

UNITED STATES OF AMERICA

**Commission Ruling
D-017**

**Motion to for Appointment of Defense
Expert Consultant
(Dr. Xavier F. Amador)**

v.

KHALID SHEIK MOHAMMED et al
(Bin Al Shibh)

26 October 2008

1. Nature of Motion:

a. This motion seeks to compel appointment and funding for Dr. Xavier F. Amador to serve as an expert consultant for Mr. Bin Al Shibh (the accused) in the field of clinical and forensic psychology.

b. The Commission has also considered the prosecution's response to D-017 and the report of the Board that conducted an inquiry into the mental capacity of the accused in accordance with the Commission's order dated 1 July 2008.

2. Discussion:

a. Questions concerning the mental capacity of the accused were raised prior to the arraignment in this case. For this reason, counsel election by the accused was postponed until such time as the matter could be investigated by his detailed defense counsel and addressed, if necessary, by a mental capacity inquiry per RMC 706 and a mental capacity determination hearing per RMC 909.

b. On 1 July 2008, the Commission ordered an inquiry into the mental capacity of the accused per RMC 706. The report of that inquiry was completed on 16 October 2008.

Significantly, [REDACTED]. Notwithstanding, [REDACTED], the Board determined, *inter alia*, that [REDACTED]

[REDACTED] Additionally, the Board determined that the accused's current condition [REDACTED]

c. [REDACTED] a mental capacity determination hearing per RMC 909 is warranted with regard to the accused.

d. The parties correctly identify the three part test set forth in *U.S. Freeman*, 65 M.J. 451 (C.A.A.F. 2007) as the appropriate standard for analyzing requests for expert assistance. To justify a request for government funding of expert 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 develop. *Id* at 458 quoting *U.S. v Bresnahan* 62 M.J. 137, 143 (C.A.A.F. 2005). The defense has met the established standard with regard to its request for expert assistance in D-017.

e. The Commission's review of the discovery material associated with issue of the accused mental capacity and the report of the Board conducted per RMC 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. The Commission finds that the provision of an appropriate measure of expert assistance would provide detailed defense counsel with a clear benefit in terms of analyzing the factual and medical evidence and developing possible lines of questioning for possible witnesses on the motion and potential arguments by the defense with regard to the accused capacity to stand trial. Defense counsel are typically expected to develop their own knowledge on a wide range of matters that may arise in the course of the litigation of a case. The Commission finds, however, that the circumstances surrounding the mental capacity determination of this accused auger in favor of augmenting the efforts and abilities of the detailed defense counsel with professional assistance in the area of clinical and forensic psychology.

f. Despite several entreaties by the Commission to do so, the Government has not proffered any adequate substitute options with regard to the specific request for Dr. Amador in D-017.

g. The defense has requested authorization for "up to \$21,000 in fees for Dr. Amador" based on a fee rate of \$350/hour and 60 hours of consultation. Additionally, the defense seeks provision of additional funding in conjunction with desired meetings between Dr. Amador and the accused and travel and preparation for possible testimony by Dr. Amador.

h. Per Section 13-7 of the Regulation for Trial by Military Commissions, only the Convening Authority may authorize the employment of expert witnesses at government expense. The Commission finds that this rule also governs the funding of expert assistance. The rule also dictates that the compensation rates for expert assistance be based on the normal compensation paid by United States Attorney's for such services. The Commission will not dictate any set rate of compensation for Dr. Amador, but rather will defer, at least in the first instance, to Office of the Convening Authority for appropriate management of the payment.

i. The Commission will direct however, that the Convening Authority provide authorization for employment of Dr. Amador as an expert assistant at least to the extent of 40 hours of employment for review of evidence and consultation with the detailed defense counsel. Funding should also be provided to facilitate Dr. Amador's travel to Washington D.C. for review of related classified material.

j. Funding should also be provided for travel by Dr. Amador to Guantanamo Bay to provide assistance to detailed defense counsel at the RMC 909 hearing concerning this matter. The employment of Dr. Amador to be present at the RMC 909 hearing should be in addition to the 40 hours directed above.

k. The 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.

3. Ruling: The Defense motion is granted in part and denied in part. The Government shall provide the defense with expert assistance in the field of clinical and forensic psychology consistent with the discussion above.

RALPH H. KOHLMANN
Colonel, U.S. Marine Corps
Military Judge