



Subject: United States v. Mohammed, et al: Defense (bin al Shibh) Special Request for Relief from Protective Order # 7 (Amador) (U)

UNCLASSIFIED

Sir:

Detailed defense counsel for Mr. bin al Shibh respectfully submit the following Special Request for Relief for consideration by the Commission:

1. Relief Requested:

The defense respectfully requests relief from Protective Order 7, for the limited purpose of allowing Dr. Xavier Amador to consult with habeas counsel and disclose information obtained during his interviews and discussions with several of the co-accuseds while in Guantanamo in January 2009.

2. Facts:

a. Mr. bin al Shibh exercised his privilege and filed a writ of habeas corpus in the U.S. District Court, District of Columbia (bin al Shibh v. Bush, 06-CV-01725-EGS). On 16 January 2009, the Hon. Emmet G. Sullivan issued an Order that Dr. Xavier Amador be "permitted in the context of his habeas corpus petition to commence a mental health evaluation of Petitioner forthwith."

b. Pursuant to the Order of Judge Sullivan, Dr. Amador met with Mr. bin al Shibh in Guantanamo on 16-18 January 2009. Additionally, and pursuant to both his appointment as consultant for Commission and habeas counsel, Dr. Amador was present in the courtroom for sessions of the Commission on 19 and 21 January, where he had the opportunity to talk with Mr. bin al Shibh and other co-accuseds, at the request of their respective stand-by counsels (primarily Mr. Ali).

c. In March 2009, Dr. Amador was advised by the Court Security Officers from the Department of Justice that he needed to seek relief from the protective orders in place from the Military Commission in order to generate a report that includes or relies upon any of the information gathered during observations from the Commission sessions or discussions with the accuseds during recess of those sessions. To date, Dr. Amador has not been able to

share this information during his consultation with habeas counsel because of the restrictions placed upon him by Protective Order # 7.

3. Justification:

a. Dr. Amador was appointed as an expert consultant to detailed defense counsel on 26 October 2008. See Commission Ruling, D-017; aff'd Commission Ruling, D-017, dated 4 November 2008. As an appointed expert consultant to the defense team, Dr. Amador is subject to the protective orders issued in this case. See, e.g., PO 007, para. 4. All statements made by the accused are presumptively classified. See *id.* at para. 6.f. As such, all information derived from Dr. Amador's interviews and discussions with Mr. bin al Shibh and other co-accuseds is presumptively classified information.

b. As stated, *supra*, Dr. Amador has also been appointed as an expert consultant to counsel representing Mr. bin al Shibh in his habeas proceeding. The habeas proceeding also has protective orders in place that restrict him from sharing any information acquired from his mental health evaluation from any person other than habeas counsel. Dr. Amador conducted the interviews with Mr. bin al Shibh under the authority of the Order of Judge Sullivan in the habeas proceeding, not by virtue of access granted by the Commission when it ordered Dr. Amador's appointment. In fact, the Commission ruling 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." Commission Ruling, D-017, at 2.k. Thus, Dr. Amador finds himself in the difficult, if not impossible position of trying to segregate and compartmentalize in his own mind the sources of information he obtained as they relate to his opinions and overall evaluation of Mr. bin al Shibh's mental health, which are all relevant to his consultation to both detailed defense counsel and habeas counsel.

c. The United States Government (which includes both the Office of Military Commissions Prosecution and the Civil Division of the Department of Justice) continues to take the position that Dr. Amador must be afforded relief from Protective Order # 7 by the Military Commission in order to fully consult with habeas counsel and to avoid liability for violating its restrictions. Presumably, this is because the Government, like Dr. Amador, recognizes that it is impossible for him to precisely decipher the authority, Commission or habeas, under which he acquired information from Mr. bin al Shibh and co-accuseds on 19 and 21 January.

d. The confusion of the scope of the respective protective orders has significantly stifled Dr. Amador's ability to provide full consultation to detailed defense counsel and habeas counsel, as he was appointed to do by both the Military Judge and Federal District Court Judge. Detailed defense counsel are certain that this result was not intended by Protective Order # 7, as there is no risk of an unauthorized disclosure of classified

information by Dr. Amador when all counsel involved have the prerequisite security clearance and been determined by the Original Classification Authority to have a "need to know" in order to fulfill their respective duties. The requested relief should be granted to ensure fair and legitimate adjudication in both proceedings, and Mr. bin al Shibh is properly afforded his right to counsel.

4. Conference:

Pursuant to RC 3.3, the defense conferred with the prosecution concerning this request. The prosecution acknowledges the conference but requires additional time to determine its position. The prosecution notes that its position will be articulated in its response.

Very Respectfully,

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Defense Counsel