

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 to Allow *Ex Parte* Applications

August 12, 2008

1. Timeliness: This Motion is filed within the time frame permitted by the Military Commissions Trial Judiciary Rules of Court and the Orders of the Military Judge.
2. Relief Sought: The *pro se* accused, Khalid Sheikh Mohammed and Ali Abdul Aziz Ali, joined by counsel for Mr. Bin al Shibh and Mr. Al Hawsawi, move to allow *ex parte* consideration of their petitions for expert assistance and other resources.
3. Overview: The accused are charged with multiple capital offenses. It is necessary in the preparation of their defense that their applications for expert assistance be considered *ex parte*. Current Commission rules do not, on their face, allow for such *ex parte* applications. *See* RMC 703d, RC 2.1. This prohibition, particularly as applied in this a capital case, runs counter to many fundamental concepts of law and due process. Accordingly, the *pro se* accused and counsel move the Commission to allow *ex parte* applications.
4. Burden of Proof: The burden of proof is upon the movants, the accused.
5. Facts:
 - a. This Motion is filed at the behest of the *pro se* accused, Khalid Sheikh Mohammed and Ali Abdul Aziz Ali.
 - b. The accused have been in the custody of the United States government for approximately five years and have no present ability to pay for the assistance that is reasonably necessary to ensure a fundamentally fair trial, and so must depend on the Commissions’ financial resources in preparing their defense. In preparing their defense the co-accused anticipate that they will necessarily file numerous applications for funds for defense expenses and the appointment of various experts.¹ While current Military Commissions procedural law seemingly precludes that such applications be made *ex parte*, numerous justifications support the conclusion that *ex parte* applications should be allowed.

¹ The issues raised by this motion apply equally to expert witnesses, mitigations specialists and investigators, fact investigators, consultants, data processors and analysts along with other financial resources sought by the Defense. For simplicity, counsel will use the term “experts” to refer to all such reasonably necessary assistance.

c. On 4 August 2008, the *pro se* accused, joined by counsel for Mr. Bin al Shibh, petitioned the Convening Authority to allow for *ex parte* consideration of their applications.² The accused proposed a process consistent with both due process and the government's concern for the preservation of resources. The accused proposed that the Convening Authority identify counsel, walled off from the prosecution team in this case, to evaluate defense requests for assistance. On 11 August 2008, the Convening Authority denied the request stating that the process established by 703(d) protected the government from the wasteful expenditure of resources.³

d. On 4 August, counsel for Mr. Bin al Shibh requested the appointment of a mitigation specialist *ex parte*.⁴ The Convening Authority declined to consider the request *ex parte*, stating: "[y]ou have not demonstrated any unusual circumstances that would justify a departure from the normal process in this case."

e. The *pro se* accused and counsel have identified areas in which expert assistance is required. In many cases, the defense has identified specific experts who are willing to assist. For the reasons that follow the defense submits that they must be permitted to make application for experts and defense resources *ex parte* – that is, in the absence of an attorney associated with the prosecution -- in order to ensure a fundamentally fair process.

6. Law and Argument:

Capital Cases Require Heightened Procedural Protections

This is a capital case. If convicted of any of the capital counts, the accused could be sentenced to death. The co-accused's right to make *ex parte* applications for expert assistance is supported by the United States Supreme Court's decision in *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985), by the requirements set out in the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, and by various constitutional provisions which compel the recognition of this right.

Since this is to be a capital prosecution, exacting standards must be met to assure that it is fair. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

Because "death is different," the United States Constitution requires that "extraordinary measures [be taken] to insure that the Accused 'is afforded process that will guarantee, as much as is humanly possible, that [a sentence of death not be] imposed out of whim, passion, prejudice, or mistake.'" *Caldwell v. Mississippi*, 472 U.S. 320, 329 n.2 (1985) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1981) (O'Connor, J., concurring)). Indeed, "[t]ime and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case." *Caspari v. Bolden*, 510 U.S. 383, 393 (1994) (quoting *Strickland v. Washington*, 466 U.S. 668, 704-705 (1984) (Brennan, J., concurring in part and

² A copy of the request is attached as **Exhibit A**.

³ A copy of this letter is attached as **Exhibit B**.

⁴ A copy of the Convening Authority's denial is attached as **Exhibit C**.

dissenting in part)). *See also Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (noting that the Court's "duty to search for constitutional error with painstaking care is never more exacting than in a capital case.") (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987)).

This elevated level of due process applies to all stages of the proceedings. "To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that *tended* to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination." *Beck v. Alabama*, 447 U.S. 625, 638 (1980) (emphasis added).

Current Procedure

Current procedure regarding requests for expert assistance is found in Rule for Military Commission (RMC) 703 which does not, on its face, provide for *ex parte* applications. The defense is also aware of Rule of Court (RC) 2.1, which speaks generally to an intent to avoid *ex parte* communications and to prohibit such communications except as specifically authorized. The defense moves that these rules be viewed in light of RC 1.4 and 1.5 which provide the Military Judge the ability to modify, change or determine any rule not applicable to any given trial.

Moreover, RMC 703 should be considered in light of actual practice which, in the general context of military law, does allow for *ex parte* applications in this context. *See United States v. Garries*, 22 M.J. 288 (C.A.A.F. 1986) (inherent authority of Military Judge to hear *ex parte* applications if necessary to provision of fair trial). *See also United States v. Kaspers*, 47 M.J. 176, 180 (C.A.A.F. 1997), (recognizing that an *ex parte* hearing may be warranted "if the circumstances are 'unusual,' and where defense counsel risk revealing privileged information or prejudicing the defense case if required to seek assistance in an adversarial proceeding").

Additionally, military law recognizes the appropriateness of *ex parte* proceedings for many other purposes. *See, e.g., United States v. Baker*, 58 M.J. 380, 388 (C.A.A.F. 2003) (recommending *ex parte* proceeding where a defense counsel believes the accused will present perjured testimony); *United States v. Province*, 45 M.J. 359 (C.A.A.F. 1996) (recommending *ex parte* hearings to resolve whether the defense must turn over potentially incriminating physical evidence); *United States v. Rhea*, 33 M.J. 413 (C.M.A. 1991) (same); *United States v. Loving*, 34 M.J. 956, 963 (A.C.M.R. 1992) (referring to *ex parte* hearing held concerning adequacy of expert assistance for the defense in capital court-martial), *aff'd*, 41 M.J. 213 (C.A.A.F. 1994), *aff'd*, 517 U.S. 748 (1996); Rule for Courts-Martial 701(g)(2) (authorizing *ex parte* showing of reasons for a protective order limiting discovery); Mil. R. Evid. 505(i)(3) (providing that "[i]n order to obtain an in camera proceeding under this rule, the Government shall submit the classified information and an affidavit *ex parte* for examination by the military judge only"). Finally, in the instant matter, the rules allow the Government to take many *ex parte* applications – such as requesting protective orders -- involving the asserted protection of materials for which it wants to prevent or limit disclosure, from the public and even from the accused or his counsel.

To clarify what the accused seek, this is not a request for the defense to have communications with the Court off the record. Rather, the accused would ask that any representations made by the defense related to the need for experts, investigators, and/or for expenses associated with investigating this case should be on the record, before a court reporter,

with any pleadings related thereto and the transcripts of any argument made to the Court, and the actions authorized, remaining under seal, but part of the record of this case.

The resultant procedure would place the prosecution and defense on a more even playing field. While taking nothing from the Government that it is entitled to, the Commission can strike a procedural balance in this limited area.

Nobody would seriously assert that -- regardless of what the Military Judge decides in regard to this motion -- the Government will not have unlimited resources available in the future without any need for notice or request to the Convening Authority or Military Judge. Therefore, while RMC 703(d) speaks of any "party" needing such services making requests under the constraints of the Commissions Rule, because of the Government's unlimited access to resources, this Commission's decision affects only the accused. It is only the accused that must make such requests under RMC 703, requiring factual revelations to the opposition

Under the current procedural system the accused are constrained to utilize the flawed RMC 703 procedure while the Government can obtain resources outside the Commissions without ever revealing their investigative strategy to the defense, Convening Authority or the Commission. There is no authority requiring the Government to publicly demonstrate particularized need for the retention of experts or to expend funds investigating and preparing its case for trial, outside the effectively inapplicable provisions of RMC 703. Instead, the Government is unrestrained by procedural rules that do not realistically apply to it.

Consequently, the government can accomplish what it needs to and never has to deal with RMC 703. It can totally conduct an unfettered investigation and may prepare for trial under the cloak of secrecy. The Government by its own representation has already received the advice and assistance of innumerable, unidentified experts.⁵

Under the current procedural system the Government can investigate a case and obtain a referral in secret. The Government can, as it has, obtain expert opinions from outside experts like forensic pathologists, secure orders and warrants to gather evidence, and investigate the case as it so pleases -- all without asking the court's permission. It can then prosecute that case without giving the defense a prior blueprint of its theories, witnesses, and evidence. Unlike the defense, the Government does not have to disclose its case preparation including expert selection. Unlike the defense, it does not have to demonstrate a particularized need for assistance, and deal with objections from the opposition to its requests.

The current procedural system is obviously skewed in favor of the Government. While in no way achieving a balance, the adoption of a procedural system allowing *ex parte* requests would move the Commission in closer to the balance fundamental fairness requires.

⁵ In its response to Protective Order Number 3, filed May 30, 2008, the prosecution characterized its pretrial investigation as the "largest criminal investigation in the history of the United States," noting that it required coordination between state, federal and foreign agencies and governments. Appellate Exhibit 25.

Ake v. Oklahoma Requires the Commission to Allow Ex Parte Applications for Services

Ake v. Oklahoma, 470 U.S. 68 (1985), instructs the court to conduct *ex parte* hearings to determine whether the Constitution entitles the defendant to his requested experts. In *Ake*, the United States Supreme Court determined that due process required the appointment of a mental health expert when a defendant's mental health is likely to be a significant factor at trial. *Id.* at 74.

Regarding the procedure to be followed in enforcing this right, the *Ake* Court directed the trial court to appoint a mental health expert to assist the defendant when the defendant makes an *ex parte* showing to the trial court that his sanity is likely to be a significant factor in his defense. *Id.* at 82-83. The *Ake* Court's reference to an *ex parte* procedure was consistent with its goal of fundamental fairness because it permitted the defendant to retain a mental health expert while safeguarding his defense strategy from the Government.

Conversely, RMC 703 governing the retention of experts in the Commissions' process, requires the accused to make many disclosures not contemplated by the *ex parte* proceeding endorsed in *Ake*. These disclosures prejudice the defense in several ways. First, the disclosures provide the Government with accelerated discovery of testifying experts. Second, they give the Government a window into defense strategy and potential factual defenses. Third, they give the Government notice of non-testifying defense experts – that is, experts whom the defense ultimately elects not to call at trial. All of these prejudicial disclosures provide the Government with extra time for preparation relating to those witnesses and may alert the Government to holes in its own case. The Government can then use this knowledge to prepare or tailor its pre-trial investigation, opening and closing statements, presentation of witnesses and evidence, and cross-examination.

The RMC 703 hearing can also provide the Government with notice of witnesses the defense retained to testify at trial, but then withdrew. This may alert the Government that the expert has uncovered damaging evidence that the Government would otherwise not have discovered. Because of the potential for alerting the Government to such damaging evidence, counsel to an indigent accused will be forced to explore potential defenses more conservatively. Thus, in order to comply with the language and spirit of *Ake*, the court should follow the procedure set forth in *Ake* and conduct an *ex parte* hearing on the accused's motions for expert assistance.

ABA Guidelines Require the Commissions to Allow Ex Parte Applications for Services

The right to an *ex parte* hearing is explicit in the ABA Revised Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, which establish the standard of care for capital representation. *ABA Revised Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, in 31 *Hofstra L. Rev.* 913 (2003) [hereinafter ABA Guidelines] (also available online at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf>).

Indeed, the approach recommended by the ABA Guidelines totally removes the government from the equation wherever possible, by instructing Responsible Agencies (defined

in Guideline 3.1) to construct a Legal Representation Plan that funds defense experts for indigent defendants through entities independent of the prosecutors. The ABA recommends that:

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. The Plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.

1. Counsel should have the right to have such services provided by **persons independent of the government.**

ABA Guideline 4.1B.

Should the jurisdiction not provide an entirely independent access to funds for necessary experts, the Guidelines **require** counsel to seek funds in an *ex parte* proceeding, so as not to jeopardize the defendant's right to high quality legal representation. The Commentary to ABA Guideline 10.4 explicitly states:

At every stage of the case, lead counsel is responsible, in the exercise of sound professional judgment, for determining what resources are needed and for demanding that the jurisdiction provide them. Because the defense should not be required to disclose privileged communications or strategy to the prosecution in order to secure these resources, it is counsel's **obligation** to insist upon making such requests *ex parte* and *in camera* (emphasis added).

Commentary to Guideline 10.4 (The Defense Team), ABA Revised Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra Law Review at 1004 (Summer 2003) (footnotes omitted) (hereinafter "Commentary to ABA Guideline ____").

Indeed, requesting mitigation services in an *ex parte* manner was made a black letter rule in the recently released *Supplemental Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, which says:

In performing the mitigation investigation, counsel has the duty to obtain services of persons independent of the government and the right to select one or more such persons whose qualifications fit the individual needs of the client and the case. **Applications to the court for the funding of mitigation services should be conducted *ex parte*, *in camera*, and under seal.**

Supplemental Mitigation Guideline 4.1A, (The Capital Defense Team: The Role of Mitigation Specialists), Supplemental Guidelines for the Mitigation Function of Defense Teams in Death

Penalty Cases, in 36 Hofstra Law Rev 677, 680 (Spring 2008) (hereinafter “*Supplemental Mitigation Guidelines*”)(emphasis added).

ABA Guidelines Must Apply in Proceedings Before Military Commissions

As clear as the requirement under the ABA Guidelines to provide *ex parte* hearings is the requirement for the attorneys involved in the Commission process to follow the ABA Guidelines. The ABA Guidelines are recognized as the standard of care for practitioners through their endorsement in United States Supreme Court and military case law. A large portion of the attorneys involved in the Commissions process are mandated by their state and services’ ethics rules to abide by these Guidelines. Clearly, the ABA Guidelines must be followed by all counsel involved in the Commissions process and are not simply aspirational guidance which either counsel or the judiciary can ignore.

ABA Guidelines establish mandatory standard of care

The ABA Guidelines establish rules for the present rather than aspirations for a legal system we hope to have in the future. The ABA Guidelines "are not aspirational" but rather "embody the current consensus about what is required to provide effective defense representation in capital cases." ABA Guideline 1.1 (Objective and Scope of Guidelines). So too, the Supplementary Guidelines which explicate the ABA Guidelines by **summarizing “prevailing professional norms** for mitigation investigation, development and presentation by capital defense teams." Supplementary Guidelines, *supra* note 3, at Guideline 1.1(A) (emphasis added).

ABA Guidelines recognized by United States Supreme Court and other Federal Courts

Numerous United States Supreme Court and other federal cases establish the ABA Guidelines as the lens through which counsel’s compliance with Rule of Professional Conduct 1.1 will be judged. The United States Supreme Court has frequently cited the ABA Guidelines as the standard in death penalty cases. *See 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). The Seventh Circuit has similarly indicated that it will look to the ABA Guidelines to evaluate “the proper measure of attorney performance.” *Canaan v. McBride*, 395 F.3d 376, 384-85 (7th Cir. 2005). The Sixth Circuit adds, “[T]he ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the ‘prevailing professional norms’ in ineffective assistance cases.” *Hamblin v. Mitchell*, 354 F.3d 482, 486 (6th Cir. 2003).

ABA Guidelines recognized by military court

As federal case law moves toward a virtually universal recognition of the ABA Guidelines as the standard of practice, military case law moves with it. Gone are the days when a military court can, as the court did in *United States v. Loving*, decline to apply the ABA Guidelines because the Guidelines expressly provide a military exception. *See United States v. Loving*, 41 M.J. 213, 300 (C.A.A.F. 1994), *aff’d*, 5517 U.S. 748 (1996).

Instead, the ABA Guidelines no longer provide for a military exception and the military courts increasingly look to the Guidelines for the standard of practice. In fact, the Guidelines’

jurisdictional statement specifically notes their applicability to trial before military commission. Guideline 1.1, *History of Guideline*. At the very least, the military courts should consider the Guidelines and federal law “instructive.” See *United States v. Murphy*, 50 M.J. 4, 9 (C.A.A.F. 1998).

ABA Guidelines mandatory on some members of Commissions process

Perhaps most importantly, the Air Force Standards for Criminal Justice appear to incorporate the ABA Guidelines, making them a mandatory standard governing the conduct of Air Force attorneys. See TJAG Policy Memorandum TJS-3, Air Force Standards for Criminal Justice (15 Oct 2002). The Air Force Standards were “directly adapted from the [ABA] Standards for Criminal Justice” and provide, “The following chapters of the *ABA Standards [for Criminal Justice]* apply to Air Force practice, except as indicated or qualified in the text . . . Chapter 4 The Defense Function.” *Id.* at Attachment 1, page 1. The ABA Defense Function Standard, in turn, provides:

Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused. Defense counsel should comply with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

ABA Standard of Criminal Justice 4-1.2(c).

The Air Force Standards apply to “all military and civilian lawyers . . . in The Judge Advocate General’s Corps, USAF.” Air Force Standards at Attachment 1, page 1. Consequently, all Air Force Judge Advocate General Corps officers involved in the Commissions process are obligated to abide by the ABA Guidelines.

Many Air Force attorneys are involved in the Commissions process including the Convening Authority’s Legal Advisor, Brigadier General Thomas Hartmann, the incumbent Chief Defense Counsel, COL Peter Masciola, and members of the various defense and prosecution teams. Brigadier General Hartmann consequently has a duty as Legal Advisor that he recommend courses of action that comply with the ABA Guidelines.⁶ Similarly, COL Masciola will have a supervisory responsibility to ensure that those he supervises comply with the Guidelines. Finally, Air Force counsel on the various teams have a clear and absolute duty to comply with the Guidelines.

Various Constitutional Provisions Require the Commission to Allow Ex Parte Applications for Services

For purposes of this motion the defense will not belabor a conclusion which they believe was made obvious by the recent United States Supreme Court decision in *Boumediene v. Bush*, 553 U.S. ___, 128 S.Ct. 2229 (2008), to the effect that constitutional protections apply to the

⁶ In its request to the Convening Authority, the defense has requested that General Hartmann be precluded from providing advice in this case until this Commission resolves the Motion to Dismiss for Unlawful Influence.

Commissions process. Accepting this general premise, there are a great number of constitutional protections -- including due process, the Sixth Amendment right to counsel, the Fifth Amendment right against self incrimination and the Sixth Amendment right to compulsory process--supporting the right of an Accused to make *ex parte* applications for expert services.

Due Process

The near-universal acceptance of *ex parte* funding applications reflects a fundamental truth: requiring defendants to apply for expert assistance in open court violates their due process rights under the Fourteenth Amendment to the United States Constitution. Looking at the analogous issue of a state procedural rule, the United States Supreme court said that a state rule of criminal procedure violates an accused's due process rights when it offends a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). To determine whether a state rule of criminal procedure violated a fundamental principle of justice under *Palko*, the Supreme Court in *Medina v. California*, 505 U.S. 437, 446-53 (1992), examined the rule's contemporary and historical practice, the rule's operation, and Supreme Court precedent. The examination of these factors which follows establishes that an open hearing for expert assistance offends a fundamental principle of justice under *Palko* and thus violates the defendant's Fourteenth Amendment due process rights.

First, because *Ake* granted the right to a mental health expert only twenty years ago there is little historical practice to consider concerning the right to an *ex parte* hearing for expert assistance. Before the recognition of the right to expert assistance there was logically no need to consider whether application for those services would be made *ex parte* or in an open forum. It is significant to note then that the initial recognition of the right to make *ex parte* application for services in *Ake* was made contemporaneously with the recognition of the right to receive those services.

Moreover, contemporary practice weighs heavily and increasingly in favor of a due process right to *ex parte* application for expert assistance. Nearly every death penalty jurisdiction provides some avenue for capital defendants to obtain expert assistance without setting out and justifying their request in open court, with the Government and the public present. A federal statute specifically provides for the right to ask for *ex parte* services. Finally, the military itself has recognized the right, at least on a limited basis.

The Military Commissions stand almost alone in requiring indigent defendants to apply for expert assistance in open court. Of the thirty-eight death penalty jurisdictions, nineteen provide at least a limited right to an *ex parte* hearing for expert assistance through case law or statute.⁷ In the remaining death penalty jurisdictions, defense counsel for indigent capital clients

⁷ See 21 U.S.C. § 848(q)(9) (2000) (providing the right to an *ex parte* hearing upon the showing of need); Cal. Penal Code § 987.9(a) (West Supp. 2005) (permitting capital defendants to apply *ex parte* for expert assistance); Del. Super. Ct. Crim. R. Ann. 44(e)(4) (same); 725 Ill. Comp. Stat. Ann. 124/15(h), (I)(1) (West Supp. 2004) (same); Ind. R. Crim. P. 24(c)(2) (same); Kan. Stat. Ann. § 22-4508 (1995) (same); Ken. Rev. Stat. Ann. § 31.185(2) (Michie Supp. 2004); Nev. Rev. Stat. § 7.135 (2003) (same); N.Y. Jud. Law 35-b(8) (McKinney 2002) (same); N.C. Indigent Def. Svcs. R. 2D.4 (same); S.C. Code Ann. § 16-3-26(c)(1) (Law. Co-op. 2003) (same); Tenn. Code Ann. § 40-14-207(b) (2003) (same); Tex. Code Crim. P. art. 26.052(f) (Vernon Supp. 2004-05)(same); Wash. Superior Ct. Crim.

can generally secure expert assistance by applying to state or city public defender agencies.⁸ This eliminates the need for indigent defendants to apply for expert assistance in open court. Finally, even in jurisdictions where no statute or case law explicitly permits the courts to entertain *ex parte* applications for expert funds, many state trial courts nevertheless permit such applications as a matter of routine practice.⁹ Additionally, of the thirty eight death penalty jurisdictions, only three or four routinely provide for the onerous procedure of requiring defendants to apply for expert assistance in open court.¹⁰ These numbers are similar to those discussed in *Cooper v. Oklahoma*, 517 U.S. 348, 360-62 (1996), where the Court determined that a state rule of criminal procedure violated the defendant's due process rights in part because only four of the fifty states continued to use the procedure in question.

Next, while military courts have admittedly not considered themselves bound by this fact in any manner, federal criminal procedural law specifically allows *ex parte* application for services by statute. See 18 U.S.C. §3006.

In recognition of the acceptance of the rule that *ex parte* applications are required in federal court, post-conviction reversals have been followed when the court failed to permit the defense to make a showing of need *ex parte*. See, e.g., *U.S. v. Abreu*, 202 F.3d 386 (1st Cir. 2000). In this non-capital federal criminal case, the defendant was accused of trafficking small amounts of cocaine; he required the services of a psychologist to support a downward departure sentence. The court would not allow *ex parte* application and held an adversarial hearing at which the government opposed the motion and at which therefore the defense declined to place confidential matters on the record. The Court of Appeals reversed, relying on *Ake* for the proposition that it was "crucial that the defendant have a fair opportunity to marshal a defense" for sentencing, and remanding for an *ex parte* hearing. The court held that the need to request funds for an expert from the court did not mean that a defendant should have to reveal his strategies and theories to the government in advance of trial. "To require indigent defendants to do so would penalize them for their poverty." *Abreu*, 202 F.3rd at 391.

Finally, while limiting this right, the military case law recognizes the right to make *ex parte* applications. Limiting its use to "the unusual circumstance where it is necessary to insure a fair trial" the military court in *Garries*, a capital case, recognized the inherent authority in the military judge to permit *ex parte* applications. 22 M.J. 288 (C.M.A. 1986).

R. 3.1(f)(2) (same); Ariz. R. Crim. P. 15.9(b) (permitting capital defendants to apply *ex parte* for expert funding upon a showing of need); *Ex Parte Moody*, 684 So. 2d 114, 121 (Ala. 1996) (requiring that trial courts permit defendants to apply *ex parte* for expert assistance); *Brooks v. State*, 385 S.E.2d 81, 84 (Ga. 1989) (same); *State v. Touchet*, 642 So. 2d 1213, 1214 (La. 1994) (requiring that courts permit defendants to apply *ex parte* for expert assistance upon a showing that *ex parte* application is necessary); *State v. Ballard*, 428 S.E.2d 178, 179 (N.C. 1993) (requiring that trial courts permit defendants to apply *ex parte* for expert assistance); *State v. Peeples*, 640 N.E.2d 208, 212 (Ohio Ct. App. 1994) (requiring that trial courts permit defendants to apply *ex parte* for expert funding upon a showing of necessity); *Ex Parte Lexington County*, 442 S.E.2d 589, 593 (S.C. 1994) (requiring that trial courts permit defendants to apply *ex parte* for expert funding); *State v. Barnett*, 909 S.W.2d 423, 429-30 (Tenn. 1995) (same); *Williams v. State*, 958 S.W.2d 186, 194 (Tex. Crim. App. 1997) (same).

⁸ See Justin B. Shane, *Money Talks: An Indigent Defendant's Right to an Ex Parte Hearing for Expert Funding*, 17 Cap. Def. J. 347, 360-61 (2005) (listing states that permit indigent defendants to apply to their state public defender agencies for expert funds).

⁹ See *id.* at 361-62 (describing state trial courts that permit defendants to apply *ex parte* for expert funds).

¹⁰ *Shane, supra* note 3, at 356-62.

Beyond this, the defense would note that the reluctance of the *Garries* court to more generally allow *ex parte* applications stems from rationales not relevant to the Commissions' process. The *Garries* court's determination that *ex parte* applications for funding for experts would be generally inappropriate was based on the premise that funding must be provided by the convening authority and an *ex parte* procedure would deprive the convening authority of the opportunity to consider and arrange alternatives to the requested expert services. *Garries*, 22 M.J. at 291. It further found that such resources are generally available without cost in the military. *Id.*

That rationale carries little to no weight under the facts and equities of this case. Here, the convening authority for the Commissions is not akin to the local commander who has his own resources to perhaps provide to the defense. All resources will come from outside the Commissions and there are no local experts available for the convening authority to provide. Moreover, the requested expert services required in this case are not the "run of the mill" services but involve matters complicated by unique issues including torture, seclusion, foreign culture and a unique hearing system with standards of adjudication unique from those of any other criminal system.

Moreover, it should be clearly understood that the Convening Authority's job is not primarily to protect the Government's purse strings. Instead, it is the Convening Authority's obligation to ensure a fair trial, which means that the defense must have all the tools necessary to mount a defense at trial and in preparation for capital sentencing. *See, e.g. United States v. Kreutzer*, 61 M.J. 54 (2005) (death sentence reversed for failure to grant defense request for mitigation specialist). To the extent that the Commission must exercise some fiscal care, at least over the defense team, that duty of care has to reflect the primacy of defense needs in a capital case. If this dual role should cause a conflict, it is the fiscal responsibilities which must suffer; nothing can be more primary than the court's obligation to ensure basic fairness, and it is paramount in a capital case.

A tribunal's primary role and responsibility is to seek justice. In this light, many courts have examined their role, recognized the need for procedural fairness and thus recognized a right to *ex parte* applications even when such appear contrary to the existing written rules. Beyond the high consensus of opinion in death jurisdictions shown earlier, the defense would note the frequent actual practice in this evolving area of allowing *ex parte* applications even when such are not only not explicitly endorsed by the written rules, but when such applications, on their face, appear directly contradictory to the written rules.

Various state courts have determined that trial courts may permit *ex parte* hearings for expert assistance even if not required by the Constitution, and even when their state judicial canons could be read to disapprove of such hearings. In *Stevens v. State*, 770 N.E.2d 739, 759 (Ind. 2002), the court determined that trial courts should permit *ex parte* hearings upon a showing of good cause despite the Indiana judicial canon that prohibits a judge from "initiat[ing], permit[ing], or consider[ing] *ex parte* communications, [or]. . . other communications made to the judge outside the presence of the parties" except "when expressly authorized by law." Ind. Canons of Jud. Conduct 3(B)(5)(e). Likewise, the Supreme Court of Louisiana in *Touchet* determined that trial courts could conduct *ex parte* hearings upon a showing of good cause although the Constitution did not require such hearings. 642 So. 2d at 1214. The court reached its conclusion despite Louisiana Canon of Judicial Conduct 3(A)(6),

which states that “[e]xcept as permitted by law, a judge shall not permit private or ex parte interviews, arguments or communications designed to influence his or her judicial action in any case, either civil or criminal.”

Additionally, the *Garries* rationale for not more freely granting *ex parte* applications must be balanced in this case by the reality that this is the most unusual case by the government’s characterization it is “the largest investigation in the history of the United States.” See Prosecution Motion for a Protective Order filed May 30, 2008 (AE – 25). Therefore, it is only fair that some balancing be made of resources.

The commentary to the ABA Guidelines speaks to this balancing when it says:

As a rough benchmark, jurisdictions should provide funding for defender services that maintains parity between the defense and the prosecution with respect to workload, salaries, and resources necessary to provide quality legal representation (including benefits, technology, facilities, legal research, support staff, paralegals, investigators, mitigation specialists, and access to forensic services and experts). In doing so, jurisdictions must be mindful that the prosecution has access at no cost to many services for which the defense must pay. A prosecution office will not only benefit from the formal resources of its jurisdiction (e.g., a state crime laboratory) and co-operating ones (e.g., the FBI), but from many informal ones as well.

Commentary to ABA Guideline 10.4.

Beyond the obvious due process concerns inherent in the Commissions’ use of the flawed RMC 703 procedure in the face of the virtually universally accepted *ex parte* procedure used elsewhere, due process concerns arise out of Supreme Court precedent that supports the defense’s argument that the operation of the current procedure improperly requires him to make factual revelations not required of the Government. The Court in *Wardius v. Oregon*, 412 U.S. 470 (1973), addressed a discovery rule that implicated the same concerns as open court hearings for expert assistance. *Wardius* struck down a notice-of-alibi statute because the statute did not require the state to reciprocate once the defendant disclosed his list of potential alibi witnesses. *Id.* at 471-72. The Court noted that “[i]t is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.” *Id.* at 476.

Looking at the rule’s operation in this case reveals that, since in this case the Government funds its own pretrial preparation and need not apply to the court for financial assistance, open hearings for the defendant’s expert assistance will require the Defense to disclose its reasons for requesting experts to the Government, while providing it with no equivalent information about the Government’s case. Further, as in *Wardius*, the accused’s disclosures provide the Government with information it can use as a weapon against the accused.

Along these lines, the Defense would note that the Army appellate court in *United States v. Kreutzer*, stated that part of the rationale for the federal statutory scheme allowing *ex parte*

applications under 18 U.S.C. §3006 is that the lack of an *ex parte* application procedure requires an accused to expose his trial strategy prematurely. 59 M.J. 773, 778-79 (Army Ct. Crim. App. 2004).

This is a particular problem where, as here, the statutory requirement for making a showing of need is so stringent: Rule 703 (d) requires that "a *complete* statement of reasons why employment of the expert is necessary" be furnished. (Emphasis supplied).

An open hearing for expert funds also operates to prejudice the defendant on account of his poverty, and thus violates Supreme Court precedent seeking to provide indigent defendants with meaningful access to justice. In *Griffin v. Illinois*, 351 U.S. 12, 17-18 (1956), the Court held that, "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." In *Ake*, Justice Marshall noted that "[m]eaningful access to justice has been the consistent theme of " Supreme Court opinions addressing indigent defendants' access to courts. 470 U.S. at 76.

Because the accused are indigent, they cannot afford to hire experts independently of RMC 703d. Instead, they must seek the Commission's appointment of these experts, and unless allowed to do so *ex parte*, they must make significant disclosures to the Government as the price of making their requests. These disclosures include the type of expert needed, the number of hours the expert will work, and how the defense plans to use the expert. This will give the Government advanced notice of potential defense strategies involving expert assistance, and will allow the Government to tailor its own trial strategy and investigation. The Government would not obtain any of this information if the defendant could independently hire his own experts. This puts an indigent defendant at an extreme disadvantage compared to a similarly situated monied defendant. This inequity puts the Commission's expert application procedure at odds with *Ake* and *Griffin's* goal of providing indigent defendants with meaningful access to justice.

Finally, the operation of the challenged rule will cause the accused to forgo fundamental due process rights while advancing no appropriate governmental interest. The United States Supreme Court in both *Medina v. California* and *Cooper v. Oklahoma* established that a court must balance the procedural rules' risks to the defendants and the states' interests in maintaining those rules. *Medina v. California*, 505 U.S. 437, 448; 112 S. Ct. 2572; 120 L. Ed. 2d 3530 (1992) (questioning whether the state could place the burden of proving incompetency upon the accused); *Cooper v. Oklahoma*, 517 U.S. 348, 362-67; 116 S. Ct. 1373; 134 L. Ed. 2d 498 (1996)(approving that the burden of proof by a preponderance be placed upon the accused to show incompetency).

An open hearing will compel the accused to disclose information that the Government can use to tailor its investigative strategy. For instance, if an accused requests a mitigation expert to investigate the accused's mental retardation, an open hearing could inform the Government of the witnesses the expert plans to interview about the accused's condition and functioning. The Government could then use this information to reach these witnesses before the defense expert and undermine the expert's ability to get honest interviews about the accused's mental retardation. This threat may cause the accused to forgo requesting an expert because he fears that the information disclosure will give the Government an overwhelming advantage. Therefore, an open hearing undermines the proper functioning of the adversarial process, and needlessly risks severe prejudice to the accused.

By contrast, the Government has little valid interest in holding open hearings for defense expert assistance. The Commission is entirely capable of protecting against misuse or waste of government funds. Even the existing rules contemplate that an accused can take a denial of funds to the Military Judge. The Military Judge, who already possesses a more comprehensive knowledge of the underlying facts and the context of the motion, can deny motions for unnecessary experts, if he finds a request to be inappropriate. Although the Government has an interest in promoting adversarial hearings, its interest is minimal in this situation. An accused must apply for expert assistance at an early stage in the proceedings, and therefore, the Government will have limited knowledge of the defendant's strategy at that time. Because of the Government's lack of knowledge, the Government will have few valid arguments against the defendant's need for an expert.

Sixth Amendment right to Counsel

In addition to violating the defendant's equal protection and due process rights, an open hearing for expert assistance violates the defendant's Sixth Amendment right to assistance of counsel in multiple ways. *See Ex Parte Moody*, 684 So.2d 114, 120 (Ala. 1996).

First, open hearings for expert assistance unconstitutionally interfere with counsel's ability to present a defense. *See Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972) (striking down statute forcing criminal defendants to testify prior to other defense witnesses). The *Brooks* Court noted that the statute interfered with counsel's ability to present a defense because it required counsel to decide whether to introduce testimony "without an opportunity to evaluate [its] actual worth" within the defense strategy. *Id.* at 612.

The Sixth Amendment prohibits "restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments." *Herring v. New York*, 422 U.S. 853, 857 (1975).

An open hearing for expert assistance confronts defense counsel with the same issue. The open hearing allows the Government to learn the defendant's strategy, particularly what experts the defense will use and why it will use them.

Another example illustrates the problem. Suppose that a defendant wants to hire an audiologist to determine whether a Government witness could have heard a disputed gunshot. Assuming the Government did not think to hire an audiologist, the RMC 703 hearing will alert the Government to a gap in its case and permit it to wait to see whether the audiologist uncovers corroborating or damaging evidence without doing its own tests. Defense counsel's creativity and zeal thereby gets turned against the client. Defense counsel, therefore, must weigh an expert's potential value against the damage the defense may incur by revealing its strategy to the Government. Defense counsel will elect not to pursue an expert who is not extremely likely to discover valuable information, although a substantial chance exists that the expert could uncover very valuable information. Thus, as in *Brooks*, the defense must decide whether to retain an expert witness without a fair chance to evaluate that expert's worth.

Moreover, open hearings for expert funding require defense counsel to forgo experts if counsel believes that the experts' worth do not outweigh the damage from disclosing defense

strategy to the Government. The Sixth Amendment imposes an “obligation to conduct a thorough investigation of the defendant's background.” *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). Forgoing certain mitigation experts for strategic reasons prevents counsel from conducting a thorough mitigation investigation.

Suppose, for example, that defense counsel wants to retain an investigator to interview the defendant’s father concerning the father’s abuse of the defendant as a child. The RMC 703 hearing will alert the Government to the defendant’s theory and enable its investigator to interview the defendant’s father first. This not only allows the Government to obtain self-serving statements from the father that he did not abuse the defendant, but also will alert the father to the defense’s intentions and render him unwilling to talk to the defense’s investigator. Open hearings, therefore, prevent defense counsel's compliance with *Wiggins*, *Williams*, and the Sixth Amendment duty to conduct a thorough mitigation investigation.

Further, open hearings for expert assistance violate the defendant's Sixth Amendment assistance of counsel right because they permit the Government to intrude into the attorney-client relationship. The United States Supreme Court has noted that the “assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private and that *his lawful preparations for trial are secure against intrusion by the government, his adversary in the criminal proceeding.*” *Weatherford v. Bursey*, 429 U.S. 545, 544 n. 4 (1977) (quoting Brief for United States in *Hoffa v. United States*, O.T. 1966, No. 32, p.71).

Professor Lawrence Fox, an eminent ethics expert¹¹, notes the important connection between the attention to client confidentiality required by the ABA Guidelines, the consequent obligation to seek funding in an *ex parte* hearing, and Model Rule of Professional Conduct 1.6.¹²

This is because “the foundation of the development of a relationship of trust with the client must be a commitment—an oft repeated commitment—to maintaining the confidences of the client. . . . The Supplementary Guidelines make the point that the privilege is of utmost importance in legal proceedings in which the client’s life hangs in the balance. The very *raison d’être* of the confidentiality obligation is the fact that, as hard as it is to convince clients they should share their innermost concerns with their lawyers, one way to overcome that reluctance is to pledge that the lawyers’ lips are sealed. . . . In the world of capital litigation, this commitment becomes even more important because the need for client trust is higher and the

¹¹ Partner and former Managing Partner at Drinker Biddle & Reath LLP in Philadelphia, the I. Grant Irej, Jr. Adjunct Professor at the University of Pennsylvania Law School, and Lecturer on Law at the Harvard Law School. Mr. Fox has served as a member and Chair of the American Bar Association’s Standing Committee on Ethics and Professional Responsibility and was a member of the American Bar Association Ethics 2000 project, which rewrote the Model Rules. Mr. Fox is the author of *Legal Tender* and, with Susan Martyn, has written a case book, *TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY* (2d ed. 2008) and *THE LAW GOVERNING LAWYERS: NATIONAL RULES, STANDARDS, STATUTES, AND STATE LAWYER CODES* (4th ed. 2008). Mr. Fox and Professor Martyn also wrote *RED FLAGS: LEGAL ETHICS FOR LAWYERS* and *YOUR LAWYER, A USER’S GUIDE* (2006).

¹² Model Rule 1.6 concerns Confidentiality of Information within the Attorney-Client Relationship.

stakes are so profound." *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities*, 36 Hofstra Law Review 775, 800 (Spring 2008).

The Supreme Court has described "the attorney-client privilege under federal law, as "the oldest of the privileges for confidential communications known to the common law.'" *United States v. Zolin*, 491 U.S. 554, 562 (1989) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). The privilege exists "to encourage full and frank communication between lawyers and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

This need for an accused to believe that his attorney will treat their communications as confidential is multiplied many times over by this Military Commissions system. The Commissions process causes an accused to be, at the very least, vigorously interrogated and prosecuted by those of another nationality, culture and religion. He is then necessarily defended by those of the same nationality, culture and religion as his interrogators and prosecutors. Moreover, the whole process is conducted under factual circumstances where an accused realistically has to question whether disclosures can harm not just him, but his family in their homes in another part of the world where any promise of protection is realistically an empty one.

In the world of capital litigation, this commitment to confidentiality becomes even more important because the need for client trust is higher and the stakes are so profound. The Supplementary Guidelines appropriately make repeated reference to the duty of the entire defense team to maintain the confidentiality of client communications.¹³

Under no circumstances should counsel in a capital case proceed in a fashion that enables the prosecution to use members of the defense team as state's witnesses against the accused. *Delap v. State*, 440 So. 2d 1242, 1246-47 (Fla. 1983). This would be the natural result of, as a practical matter, requiring any counsel to testify in open court about the reasons justifying a motion for services.

It follows as a matter of the highest ethical imperative not just that "**it is counsel's obligation to insist upon making [requests for needed resources] ex parte and in camera,**"¹⁴ but that lawyers have a duty under the professional rules to go to the limit to defend the confidentiality of the legal and factual investigative work of the defense team in the event that a court fails to respect this core principle. After all, the ultimate purpose of mandating confidentiality so as to ensure the effective representation of each individual client is to benefit the criminal justice system as a whole. *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities*, 36 Hofstra Law Review at 801(emphasis supplied) (footnotes omitted).

¹³ See Supplementary Guidelines, at Guideline 4.1(C) (all defense team members "are bound by rules of professional responsibility that govern the conduct of counsel respecting privilege, diligence, and loyalty to the client"); *id.* at Guideline 4.1(D) (counsel must inform non-attorney defense team members of "rules affecting confidentiality, disclosure, privileges and protections"); *id.* at Guideline 5.1(C) (mitigation specialists must have the skills to conduct interviews that produce "confidential, relevant and reliable information") (emphasis added).

¹⁴ Citing ABA Guideline 10.4 and Commentary, as well as Supplementary Guideline 4.1(a).

Finally, open hearings for expert assistance permit the Government to intrude into attorney-client preparation. The Government's presence at the hearing permits the Government to discover experts the defense plans to hire solely for trial preparation and makes the Government a party to the defense team's confidential strategic discussions. If not for the open hearing for expert assistance, the Government would have no access to this information. In order to protect the defendant's Sixth Amendment right to counsel, the court should not permit the Government to intercept the defense strategy in this way.

Fifth Amendment Privilege Against Self-Incrimination

Open hearings for expert assistance also violate the defendant's Fifth Amendment privilege against self-incrimination. Communications that violate a defendant's privilege against self-incrimination must be testimonial, self-incriminating, and compelled. *Williams v. Florida*, 399 U.S. 78, 84 (1970). Testimonial communications "explicitly or implicitly, relate a factual assertion or disclose information." *Doe v. United States*, 487 U.S. 201, 210 (1988). At a RMC 703 hearing for expert assistance, an accused must present a factual basis for the type of expert he needs and the expert's intended function. These factual disclosures are testimonial communications for self-incrimination purposes.

Further, the RMC 703 hearing can force an accused to make self-incriminating statements. Self-incrimination occurs when the accused conveys information that "furnish[es] a link in the chain of evidence needed to prosecute the claimant." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). To meet his burden of production at such a hearing, an expert assistance hearing could well require the defendant and/or his attorney to disclose facts defense strategies and/or facts that the Government may use to tailor its own strategy or that may alert the Government to evidence of which it was previously unaware. This is a greater issue in these cases where all of the accused at some point have expressed their desire to represent themselves. As their own attorneys, they will, therefore, be presenting their own evidence and arguments on these issues. These disclosures provide the Government with "a link in the chain of evidence" for prosecution and thereby qualify as self-incriminating.

Finally, an open hearing for expert assistance could well **compel** an accused to disclose self-incriminating information. An open hearing for expert assistance will thus require the accused to choose between two constitutional rights: the privilege against self-incrimination and the right to expert assistance under *Ake*.

The United States Supreme Court in *Simmons v. United States*, 390 U.S. 377, 394 (1968), determined that compulsion for Fifth Amendment purposes occurs when the defendant must relinquish one constitutional right in order to assert another. The *Simmons* Court addressed a situation where the prosecution used testimony against a defendant at trial that he originally made to establish standing to assert his Fourth Amendment right to be free from illegal search and seizures. *Id.* The Court concluded that the State could not force the defendant to relinquish his self-incrimination right in order to assert his Fourth Amendment right. *Id.* Open hearings for expert assistance also require the accused to choose between two constitutional rights, and thereby compel them to incriminate themselves in order to obtain expert assistance.

Sixth Amendment right to compulsory process

Open hearings for expert assistance violate the accused's Sixth Amendment right to compulsory process. The Sixth Amendment requires "that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial" and that the court permit criminal defendants to present a defense. *Taylor v. Illinois*, 484 U.S. 400, 408 (1988).

The notice-of-alibi statute at issue in *Taylor* prohibited a defendant from introducing witnesses absent pre-trial disclosure of those witnesses. *Id.* at 410-16. In its compulsory process determination, the *Taylor* Court balanced the defendant's interest in introducing witnesses with the State's interest in preventing eleventh-hour defenses and excluding unreliable witnesses. *Id.* Addressing a similar Sixth Amendment claim in *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973), the Court balanced the competing interests involved when a state rule of evidence conflicted with a defendant's right to present a defense.

An open hearing for expert funding prevents an accused from introducing expert witnesses because it forces an accused to forgo requesting expert assistance in order to avoid disclosing strategy to the Government. To determine whether open hearings violate the accused's right to compulsory process, the Court should balance the accused's interest in introducing expert witnesses with the Government's interest in attending the hearing.

The accused have an absolutely critical interest in introducing expert witnesses. Simply, the inability to retain and present the appropriate expert witnesses will prohibit the accused from properly developing their case. ABA Supplemental Guideline 10.11 (The Defense Case: Requisite Mitigation Functions of the Defense Team) speaks of a number of expert witnesses who can form part of the capital defense consultation and presentation process based on the facts as they develop.

Any inability to retain a mitigation expert, for instance, could deprive the defense of the expert the *Kreutzer* court called perhaps the most experienced member of the defense team. *Kreutzer*, 61 M.J. at 298, note 7 ("because there is no professional death penalty bar in the military services, it is likely that a mitigation specialist may be the most experienced member of the defense team in capital litigation"). Even an experienced capital defender may not have the skill or time to duplicate a mitigation expert's services.

Similarly, the *Ake* Court itself recognized that "the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." 470 U.S. at 81. The Supreme Court noted that "[b]y organizing a defendant's mental history, examination results and behavior[,] . . . interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury," to accurately determine the issue before it. *Id.*

By contrast, the Government has little valid interest in attending the hearing. First, conducting an *ex parte* hearing would deprive the Government of no discovery to which it is lawfully entitled; instead, the Government will receive the same discovery it would receive from a monied defendant. Further, at the time of any hearing requesting expert services, the Government should logically have no actual knowledge of the defendant's strategy, and therefore

will be unable to assist the judge in evaluating whether the defense actually needs the investigative or expert assistance sought. Finally, the trial judge can adequately protect against misuse of governmental resources.

Thus, given the Government's minimal interest in being present at the hearing and the accused's substantial interest in calling expert witnesses, the Compulsory Process Clause requires that the Commission permit the accused to apply *ex parte* for expert assistance.

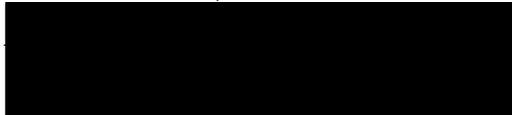
7. Request for Oral Argument: The accused request argument.
8. Request for Witnesses: None.
9. Conference with Opposing Counsel: Counsel for the accused have consulted with opposing counsel regarding this motion. Opposing counsel has stated that the prosecution will oppose this motion and the relief sought herein.
10. Attachments:
 - a. Letter to the Convening Authority Requesting *Ex Parte* Consideration, dated 4 August 2008.
 - b. Letter from the Convening Authority Denying Request for *Ex Parte* Consideration, dated 11 August 2008.
 - b. Letter from the Convening Authority Denying *Ex Parte* Consideration of Counsel for Mr. Bin al Shihb's Request for Appointment of a Mitigation Specialist, dated 11 August 2008.

Respectfully submitted,

FOR: Michael Z. Acuff
Khalid Sheikh Mohammed, *Pro Se*

CAPT Prescott L. Prince, JAGC, USNR
LTC Michael Acuff, JA, USAR

Standby Counsel for Mr. Mohammed
Office of the Chief Defense Counsel
Office of Military Commissions



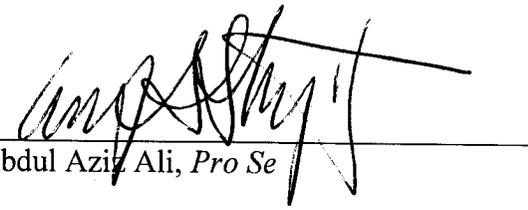
David Z. Nevin
Scott McKay
NEVIN, BENJAMIN, McKAY &
BARTLETT, LLP
Advisory Civilian Counsel



BY: 
CDR Suzanne Lachelier, JAGC, USNR
LT Richard E.N. Federico, JAGC, USN

Detailed Defense Counsel for Ramzi Bin al Shibh
Office of the Chief Defense Counsel
Office of Military Commissions

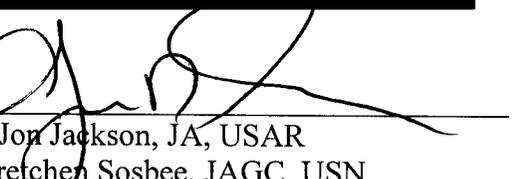


FOR: 
Ali Abdul Aziz Ali, *Pro Se*

LCDR Brian Mizer, JAGC, USN
MAJ Amy Fitzgibbons, JA, USAR

Standby Counsel for Mr. Ali
Office of the Chief Defense Counsel
Office of Military Commissions



BY: 
MAJ Jon Jackson, JA, USAR
LT Gretchen Sosbee, JAGC, USN
Office of Chief Defense Counsel
Office of Military Commissions



Jeffery Robinson
Amanda Lee
Schroeter Goldmark & Bender
Advisory Civilian Counsel



Attachment A

4 AUG 2008

MEMORANDUM FOR THE HONORABLE SUSAN J. CRAWFORD, CONVENING
AUTHORITY, OFFICE OF MILITARY COMMISSIONS

SUBJECT: Request for *Ex Parte* Consideration of Requests for Resources and Expert
Assistance

At the direction and, with the consent, of the *pro se* accused, Mr. Khalid Sheikh Mohammed and Mr. Ammar Al Baluchi (Ali Abdul Aziz Ali), standby counsel request the Convening Authority consider the *pro se* accused's requests for expert consultants and witnesses, as well as, requests for resources *ex parte*.¹ Deatiled counsel for Mr. Ramzi bin al Shibh join this request. In making this request, the accused rely on their constitutional rights to due process, assistance of counsel and compulsory process, and against compelled self-incrimination. The terms of Rule for Military Commission (R.M.C.) 703(d) may be read to permit the Convening Authority to allow the *ex parte* consideration of defense applications; allowing the Convening Authority to act in a manner that is consistent with the aforementioned constitutional guarantees.

On 9 May 2008, the Convening Authority referred charges against Mr. Mohammed, Mr. Al Baluchi, and Mr. bin al Shibh to trial by military commission authorized to impose the death penalty. Both the Supreme Court and the Court of Appeals for the Armed Forces have recognized that "death is different." *See, Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1981) and *U.S. v. Kreutzer*, 59 M.J. 61 M.J. 293 (2005). The irrevocable nature of the death penalty requires an elevated level of due process protections to ensure a reliable result and a process that is fundamentally fair. *Caspari v. Bolden*, 510 U.S. 383, 393 (1994).

R.M.C. 703 (d) establishes the procedure for the appointment of experts both as consultants and as witnesses. The defense, with notice to the opposing party, must first petition the Convening Authority for the provision of assistance. The Rule requires that the defense request set forth why the expert is relevant and necessary to the defense. Under the Rule, the "Government" then has the option of providing an adequate substitute for the defense proffered assistance. The Rule's structure serves to protect the accused right to present a defense and the Government's interest in conservation of resources. Adoption of the *pro se* accused's request serves both these interests.

Neither the Military Commissions Act nor the Rules for Military Commission mandate a process by which the accused may petition the Convening Authority for resources necessary to their defense outside the context of expert witnesses or consultants. For example, the prosecution presumably has access to the investigative resources of the

¹ Consistent with the Defense Motion to Dismiss for Unlawful Influence, the *pro se* accused maintain that BG Hartmann unlawfully influenced the charging process in this case and must, at the least, be disqualified from further participation in this case, including the provision of legal advice regarding the defense requests for resources and experts.

Departments of Defense and Justice. In contrast, the Office of the Chief Defense Counsel does not have its own budget and must rely on *ad hoc* requests to you, specifically, or through the Department of Defense Office of Legal Counsel. In the absence of a statutory provision or Rule to the contrary, you should act in a manner that is consistent with the constitution and shield individual accused's applications for resources from the prosecution team in this case.

In light of the complexity of this case, a competent presentation of the defense case will require the use of expert consultants. Mr. Mohammed, Mr. Al Baluchi, and counsel for Mr. bin al Shibh have already identified several consultants who are relevant and necessary to their defense, including mitigation teams. Mr. Mohammed, Mr. Al Baluchi and counsel for Mr. bin al Shibh propose that they be permitted to notify the prosecution of their intent to seek the employment of an expert consultant or witness while the substance of their requests is revealed only to the Convening Authority and the agents she deems necessary to assist her in evaluating the requests. Rule 703 (d) explicitly requires notice and an opportunity for the "Government" to provide a substitute. As the Convening Authority, you or your agents may fulfill this function under the plain language of the Rule. Consequently, the Government's interest in conserving resources may be adequately protected by the Convening Authority and her agents without compromising the constitutional protections at issue. In the alternative, the Convening Authority should decline to follow a procedure which violates constitutional guarantees.

In making this request, the accused request the Convening Authority consider the U.S. Supreme Court's decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), as well as, the practice in federal court and an overwhelming number of state jurisdictions in capital proceedings. In *Ake*, the Court determined that due process required the appointment of a mental health expert when a defendant's mental health is likely to be a significant factor at trial. The Court directed that the trial court appoint a mental expert once the defense had met this burden in an *ex parte* proceeding; allowing the defense to shield its defense strategy and information gleaned from confidential client communications from the prosecution.

The *ex parte* procedure endorsed by the Court in *Ake* is consistent with federal statute and the practice of an overwhelming number of state court jurisdictions. *See*, 18 U.S.C. § 3006. Of the thirty-eight death penalty jurisdictions, nineteen provide at least a limited right to an *ex parte* hearing for expert assistance through case law or statute.² In the remaining death

² *See* 21 U.S.C. § 848(q)(9) (2000) (providing the right to an *ex parte* hearing upon the showing of need); Cal. Penal Code § 987.9(a) (West Supp. 2005) (permitting capital defendants to apply *ex parte* for expert assistance); Del. Super. Ct. Crim. R. Ann. 44(e)(4) (same); 725 Ill. Comp. Stat. Ann. 124/15(h), (I)(1) (West Supp. 2004) (same); Ind. R. Crim. P. 24(c)(2) (same); Kan. Stat. Ann. § 22-4508 (1995) (same); Ken. Rev. Stat. Ann. § 31.185(2) (Michie Supp. 2004); Nev. Rev. Stat. § 7.135 (2003) (same); N.Y. Jud. Law 35-b(8) (McKinney 2002) (same); N.C. Indigent Def. Svcs. R. 2D.4 (same); S.C. Code Ann. § 16-3-26(c)(1) (Law. Co-op. 2003) (same); Tenn. Code Ann. § 40-14-207(b) (2003) (same); Tex. Code Crim. P. art. 26.052(f) (Vernon Supp. 2004-05)(same); Wash. Superior Ct. Crim. R. 3.1(f)(2) (same); Ariz. R. Crim. P. 15.9(b) (permitting capital defendants to apply *ex parte* for expert funding upon a showing of need); *Ex Parte Moody*, 684 So. 2d 114, 121 (Ala. 1996) (requiring that trial courts permit defendants to apply *ex parte* for expert assistance); *Brooks v. State*, 385 S.E.2d 81, 84 (Ga. 1989) (same); *State v. Touchet*, 642 So. 2d 1213, 1214 (La. 1994) (requiring that courts permit defendants to apply *ex parte* for expert assistance upon a showing that *ex parte* application is necessary); *State v. Ballard*, 428 S.E.2d 178, 179 (N.C. 1993) (requiring that trial courts permit defendants to apply *ex parte* for expert assistance); *State v. Peeples*, 640 N.E.2d

penalty jurisdictions, defense counsel for indigent capital clients can generally secure expert assistance by applying to state or city public defender agencies.³ This eliminates the need for indigent defendants to apply for expert assistance in open court. Finally, even in jurisdictions where no statute or case law explicitly permits the courts to entertain *ex parte* applications for expert funds, many state trial courts nevertheless permit such applications as a matter of routine practice.⁴

Military courts have recognized a limited right to make *ex parte* applications in “the unusual circumstance where it is necessary to ensure a fair trial.” *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986). *Garries* was not a death penalty case nor can it compare in complexity with the instant case.

There is a vast disparity of resources in the instant case. In the prosecution’s request for Protective Order Number 3, it characterized this case as “the largest criminal investigation in United States history” requiring coordination between the FBI, civil and state authorities, other federal agencies and foreign governmental agencies. It is likely that the *pro se* accused will never know the extent to which the prosecution has relied on expert assistance to perfect its case. Yet, the accused are required to disclose a detailed description of their legal strategy to the prosecution in order, for example, to obtain a mitigation specialist; a fundamental tool necessary to the defense of a capital case.

In addition to the due process protections articulated, the *pro se* accused request is supported by several constitutional provisions including the Fifth and Sixth Amendments. Based on the Supreme Court’s decision in *Boumediene*, these provisions must be applied to trial by military commission. Forcing the accused to reveal defense strategy and communications supporting their requests for experts unconstitutionally interferes with their ability to consult with counsel and to develop their defense. The Fifth Amendment right against compelled self-incrimination is also triggered when the accused are forced to forgo one constitutional right, the right against compelled self-incrimination, for another, the right to expert assistance. *See generally, Simmons v. United States*, 390 U.S. 377 (1968).

The *pro se* accused, Mr. Mohammed and Mr. Al Baluchi, joined by counsel for Mr. bin al Shibh, respectfully request the Convening Authority grant their request to petition her *ex parte* when seeking the appointment of expert consultants and witnesses. In order to facilitate the pretrial litigation in his case, the accused further request the Convening Authority provide a written response to this request by close of business 8 August 08.

208, 212 (Ohio Ct. App. 1994) (requiring that trial courts permit defendants to apply *ex parte* for expert funding upon a showing of necessity); *Ex Parte Lexington County*, 442 S.E.2d 589, 593 (S.C. 1994) (requiring that trial courts permit defendants to apply *ex parte* for expert funding); *State v. Barnett*, 909 S.W.2d 423, 429–30 (Tenn. 1995) (same); *Williams v. State*, 958 S.W.2d 186, 194 (Tex. Crim. App. 1997) (same).

³ See Justin B. Shane, *Money Talks: An Indigent Defendant’s Right to an Ex Parte Hearing for Expert Funding*, 17 Cap. Def. J. 347, 360-61 (2005) (listing states that permit indigent defendants to apply to their state public defender agencies for expert funds).

⁴ See *id.* at 361-62 (describing state trial courts that permit defendants to apply *ex parte* for expert funds).

Respectfully submitted,

BY: /s/ electronically by CAPT Prince
Khalid Sheikh Mohammed
Pro Se

Prescott Prince
CAPT, JAGC, USN
Michael Acuff
LTC, USAR, JA
Standby Counsel for
Mr. Mohammed

BY: /s/ electronically by MAJ Fitzgibbons
Ammar Al Baluchi (Ali Abdul Aziz Ali)
Pro Se

Brian Mizer
LCDR, JAGC, USN
Amy Fitzgibbons
MAJ, USAR, JA
Standby Counsel for
Mr. Ali

BY: /s/ electronically by CDR Lachelier
Suzanne Lachelier
CDR, JAGC, USN
Detailed Defense Counsel for
Ramzi bin al Shibh

Attachment B



CONVENING AUTHORITY

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

AUG 11 2008

MEMORANDUM FOR: CAPT Prescott Prince, USN, Defense Counsel, OMC
CDR Suzanne Lachelier, USN, Defense Counsel, OMC
LCDR Brian Mizer, USN, Defense Counsel, OMC

SUBJECT: Request for *Ex Parte* Consideration; *U.S. v. Mohammed, et al*

I received your letter dated August 4, 2008, asking that I consider *ex parte* your requests for expert assistance. Under the authority granted by Congress in the Military Commissions Act, 10 U.S.C. § 949a(a), the Secretary of Defense promulgated Rule for Military Commission 703(d), establishing procedures for requesting expert assistance. The rule gives each party the opportunity to request expert assistance where necessary to evaluate, prepare, and present the party's case. The requirement that the other party have notice and the opportunity to object helps this office evaluate the need for the expert assistance and determine whether alternatives are preferable, in order to avoid wasteful expenditures. Finally, I am aware of no basis to claim that an accused has a constitutional right to an *ex parte* hearing on such requests. Therefore, I deny your request.

Susan J. Crawford
Convening Authority
for Military Commissions



Attachment C



CONVENING AUTHORITY

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

AUG 11 2008

MEMORANDUM FOR: CDR Suzanne Lachelier, USN, Defense Counsel, OMC

SUBJECT: *Ex Parte* Request for Mitigation Expert; *U.S. v. Mohammed, et al*

I received your letter dated August 4, 2008, asking that I consider *ex parte* your request for Ms. Jill Miller as a mitigation expert on behalf of your client, Mr. Bin al Shibh. Rule for Military Commission 703(d) establishes the procedure for requesting expert assistance and requires each party to provide the opposition notice of such requests. This process helps me evaluate the need for the expert assistance and determine whether alternatives are preferable, in order to avoid wasteful expenditures. You have not demonstrated any unusual circumstances that would justify a departure from the normal process in this case.

For these reasons, I deny your request for consideration *ex parte*. You may re-submit your request with notice to the trial counsel.

Susan J. Crawford
Convening Authority
for Military Commissions



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-020

Government Response

to the
Defense Motion to Allow Ex Parte
Applications

29 August 2008

1. **Timeliness:** This response is timely filed. In an email dated 14 August 2008, the Military Judge granted the Prosecution’s Special Request for Relief Regarding the Timing of the Filing of its Response to D-020 until 29 August 2008.

2. **Relief Sought:** The Government respectfully requests the Military Judge deny the Defense Motion to Allow Ex Parte Applications.

3. **Overview:** Rule for Military Commissions 703(d) establishes the procedure for employment of expert witnesses. The rule requires disclosure by the defense to the opposing party if it desires government funding. There is no right under the law, rules, and procedures governing this commission to an ex parte hearing on such requests. While the Military Judge may – in unusual circumstances – permit ex parte or in camera proceedings to ensure a fair trial, the instances in which the Military Judge should do so are rare and the Defense has not demonstrated how any of the requests they anticipate filing require such treatment.¹

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

5. **Facts:**

a. On 4 August 2008, the defense “at the direction and, with the consent, of the pro se accused, Mr. Khalid Sheikh Mohammed and Mr. Ammar Al Baluchi (Ali Abdul Aziz Ali)” submitted a request to the Convening Authority seeking permission to submit all requests for resources and expert assistance directly to the Convening Authority and without notice to trial counsel. Detailed counsel for Bin al Shibh joined in the request. See Attachment A to defense motion.

b. On 11 August 2008, the Convening Authority denied the defense request for blanket authority and the defense request in Bin al Shibh’s case for a mitigation expert.

¹ Of course, separate and distinct from the issues addressed in this motion, the Military Judge has the right and, at times, the obligation to hold ex parte or in camera proceedings with respect to the protection of national security information.

The Convening Authority found no reason to deviate from the established procedures set out in RMC 703(d). The Convening Authority further determined that the defense in Bin al Shibh's case had failed to demonstrate "unusual circumstances" justifying a departure from Rule for Military Commissions 703(d) and suggested that they resubmit their request after notice to trial counsel. See Attachments B and C to defense motion.

c. On 12 August 2008, pro se accused, Khalid Sheikh Mohammed and Ali Abdul Aziz Ali, joined by counsel for Bin al Shibh and al Hawsawi, filed this motion requesting that the Commission allow ex parte consideration of their petition for expert assistance and other resources.

d. The defense brief fails to clearly articulate the relief it seeks. It is unclear from the defense filing whether the defense is requesting that the Military Judge direct the Convening Authority to consider all requests ex parte or whether the defense is seeking to bypass the Convening Authority and have the Military Judge rule on all requests for assistance.

6. Discussion:

a. Rule for Military Commissions 703(d) establishes the procedure for employment of expert witnesses. The process requires defense counsel to make an initial showing of necessity for expert assistance to the convening authority, with notice to the opposing party. The initial request must set out the reasons why the expert is necessary and the cost of the employment. This allows the Convening Authority to evaluate the request and determine whether substitutions are preferable - in most instances, to avoid wasteful expenditures. If the Convening Authority denies the request, then defense counsel may renew the request with the military judge, who shall determine whether the testimony is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. The military judge may then grant the defense request for expert assistance or direct the Government to find an adequate substitute. For purposes of this motion, the defense purports to lump all requests for assistance, such as requests for investigators, consultants, data processors and analysts, into this category. See footnote 1 to defense motion.

b. The defense acknowledges that the rules and procedures governing this Commission do not provide for such ex parte applications. The defense is correct. Rather, the defense points to the American Bar Association Revised Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases to support its request to ignore the rules and procedures that govern this Commission. Of course, these guidelines are not binding on this Commission (or even on courts-martial), and where, as here, they contradict the established commission rules and procedures on the present issue, they cannot be relied upon for relief. Finally, the defense contends that the recent decision by the Supreme Court in *Boumediene v. Bush*, 553 U.S. ___, 128 S.Ct. 2229 (2008) gave constitutional protections to the accused. Of course, that misstates the nature and holding of that case, which addressed the narrow issue of the applicability of the

Suspension Clause to certain enemy combatants detained at Guantanamo Bay who had been held for a number of years without being charged with or tried for offenses.

c. Although they are not binding on this Commission, two military cases, United States v. Garries, 22 M.J. 288 (COMA 1986) and United States v. Kaspers, 47 MJ 176 (CAAF 1997), provide Military Judges in courts-martial with the authority to conduct ex parte proceedings if the circumstances are “unusual.” It appears that the Convening Authority may have used this existing case law as a guide when she denied the defense request by Bin al Shihb’s counsel, pointing out that it had not “demonstrated any unusual circumstances that would justify a departure from the normal process.” The request for a mitigation expert in this joint trial submitted by Bin al Shihb’s counsel is certainly not an unusual circumstance justifying an ex parte submission to the Convening Authority or hearing with the Military Judge. Moreover, the Prosecution believes the defense is fully capable of obtaining expert assistance without revealing privileged information or prejudicing its case. Blanket authority to ignore RMC 703(d) is not the answer.

