mentally ill and that might be why he is choosing to fire his attorneys.

Q. And how many-- You've filed a total of what, four, five reports now; is that right?

A. Yes, sir.

Q. And that's part of how many challenges to Mr. Moussaoui's competency?

A. His competency has been challenged, I believe, a total of three times.

Q. Okay.

A. Would that be right?

Q. You are the witness. I only get to ask the questions.

A. Okay. It would be April-- That April/June period. Again, when he attempted to plead guilty, and then again immediately after he testified in Phase 1, a third competency challenge was raised, yes.

Q. Okay. And on every occasion Judge Brinkema has found him to be competent; is that right?

A. Yes. Without hearing me testify or any other doctor testify, she has.
Q. But you have submitted your reports to Judge Brinkema, as Dr. Patterson and others have; is that right?
A. Yes.
Q. Okay. And so she rejected it on each occasion; is that right?
A. She rejected-- Yes.
Q. Okay. And by the way, during that time period, Mr. Moussaoui obviously is aware of the fact that his lawyers are trying to have him found not competent; is that right?
A. During -- the first time he became aware of that would have been late spring of 2002.
Q. Okay.
A. So, yes.
Q. And he gets to come to court every time we have a hearing about whether he is competent or not; is that right?
A. Yes.
Q. All right. So he, he's aware of the fact, Mr. Moussaoui is well aware of the fact that, that his lawyers are trying to say he's crazy, he has got a mental illness of some sort; is that right?
A. His lawyers are trying to say something very specific.
Q. Okay.
A. That he has a mental disease or defect that impairs his

ATTACHMENT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAMZI BIN AL-SHIBH, Petitioner	:	
	:	CIVIL ACTION
v.	:	(Habeas Corpus)
	:	
BARACK OBAMA, *et al.*, Respondents.	:	NO. 1:06-cv-1725 Honorable Emmet G. Sullivan, U.S.D.J.

CONSENT ORDER

THIS MATTER having come before the Court upon Motion by Petitioner Ramzi bin al-Shibh, by and through his attorneys, the Federal Public Defender for the District of New Jersey (Richard Coughlin, Federal Public Defender, appearing), for an Order for Relief From the TS/SCI Protective Order; and the Court having considered the parties' submissions, and Respondents having no objection; and for good cause shown;

IT IS on this 1ST day of JULY, 2009, hereby

ORDERED that Petitioner Ramzi bin al-Shibh's Motion for an Order for Relief From the TS/SCI Protective Order is hereby GRANTED; and it is

FURTHER ORDERED that Dr. Amador is permitted to disclose to security-cleared Military Defense counsel the results of Dr. Amador's evaluation of Petitioner, including notes, diagnosis, observations, and contents of any conversations with Petitioner and/or Petitioner's co-defendants, subject to the Military Commission protective order and procedures.

HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE