UNITED STATES OF AMERICA v. KHALID SHEIKH MOHAMMED; WALID MUHAMMED SALIH MUBARAK BIN 'ATTASH; RAMZI BIN AL SHIBH; ALI ABDUL AZIZ ALI; MUSTAFA AL HAWSAWI	**Defense Motion** Motion to Compel Production of Expert Consultants 25 June 2009

1. Timeliness: This motion for appropriate relief is filed in a timely manner in accordance with the Military Commission ruling dated 11 June 2009.

2. Relief Requested: Counsel respectfully request the Military Commission compel the production to two expert consultants: 1) a forensic psychologist and 2) a medical doctor (general practice/internal medicine) to assist the defense in preparation for the RMC 909 hearing tentatively scheduled for 21-25 September 2009.

3. Overview: Detailed counsel for Mr. al Hawsawi requested the Convening Authority appoint two experts consultants to assist counsel in adequately preparing Mr. al Hawsawi's defense. That request was denied thus counsel request the Military Commission compel their production.

4. Burdens of Proof and Persuasion: As the moving party, the defense bears the burden. RMC 905(c)

5. Facts:

a. On 15 April 2008, charges were sworn against Mr. al Hawsawi. Those charges were referred to a capital Military Commission on 9 May 2008.

b. On 24 November 2008, counsel for Mr. al Hawsawi filed an *ex parte* request for an inquiry into the mental health of Mr. al Hawsawi in accordance with RMC 706. In that request, counsel recounted an attorney-client meeting where a good faith basis to request a mental health examination arose.

c. On 8 December 2008, the Military Commission found unusual circumstances existed to warrant the *ex parte* request and granted the defense request for an examination. The inquiry was ordered on 9 December 2008.

d. On 15 December 2008, a clinical psychologist and a forensic psychiatrist met with Mr. al Hawsawi.

e. On 19 December 2008, the final report was drafted and provided to the defense. Counsel also received a limited number of medical records relating to Mr. al Hawsawi.

f. On or about 14 January 2009, counsel for Mr. al Hawsawi requested the Convening Authority appoint two military doctors: 1) a forensic psychiatrist and 2) a medical doctor to assist in the evaluation of the 706 report and corresponding medical records. (Attachment A) Opposing counsel was notified of this request.

g. On or about 18 January 2009, the Military Commission ordered, via email, a RMC 909 hearing to evaluate Mr. al Hawsawi's competency.

h. On 21 January 2009, the Military Commission granted the Prosecution's request for a 120-day continuance. During a subsequent RMC 802 conference, the Prosecution made it clear that no action in this case would be taken during the continuance.

i. On 3 February 2009, the Convening Authority denied counsel's request for expert assistance. (Attachment B).

6. Law and Argument

The Rules for Military Commission (RMC) provide that "[t]he defense shall have reasonable opportunity to obtain witnesses and other evidence as provided in these rules." RMC 703(a). If an expert is needed, the requesting party "shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary." RMC 703(d). All parties, including defense counsel are guaranteed the same "reasonable opportunity to obtain expert witnesses" in a military commission. MCRE 706(a).

The Rules for Military Commission are similar[1] to the Rules for Courts-Martial (RCM) in that they provide for defense access to witnesses. RCM 703(a). In order to employ an expert, the same showing of necessity is required. RCM 703(d). Military case law has distinguished between an expert consultant who is "provided to the defense as a matter of due process, in order to prepare properly for trial and otherwise assist with the defense of a case. *See, e.g.*, Article 46, UCMJ; *Ake v. Oklahoma, 470 U.S. 68, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985)*; *United States v. Garries, 22 M.J. 288, 290 (C.M.A. 1986)*." *United States v. Langston*, 32 M.J.894, 895 (1991). Unlike an expert witness who testifies at trial, the consultant is considered a member of the defense team and "not subject to pretrial interviews by the other party, or to questioning during the trial. *See* Mil. R. Evid. 502; *United States v. Turner, 28 M.J. 487, 488, 489 (C.M.A. 1989)*. *United States v. Langston*, 32 M.J. 894, 894-5 (1991)." *Id*. The consultant is available to "advise the accused and his counsel as to the strength of the government case and suggest questions to be asked of prosecution witnesses, evidence to be offered by the defense, and

[1] RCM 703(a) provides "The prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process." While the guarantee to both the Military Commission and defense of "equal opportunity" is notably absent from the RMC, a minimum standard of "reasonable opportunity" remains available to the defense. RMC 703(a).

arguments to be made." *United States v. Turner*, 28 M.J. 487. 488-489 (C.M.A. 1989). Designation as a member of the defense team is important because the "expert often will receive confidential communications from the accused and his counsel; and he may have occasion to learn about the tactics the defense plans to employ. If the expert consultant were free to disclose such information to the prosecutor prior to trial, a defense counsel would be placed at a great disadvantage; and, indeed, he might hesitate to consult with the expert. The result would be impairment of the accused's right to counsel, because his attorney would be inhibited in the performance of his duties and unable fully to utilize the assistance contemplated by *Ake*." *Id.* at 489.

The three-part test to demonstrate necessity of an expert is: "[f]irst, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop." *United States v. Ndanyi*, 45 M.J. 315, 291 (C.A.A.F. 1996).

As a requirement of due process, "servicemembers are entitled to investigative or other expert assistance when necessary for an adequate defense, without regard to indigency." *United States v. Garries*, 22 M.J. 288, 290-91 (C.M.A. 1986), *citing*, *United States v. Mustafa*, 22 M.J. 165 (C.M.A.1986) (accused entitled to access to qualified psychiatrist for purpose of presenting insanity defense); *United States v. Toledo*, 15 M.J. 255 (C.M.A.1983) (accused entitled to transcript of witness' prior testimony). Typically, "the investigative, medical, and other expert services available in the military are sufficient to permit the defense to adequately prepare for trial." *Id*. at 291. Denial of expert assistance is great concern for error if mental health is in question: "When the defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent. It is in such cases that a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success." *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985). Mental health consultants can be crucial on issues of sanity "to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination." *Id*. at 82.

In the 14 January 2009 request to the convening authority, counsel for Mr. al Hawsawi established necessity for the appointment of the expert consultants. Counsel explained that the assistance was needed and expected to answer "questions about the adequacy of the examination conducted, the methodology used by the board and the contents of the medical records." (Attachment A). It was explained to the Convening Authority that the designation of a consultant was required not only to protect the privilege of counsel but to operate within the bounds of the protective orders. *Id*. During the weeks between the receipt of the 706 report and the request to the Convening Authority, attempts were made by defense counsel to properly educate themselves on the issues of mental health and medical procedures, terminology and methodology. During that process, counsel discovered further questions about notations and statements contained in both the report and accompanying medical records that were unable to be

addressed by general resources. This information was conveyed to the Convening Authority . *Id*.

In the denial, the Convening Authority indicated that necessity was not shown because "you have not articulated any basis for challenging the board results" and "you have apparently decided not to raise your questions with the sanity board members." (Attachment B). This is an incorrect statement of the law. Necessity does not require defense counsel to articulate with specificity the questions intended to be posed to the requested expert for approval by the Convening Authority. Instead, the law requires counsel to establish why the assistance is needed and what the expert is likely to accomplish. *See United States v. Ndanyi, supra*. Defense counsel complied with this requirement in the request outlining the three key areas: adequacy of the exam, methodology used and contents of the medical records, where assistance was necessary and experts could be expected to provide information to counsel. (Attachment A). The request was clear that attempts were made to properly educate counsel and gather the information required without expert assistance. Counsel were clear that the limits of self-education had been reached and the remaining questions require answers from an appropriate expert with the requisite protections of confidentiality. *Id*. Defense counsel made a reasonable request for military officers to serve as expert consultants. Counsel did not and is not requesting specific individuals. The only specific request made was for the type of doctor. It is the understanding of counsel that such experts presently exist in the National Capital Region thereby minimizing the extent of expense to the United States government.

Since the request to the Convening Authority was made, the Military Judge ordered and scheduled a RMC 909 hearing into the competency of Mr. al Hawsawi. Directly at issue is whether Mr. al Hawsawi "is presently suffering from a mental disease or defect rendering him … mentally incompetent to the extent that he … is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case." RMC 909(e)(2). As such, the need for expert assistance is now magnified as counsel are unable to adequately prepare for such a hearing without the assistance of mental health professionals.

Please note, counsel for Mr. al Hawsawi are requesting production of 1) a forensic psychologist and 2) a medical doctor. This is a small change from the initial request for a forensic psychiatrist. Also, because of the change in circumstances with the scheduled RMC 909 hearing, counsel request more than the original assessment of 1 or 2 days with the experts.

7. Oral Argument: The defense requests oral argument.

8. Request for Witnesses: Witnesses are not requested at this time. However, the nature of the possible defense reply could necessitate the addition of witnesses. If that is the case, counsel will provide a request at that time.

9. Certificate of Conference: The government opposes the requested relief.

10. Attachments

A. Memorandum for the Convening Authority

B. Memorandum from the Convening Authority

Respectfully submitted,

By: *Jon S. Jackson*

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MEMORANDUM FOR THE CONVENING AUTHORITY

SUBJECT: Request for Production of Military Expert Consultant, *United States v. Mustafa al Hawsawi*

1. Detailed military defense counsel in *United States v. Mustafa al Hawsawi* (*U.S. v. Mohammed et. al.*) request the Convening Authority approve two military officers for consultation with counsel to determine whether further expert assistance is necessary.

2. Qualifications:

1) A Forensic psychiatrist – equal in qualifications to the senior member of the 706 board
2) A Medical doctor - general practice/internal medicine

Both individuals would require TS/SCI clearance and the ability to travel to the National Capital Region to consult, in person, with defense counsel in the defense SCIF in Virginia.

3. Expert consultant's address and telephone number: We are not asking for specific individuals. Military officers that meet the above-listed qualifications are acceptable.

4. Complete statement of reasons why the expert consultant is necessary:

Defense counsel received a 706 report regarding Mr. al Hawsawi that is classified TS//SCI. Counsel have questions about the adequacy of the examination conducted, the methodology used by the members of the board, and contents of the medical records. As the report and the medical records used by the board are classified, the pool of individuals available to assist the defense is limited. Further, as various protective orders limit the individuals with whom the defense may share information, a designated expert consultant is necessary to answer counsels' questions. The members of the 706 board are unequivocal that they do not have any privileged relationship with the defense team. As such, they are unable to act as an expert consultant to the defense team. As the names of the individuals who created the records are presently withheld from the defense, the original medical officers cannot be contacted. Accordingly, we seek experts to answer our questions.

Neither military counsel are medical professionals. We have made attempts to educate ourselves on the professional standards for forensic psychiatry by reading medical journals, law review articles and relevant cases. Counsel have also attempted to familiarize ourselves with common medical abbreviations, terminology and test procedures through the same above-listed sources. However, we have specific questions based on notations contained in the report and accompanying medical records that are unable to be answered by such general resources. A medical doctor is needed to answer questions about statements contained in the medical records and accompanying laboratory results. A forensic psychiatrist is needed to answer questions about the applicable standards for a forensic exam and statements contained in the mental health records.

At present, we are not seeking individuals to meet with Mr. al Hawsawi. We are merely seeking individuals who possess the proper background and requisite security clearance to review the medical records and answer counsel's questions. We anticipate that our questions could be answered in one or two days.

5. Estimated Cost:

a. Total hours/days and total cost: 8-16 hours (1-2 working days) per consultant

b. Total days TDY at the per diem rate (such as travel days and casual status), if any: 1-2 days per consultant depending on location

c. Travel costs, if any: Dependant on duty location of consultant

d. Rate for professional services and hours/days (when travel is not involved): N/A for military personnel

e. Inconvenience fee, in any: N/A for military personnel

6. On 14 January, 2009 I notified the opposing party of this request.

G. D. Sosbee

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CONVENING AUTHORITY

FEB 3 2013

MEMORANDUM FOR: LT G.D. Sosbee, JAGC, USN, Defense Counsel

SUBJECT: Defense Request for Consultants; *U.S. v. Mohammed, et al*

I considered carefully your request for the appointment of two experts, including a forensic psychiatrist and a medical doctor, to serve as consultants for the defense team representing Mr. Mustafa al Hawsawi in the above case. You indicated you need their assistance in order to "determine whether further expert assistance is necessary."

You indicated you have questions about the adequacy of the sanity board proceedings regarding Mr. Hawsawi; however, you have not articulated any basis for challenging the board results. Furthermore, you have apparently decided not to raise your questions with the sanity board members because such communication would not be privileged, even though counsel routinely interview witnesses in preparation for trial without the benefit of confidentiality. I conclude you have not shown the necessity for the assistance of the requested experts or demonstrated why you are unable to gather and present such evidence. For these reasons, your request is denied.

Susan J. Crawford
Convening Authority
for Military Commissions

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UNITED STATES OF AMERICA **v.** **KHALID SHEIKH MOHAMMED;** **WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH;** **RAMZI BINALSHIBH;** **ALI ABDUL AZIZ ALI;** **MUSTAFA AHMED AL HAWSAWI**	**D-117** **Government Response** to the Defense Motion to Compel Production of Expert Consultants 28 June 2009

1. **Timeliness:** This response is filed within the time allowable by the Military Commission Order P-010, dated 11 June 2009.

2. **Relief Sought:** The Government respectfully requests the Military Judge deny the Defense Motion to Compel Production of Expert Consultants.

3. **Burden of Proof:** As the requesting/moving party, the accused bears the burden of persuasion. See Rule for Military Commissions (RMC) 905(c).

4. **Facts**:

a. On 9 October 2008, the accused informed his defense counsel that he wanted to represent himself (see ROT page 45 of the 8 December 2008 hearing.)

b. On 24 November 2008, defense counsel filed an ex parte request with the Commission recounting a meeting with their client that caused them to question his mental capacity to stand trial.

c. On 8 December 2008, this Commission ordered an inquiry "into the mental capacity" of the accused (see Order dated 9 December 08- Attachment A to Defense Motion). At the 8 December 2008 hearing, the Military Judge inquired as to how quickly arrangements could be made to have board members travel to Guantanamo Bay to conduct the board and complete their findings. Trial Counsel informed the Military Judge that he intended to have the board "on island … within the next 10 days." (see ROT page 149 of the 8 Dec 2008 hearing). Trial Counsel, Mr Swann, later approached Major Jackson outside the building to ask him if he wanted to be on island so that the defense could speak with the board before it interviewed the accused the following week. Major Jackson responded "no."

d. On 15 December 2008, the board convened and met with the accused as part of its duties. While the accused speaks English, the board had an interpreter to assist them. On 19 December 2008, the board issued a report finding that the accused was not presently suffering from a mental disease or defect and that the accused had the present ability to consult with his lawyers with a reasonable degree of cognitive understanding and has a

rational as well as a factual understanding of the proceedings against him. The board concluded by finding that the accused has sufficient mental capacity to understand the nature of the proceedings against him (trial by commission) and to conduct or cooperate intelligently in his defense.

e. On 19 December 2008, the Prosecution provided the Defense with nearly 500 pages of medical reports covering the period March 2003 to December 2008. On 25 June 2009, the Prosecution provided the Defense with additional 62 pages and will provide the Defense with additional reports covering the period December 2008 to the present.

f. On 14 January 2009, the Defense requested that the Convening Authority approve the appointment of two military officers for expert consultation. The Defense sought a forensic psychiatrist – equal in qualifications to the senior member of the Board (the senior member was an Army Colonel) and a medical doctor licensed in general practice/internal medicine. In support of the request, the Defense stated that they (1) questioned the adequacy of the examination conducted; (2) the methodology used by the Board and (3) the contents of the medical records. The Defense claimed they needed the doctors to answer their questions which would take one or two days.

g. On 3 February 2009, the Convening Authority denied the Defense request stating: "You indicated you have questions about the adequacy of the sanity board proceedings regarding Mr. Hawsawi; however, you have not articulated any basis for challenging the board results. Furthermore, you have apparently decided not to raise your questions with the sanity board because such communication would not be privileged, even though counsel routinely interview witnesses in preparation for trial without benefit of confidentiality. I conclude you have not shown the necessity for the assistance of the requested experts or demonstrated why you are unable to gather and present such evidence."

h. On 25 June 2009, the Defense filed this motion now seeking a forensic psychologist and not the forensic psychiatrist they earlier sought and were denied. The request for a medical doctor remains the same. Further, the Defense originally sought the experts for one or two days. Now they want the experts for more than one or two days with no end date for their services.

5. Discussion and Conclusion: The Defense contends that the Convening Authority erred when she denied the Defense request for two expert consultants. The Government disagrees. An accused is entitled to expert assistance when necessary to prepare an adequate defense. United States v. Mustafa, 22 M.J. 165 (CMA 1986), cert. denied, 479 U.S. 953. The defense, however, bears the burden of establishing the necessity of services by showing that the expert would be some value and denial would result in a fundamentally unfair trial. United States v. Robinson, 39 M.J. 88, (CMA 1994). Necessity presumes that the Defense will try to educate themselves to attain competence.

The Defense request failed to establish necessity. For instance, why didn't counsel ask the sanity board for the meaning of notations in medical records? Why can't counsel educate themselves on the methodology after inquiring of the board what methodology they

used? None of these questions run the risk of revealing privileged material. The Defense request failed to provide the Convening Authority with a proper showing of necessity and was properly denied.

Finally because the Defense now seeks experts different from their original request, it is incumbent on the Defense to resubmit their request to the Convening Authority before this Commission gets involved. R.C.M. 703 (d). A proper request demonstrating necessity may cause the Convening Authority to change her mind. If not, this Commission may act but only after a proper request has been denied.

6. Request for Oral Argument: The Prosecution does not request oral argument but reserves the right to respond to any oral argument the defense may make.

7. **Respectfully submitted**,

//s//

Robert L. Swann
Prosecutor
Office of Military Commissions