7. Conclusion: The Prosecution is not interested in denying the defense resources necessary to ensure the accused receive a fair trial. Procedures are in place to handle all reasonable requests for assistance. The relief sought is unnecessary and the defense request finds no support in the law, rules, or procedures that govern these proceedings. Accordingly, the defense motion should be denied.

8. 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.

9. Respectfully submitted:

//S//

Robert L. Swann

Prosecutor

Office of Military Commissions

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

D-020

**Reply to Government's Response to
Defense Motion to Allow
Ex Parte Treatment**

3 September 2008

1. Timeliness: This reply is timely filed within the rules prescribed by the Military Commission Trial Judiciary.

2. Additional Relevant Facts:

a. At his arraignment, Mr. Aziz Ali in open court alluded to his treatment during his five years of detention. He expressed frustration at the government's failure to provide him with a lawyer when he was first arrested. At the end of his initial colloquy, he alluded to his fear of those who have detained him ("I'm staying a few hours in the Court and I'm going back to them.") Draft transcript, *U.S. v. Mohammed, et. al.* (5 June 2008) at page 134.

b. On 9-10 July 2008, the Military Judge conducted individual hearings to determine whether any accused was coerced or intimidated in their election of rights. At the outset of Mr. Ali's hearing, standby counsel noted:

DC [LCDR MIZER]: I would note for the record that at the last hearing, there were a number of people seated in the rear of this courtroom. And there are a number of individuals seated in the rear of the courtroom again, and I would just ask for the sake of preserving the record that these individuals also be identified. And in particular I'm concerned about agency affiliations, Your Honor. I think that at the last hearing Mr. al Baluchi mentioned that he was threatened by the CIA.

Draft transcript, *U.S. v. Mohammed, et. Al.* (9 July 2008) at page 2.

The Military Judge acknowledged there were three individuals present who had not entered appearances on the record. These individuals were not required to identify themselves.

c. At the conclusion of the hearing, one of the individuals seated in the rear of the courtroom approached standby counsel and confirmed that he represented the Central Intelligence Agency.

3. Argument: The government's perfunctory Response belittles the importance of this issue to the accused's ability to make their defense in this capital case. The government concedes that, under the law applicable to courts-martial, the military judge has the authority to approve *ex parte* requests in an appropriate case. D-020, Gov't Response, ¶ 6.c. It then ignores the factors that make this relief appropriate and necessary to a fair trial for these accused, from the special requirements of capital defense, to the constitutional rights that disclosure of defense requests puts in jeopardy.

As the accused have explained in previous filings, there is an unusual need for expert assistance in every capital case, and an extraordinary need for it in these cases. In a typical, noncapital case, there may be one or two experts on the one or two issues that are dispositive to the case – whether the defendant's mental state at the time of the crime satisfies the requirements of the insanity defense, whether the fingerprints or other forensic evidence obtained at the scene of the crime is actually linked to the defendant, and so on. Both sides – prosecution as well as defense – know from the outset of the case that these are the real issues, and thus what the defense is going to be. The situation is entirely different in capital case, however, because the range of issues that can and must

be investigated and raised at sentencing is so broad. Revealing the need for an expert in a particular area in the capital context thus reveals defense strategy, and sometimes privileged information, in a manner that gives the prosecution an unfair and unprecedented advantage. That is the reason that the ABA Guidelines puts such emphasis on the critical need for *ex parte* proceedings with regard to defense requests for resources.

Indeed, the prosecution fails to address any of the constitutional provisions relied upon by the defense in seeking an order allowing for *ex parte* applications in this case, and instead elects to focus solely on the defense citation of the American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. The Guidelines reflect the current practice in the overwhelming number of death penalty jurisdictions with respect to *ex parte* applications. This position is further supported by the Supreme Court's opinions in *Ake v. Oklahoma*, 470 U.S. 68 (1985) and *Wardius v. Oregon*, 412 U.S. 470 (1973). The fact that there is no binding Commission's precedent regarding the application of the Guidelines is no reason to reject them. This Commission should rather take cognizance of the fact that the United States Supreme Court, which has ultimate power of review over these proceedings, treats them as the governing standard of care.

The Supreme Court has relied upon the ABA Revised Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("the Guidelines") in numerous rulings. *See Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2556 (2005), n. 7 (same); *Florida v. Nixon*, 543 U.S. 175, 191, 125 S.Ct. 551 (2004) (same); *see also, McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944 (2002)(relying on ABA

Standards for Criminal Justice as authoritative); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 382, 126 S.Ct. 2669 (2006)(dissent) (relying on commentary to ABA Standards for Conduct of Death Penalty Cases as authoritative). In fact, the Supreme Court has repeatedly endorsed the ABA Guidelines by acknowledging: “[W]e long have referred [to these ABA Standards] as ‘guides to determining what is reasonable.’” *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527 (2003), quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984).

As detailed in the accused’s opening motion on the present issue, the ABA Guidelines explicitly provide for *ex parte* consideration of matters relating to expert assistance, so as to ensure independence from the prosecution. [D-020, at 5-6] There is no reason not to abide by this Guideline here. Doing so would be of no consequence to the government, and it would bring the Commission process in line with widely accepted federal practice.

There are numerous practical reasons for considering *ex parte* any defense request for expert assistance. In requesting funding for expert assistance, the defense must demonstrate relevance and necessity. *See* R.M.C. 703(c)(2). In order to make this showing, as to virtually any expert requests, the defense would have to reveal confidential information, including names and locations of family members or other persons an expert might interview. The accused’s opening brief outlines in great detail the need to protect the attorney-client relationship and the confidential communications that arise therein. [D-20, at 14-16]. This need is particularly compelling in this case where the accused have been held in isolation, deprived of their fundamental human

rights¹, by the United States Government and are now forced to proceed with counsel provided by that same government.

The prosecution speculates that perhaps the Convening Authority applied military cases of *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986) and *United States v. Kaspers*, 47 M.J. 176 (C.A.A.F. 1997) in her denial of Mr. Bin al Shihb's request for *ex parte* consideration of his request for a mitigation specialist. Whatever the merits of that speculation, this Commission must make its own independent judgment of the merits of this request.

If the Military Judge elects to apply *Garries*, there can be no doubt that this case cannot compare to any fact pattern ever confronted by a military-courts martial. As the accused brief sets out, the current procedure would require the accused to make a particularized showing of need which would then be shared with the prosecution in determining whether he should receive expert assistance. As the Commission is aware, the prosecution has failed to provide, or to even answer, the defense requests for discovery. Consequently, the defense has only one source for information that could establish particularized need: the accused. Disclosure of this information would thus violate their Fifth and Sixth Amendment rights, as well as the attorney-client privilege. On these facts, the ability to make *ex parte* applications is fundamental to a fair trial.

Moreover, the accused do not have unrestricted access to select their counsel. They must proceed with military counsel. The accused are justifiably distrustful of the system, viewing it as an extension of their detention. Standby counsel for Mr. Aziz Ali noted his concern regarding the CIA's presence and potential involvement in this case at the 9 July hearing. Given this history, the accused are naturally adverse to revealing

¹ See, Draft Transcript, *U.S. v. Mohammed*, et. al. (5 June 2008) at page 134.

information to the prosecution relevant to requests for expert assistance that the accused believe the Government may exploit to harm their family and acquaintances.

The defense petitioned the Convening Authority to wall off members of the prosecution team to ensure a process that comports with fundamental fairness. The prosecution does not need to know all the information entailed in a defense showing of relevance and necessity.² The prosecution cites absolutely no basis for its having to review defense requests for expert assistance. There is no such basis. The Convening Authority is fully capable of conducting a review of expert requests, without prosecution participation. When the Convening Authority refused to adopt this procedural protection, the defense petitioned the Commission. The defense asserts that *ex parte* applications are constitutionally required in this case-both by the Convening Authority and the Military Judge.

4. Relief Requested: The accused seek to submit any expert assistance request to the Convening Authority, *ex parte*. Should the Convening Authority deny any such request, the accused then seek to submit an *ex parte* motion to the commission. The accused aim to keep confidential any communications between defense counsel and the accused, to maintain the confidentiality of persons who would be contacted during any part of the defense investigation, and to preclude disclosure of defense strategy.

5. Oral Argument: The accused previously requested, and hereby affirm, their request for oral argument on this motion.

² The accused recognize that the identity of fact witnesses at trial would likely have to be revealed. The instant request for *ex parte* treatment does not purport to avoid disclosing witnesses to the government at such time that it will be appropriate. The investigation of a case, however, entails speaking with many more individuals than simply those who would be witnesses at trial. The accused seek to protect disclosure of the scope of any inquiries (including persons interviewed and locations visited) in which an expert might engage while assisting the defense in preparing for trial.

6. Attachments: None.

DATED this 3rd day September, 2008.

Respectfully submitted,

FOR: _____/s/_____

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CAPT Prescott L. Prince, JAGC, USNR
LTC Michael Acuff, JA, USAR
Standby Counsel for Mr. Mohammed
Office of the Chief Defense Counsel
Office of the Military Commissions



David Z. Nevin
Scott McKay
NEVIN, BENJAMIN, McKAY &
BARTLETT, LLP
Advisory Civilian Counsel



FOR: _____/s/_____

Ali Abdul Aziz Ali, *Pro Se*
LCDR Brian Mizer, JAGC, USN
MAJ Amy Fitzgibbons, JA, USAR
Standby Counsel for Mr. Ali
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Jeffery Robinson
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BY: _____/s/_____

CDR Suzanne Lachelier, JAGC, USNR
LT Richard E.N. Federico, JAGC, USN
Detailed Defense Counsel for
Ramzi bin al Shibh
Office of the Chief Defense Counsel
Office of Military Commissions



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MAJ Jon Jackson, JA, USAR

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Mustafa Ahmed Adam al Hawsawi

Office of the Chief Defense Counsel

Office of Military Commissions

